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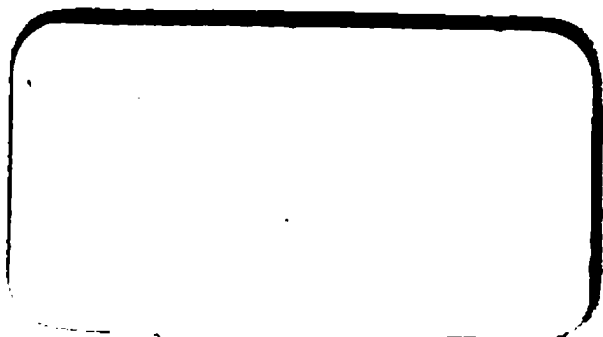
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Frankfort, Ky.

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COURT OF APPEALS OF KENTUCKY.

BAKER v. BEST.

(Filed March 4, 1908—Not to be reported.)

1. Actions—Owner of property—Liability of for accidents—In this action by B. for damages for injuries sustained by falling through an elevator shaft, Dunn was not liable because it is shown by the record that his purchase of the property was not complete at the time of the accident.

2. Same—The verdict against Mrs. B., the owner, seems to be supported by the evidence, and it must be upheld. The evidence complained of could not have prejudiced appellant's rights.

B. W. Hall, C. H. Shield and J. B. McCormick for appellant.

W. B. White for appellee.

Appeal from Montgomery Circuit Court.

Opinion of the court by Judge Hobson, affirming.

On November 8, 1905, J. M. Best fell through an elevator shaft in what is known as the Tyler Apperson Building, owned by Kate S. Baker, in Mt. Sterling, Ky.; he brought this suit to recover for his injuries, against her and J. E. Dunn. The court, on the hearing of the case, instructed the jury peremptorily to find for Dunn and submitted to the jury the question whether Kate S. Baker was liable. The jury found for Best \$500, and she appeals.

Dunn made a proposition, on September 18, to buy the property. On November 7 his proposition was accepted; a deed and notes were drawn and placed in the hands of C. H. Shield, to be delivered by Shield, if, upon an examination of the title, he approved it. Best was injured on the eighth. After this, on the twentieth, Shield examined the title, and the deed and notes were delivered, it being agreed between the parties that Dunn should take the rents from November

7th. But on November 8th the title had not passed from Mrs. Baker to Dunn. If Shield had reported adversely to the title, the deed would not have been delivered, and as he had not reported on November 8, the title remained in Mrs. Baker until the deed was delivered absolutely to Dunn. The circuit court, therefore, properly held that Dunn was not liable. The proof for Best was to the effect that the building was rented out for offices; that he was in the building to see a lawyer who had an office on that floor; that the hallway was not lighted so that he could see; that the lawyer had two rooms, with a door in each entering the hallway, and between these two rooms was the elevator shaft, with a door entering it; that the door of the elevator shaft was left open, and he, taking it for the door to the lawyer's office, walked into it and fell down the shaft. He was precipitated to the cellar, a distance of 18 feet, according to his proof; was confined to his bed about ten days; suffered much pain in his back and shoulders. At the trial, 18 months afterwards, he still continued to suffer, and had been unable to do hard manual labor, as before the fall.

The verdict of the jury for \$500 can not be said to be so excessive as to indicate passion or prejudice. If the elevator door was left open in a dark, unlighted hall, where people were expected to come to get to the offices on either side of the hall, it was a question for the jury whether ordinary care was used; because strangers using the hallway would naturally think, without notice to the contrary, that open doors led into rooms on either side. It was incumbent upon the owner of the property, when the rooms in the building were rented out for public offices, to exercise ordinary care to keep safe the hallways and the elevator shaft. Best was not a mere licensee; he was a person invited upon the premises; for all persons who had business with the lawyers were, by implication, invited to their offices, and to use the hallways for this purpose.

John A. Judy was introduced as a witness for the plaintiff, and was allowed to state that he had an office in the building, and that he had often seen the elevator door standing open when the elevator had been moved up to some other floor, with nothing to prevent a man from stepping into it and falling to the cellar below. It is insisted for the appellant that this evidence is incompetent, for the reason that negligence on one day in leaving the door open, can not be shown to prove negligence on another day. (Southern Railway v. Winchester, 32 Ky. Law Rep., 19.) We think the evidence should not have been admitted, but we can not see how it was prejudicial to the defendant. It was manifest that the plaintiff fell through the elevator shaft. This was undisputed. There was no proof introduced by the defendant to the effect that the door was closed. The only effort to show this was by the witness who helped to get Best out of the cellar, and he said that he understood Best to say that he had opened the door, thinking it was Judge Hazelrigg's office door, but he did not know for sure whether he said this or not. The plaintiff, Best, testified positively that he made no such statement. John C. Wood, introduced by the defendant, testified, on his direct examination, that Best told him, just after he came out of the building, that the elevator door was open and he fell through it, taking it for the door of the lawyer's office. The janitor was introduced for the defendant, and stated that on the day Best was hurt, he had not opened that door, or seen it open. But he does not testify it was not open, or that he had seen it that day closed. This being all the evidence on the subject, the jury were bound to believe, under the proof, that the door was open when Best fell through it; and the proof that the door was open on some other day could have had no effect on the verdict. If the defendant had introduced proof showing

that the door was closed and that Best had opened it, a different question would be presented. But, on the whole record, we conclude that the substantial rights of the defendant were in nowise prejudiced by the admission of this evidence, and that a new trial should not be granted.

Judgment affirmed.

BLACK RAVEN COAL CO. v. EDMONSON.

(Filed March 25, 1908—not to be reported.)

Detinue—Action for Specific Articles—Recovery for Aggregate Sum—Validity of Verdict—In an action by a claimant of certain specified articles of household furniture, against one he alleged had wrongfully taken them, to recover same or their value and for damages for their detention, where the value of each item was separately stated in the petition, a verdict of the jury awarding the plaintiff the aggregate value of all the items as set out in the petition, was not erroneous in that it did not fix the separate value of each article detained.

D. B. Logan for appellant.

Chas. W. Logan for appellee.

Appeal from Bell Circuit Court.

Opinion of the court by William Rogers Clay, Commissioner, affirming.

Appellee, L. E. Edmonson, was employed as a coal miner by appellant, Black Raven Coal Company, in its mines in Bell county, Kentucky. It rented to him a house in which he lived, and, at the same time, sold and delivered to him a lot of household furniture for the agreed price of \$75. The contract of sale, which was dated July 30, 1906, after setting forth the articles purchased by appellee, has the following provision:

"The ownership of these goods to remain with the Black Raven Coal Company in full until I have sufficient credit in the office to pay for the same."

In November, 1906, appellee quit working for appellant and secured employment at the Straight Creek mines, in the same county. For the purpose of moving his household fixtures he secured two wagons, which were driven to the house which he had occupied as tenant of appellant. After a considerable portion of his household goods was loaded on the wagons, the parties in charge of them were directed by appellant's agents not to remove the goods, but to unload the same. Thereafter appellee instituted this action in the Bell Circuit Court to recover the articles of furniture detained by appellant, and, in his petition, described each and every article and the value thereof, together with the aggregate value of all the articles, amounting to \$179.90. Appellee also asked damages in the sum of \$175 for the detention of the furniture. Appellant, by its answer, denied appellee's ownership, of the first twelve items of property sued for, and admitted that it held the possession and averred that it was the owner of these twelve articles. The answer further denied that appellant ever withheld from, or prevented appellee from taking his other articles of household or kitchen furniture, but charged that appellee had abandoned them in appellant's tenement house. While admitting that it had sold to appellee the twelve articles referred to, it alleged that he had

never paid for the same, but still owed thereon the sum of \$43.06, and claimed that it had the right to take possession of the goods in question and hold them until they were paid for. Upon the hearing of the case the jury returned a verdict in favor of appellee. From an order overruling appellant's motion and grounds for a new trial this appeal is prosecuted.

While several grounds for reversal are urged appellant relies upon the following grounds alone: (1) The finding of the jury, that appellee had paid for the goods in question, was flagrantly against the weight of the evidence. (2) The court erred in giving instruction No. 3, which fixed the value of each of the articles sought to be recovered, instead of submitting this as a question to be determined by the jury. (3) The verdict of the jury did not fix the value of the several articles of property separately, and was not sufficient to authorize the judgment rendered.

First. According to the testimony of appellant's bookkeeper, appellee was indebted to the company, as shown by the statements taken from its books, in the sum of \$43.06, at the time he attempted to take the furniture. It appears, however, that at the end of the month of October: appellee's indebtedness, according to the company's statement, was only \$5.53. Prior to that time, appellee had been charged with \$10, which he, as surety, had agreed to pay for one Woodyard. Appellee contends that his liability to the company was only in the event Woodyard failed to pay the same, and that in no event could this sum of \$10 be charged as against his furniture. Deducting this item of \$10, appellant, at the end of October, would have been indebted to appellee in the sum of \$4.47. Appellee also testified that appellant's bookkeeper told him that he had paid for his furniture and had a nice snug outfit, and that he (the bookkeeper) would tear up the contract, as it was settled. We do not believe that, after appellee had paid for his furniture, appellant could thereafter make advancements to him which would be a charge against it. By this system of bookkeeping he could never pay for the furniture as long as he owed appellant anything for advancements for other purposes. At any rate, the question whether he had paid for the furniture in full was for the jury, and we are unable to say that their finding was flagrantly against the weight of the evidence.

Second. In instruction No. 1 the court told the jury that, if they believed appellant detained appellee's goods, they should find for appellee the goods so detained, or the value of the goods so detained, not exceeding the sum of \$179.90; also the damages sustained by appellee, not exceeding \$175, provided the jury believed that appellee had fully paid for the furniture set out in the bill of sale. By instruction 2 the jury were told that, if they believed appellee voluntarily abandoned the household goods claimed by appellant, then they should not find any damages against appellant for the goods it did not claim. By instruction No. 3 the jury were told that if they believed appellant wrongfully or forcibly took possession of the articles of personal property claimed by the plaintiff in his petition, to wit: One oak dresser, worth \$10, one oak washstand, worth \$4, and so on, naming each article and the value thereof, they should find for appellee the value of said articles, not exceeding the sum of \$179.90, and in addition thereto such damages as appellee had sustained, not exceeding the sum of \$175, the amount claimed in the petition. By instruction No. 4 the jury were told that appellant had the right to take possession of the articles claimed by it in its answer by any peaceable means if appellee had not fully paid for same; and if appellee had not fully paid for same, they should find for appellants as to said articles so set out in the bill of sale.

While instruction No. 3 was unnecessary, we do not think the giving of it was prejudicial error. It does not fix in absolute terms the value of each article, but submits to the jury the question whether or not appellant detained certain articles therein of a certain specified value, and provides that if they so believe, they will find for appellee the value of said articles; thus still leaving to the jury the right to determine the value of the articles so detained. Furthermore, the value of the articles set forth in the instructions was fixed by appellee in his petition and also in his testimony, and there was no evidence to show that the value so fixed by appellee was incorrect.

Third. The verdict returned by the jury is as follows: "We, the jury, do agree and find for the plaintiff the sum of \$179.90 for value of household goods, and damage of \$75 for retaining same." Counsel for appellant contends that, under section 330, of the Civil Code, and the rule laid down in *Buckner v. Haggin*, 3 Mon., 59, and *Young v. Parsons, &c.*, 2 Met., 499, the verdict is erroneous in that it does not fix the value of the several articles detained by a separate finding as to each. The effect of the verdict, however, was to fix the aggregate value of the articles detained according to the total sum of their separate values as claimed by appellant in his petition, and fixed by him in his testimony. By instruction No. 3 it was left to the jury to say whether they believed from the evidence that appellant detained each article, and whether it was worth the price named by appellee in his petition and in his testimony. By finding for appellee in the total sum fixed by him, which sum was made up of the separate values also fixed by him, the jury, in effect, found the separate values of the various articles to be the same as fixed by appellee. Furthermore, the judgment entered upon the verdict provided for the recovery of the several articles according to the separate value fixed on each. Under this judgment appellant could either return the various articles or in lieu thereof pay the value as fixed therein. Under these circumstances we do not think the failure of the jury to find the separate value of the articles detained was prejudicial to the substantial rights of the appellant.

For the reasons given, the judgment is affirmed.

SLAUGHTER v. DITTO.

(Filed March 25, 1908—Not to be reported.)

Married Women—Contract—Note for Worthless Stock—Saving Husband from Prosecution—Validity of Contract—Ratification—Estoppel—Where a note was executed by a married woman for stock in a pants factory, which was at the time worthless, which fact was unknown to her, and because of representations made to her that if she did not purchase the stock her husband would be prosecuted on a charge of burning the factory, in an action thereon it was competent for the wife to testify to statements made to her by her husband to induce her to sign the note and thereby save him from a prosecution for arson, such evidence being competent for the purpose of showing her condition of mind at the time she signed the note; and the fact that she subsequently made a payment on the note when in the same condition of mind, did not amount to a ratification of the contract, or estop her from making defense to the remainder, or to recover back the sum paid.

Geo. W. Jolly and W. Scott Morrison for appellant.

Sweeney, Ellis & Sweeney and Little & Slack for appellee.

Appeal from Davless Circuit Court.

Opinion of the court by Judge Carroll, affirming.

This is the second appeal of this case. The former opinion may be found in 28 Ky. Law Rep., 1165, but a brief statement of the facts will be necessary to present the objections urged by appellant.

On June 30, 1903, the appellee, Clara L. Ditto, executed to appellant, Slaughter, a note for \$1,600. The note recited that it was given as the purchase price of thirty-three shares of stock in the Owensboro Pants Manufacturing Co.—the stock being pledged as collateral security for the note. In October, 1903, Mrs. Ditto paid \$1,000 on the note, and afterwards Slaughter brought suit to recover the balance. In answer to this suit, Mrs. Ditto averred that the note was executed without consideration, that the stock for which it purported to be given was worthless, and further, that the note, as well as the \$1,000 paid thereon was procured by fraud and duress. She tendered with her answer the shares of stock, and sought to recover upon a counter-claim the \$1,000 paid Slaughter. Upon the first trial, from which the former appeal was prosecuted, the lower court peremptorily instructed the jury to find for Slaughter.

On the first trial, as on the one from which this appeal is prosecuted, the evidence shows that the stock in the pants company was worthless, and had no market value, and that Slaughter knew this, but that Mrs. Ditto did not. There was also evidence that the husband of Mrs. Ditto had been arrested for burning the pants factory, which was heavily insured, and that his examining trial was to be held on the day the note was executed. Mrs. Ditto and her husband lived in Owensboro. The note was written in the law office of Miller & Todd, and was taken from there by her husband, who returned in a few minutes afterwards with the note signed by Mrs. Ditto.

On the former trial, as appears from the opinion, Mrs. Ditto offered to testify that when her husband presented the note to her, he told her that Slaughter would not consent that Mr. Miller, an attorney whom he was anxious to secure in his defense, might appear for him, and that unless the note was executed Slaughter would become a witness against her husband, and relate facts which would be very damaging to him in the prosecution. That, influenced by these statements, she signed the note, and that she paid the \$1,000 on the note under threats made by Slaughter, which were reported to her by her husband, that he, Slaughter, would go before the grand jury and procure an indictment against her husband unless the \$1,000 was paid. In reference to this evidence, this court said that, although both Mrs. Ditto and her husband could not testify, it was competent for her to relate what her husband said to her at the time she signed the note, and when she paid the \$1,000, for the purpose of showing her state of mind, and to illustrate whether her signature and the payment were obtained by fraud or duress. The court further said that there was sufficient evidence upon the question of fraud and duress to take the case to the jury, and as the evidence upon the last trial was in substance the same as upon the first, the case was properly submitted to the jury.

On the trial from which this appeal is prosecuted, Mrs. Ditto testified that she never bought any stock in the Owensboro Pants Co. from Slaughter, or had any conversation with Slaughter, or any other person, in regard to the stock, and had no idea what it was worth; that on the day she signed the notes she knew that her husband was to appear before the county judge on the charge of arson, accused of being implicated in the burning of the Owensboro Pants Co.'s plant; and that her husband had been endeavoring to employ Mr. Miller as an attorney to defend him in the prosecution; that on the morning

of the day the prosecution was set for trial her husband brought her the note sued on, and she signed it, because her husband told her if she did not sign it Mr. Slaughter would not let Mr. Miller represent him, and Mr. Slaughter was going to appear against him as a witness in the prosecution; that at the time she was greatly distressed and would not have signed the note except for the fear and mental distress under which she was laboring. She further testified that when she made the payment of one thousand dollars, that her husband told her the note that she had signed was due and that Slaughter had said to him that the grand jury would soon be in session and that unless she made a payment on the note he would appear before the grand jury against her husband, and that induced by the fear that her husband would be prosecuted by Slaughter, she paid \$1,000, and did not know at the time that she was not liable on the note. While Mrs. Ditto was testifying, the court frequently admonished the jury that the statements made to her by her husband were only competent for the purpose of showing her state of mind at the time she signed the note, and when she made the payment of \$1,000.

Slaughter, on the witness stand, denied that he had ever threatened to prosecute Ditto, or that he had interfered with his employment of Mr. Miller. That while in Miller's office on the morning before mentioned, Ditto said to him: "I will buy your stock, or at least my wife will; I will give you fifty cents on the dollar;" that he asked Mr. Miller to draw up a note, and Ditto took it and went out to get his wife's signature, returning in about fifteen minutes with the note signed by her. That he also took with him notes to be signed by his wife payable to Brown and Rinehart, who, in connection with Slaughter had been induced by Ditto to buy stock in the pants company. It may be here remarked that Slaughter, Rinehart and Brown claimed that Ditto had induced them to purchase the stock by misrepresentation and fraud as to its value, and that they were about to, or had, instituted proceedings against Ditto to recover from him the purchase price paid, upon the ground that he had practiced a fraud upon them.

Appellant offered to prove by Rinehart and Brown that on the occasion that Slaughter sold his stock and took Mrs. Ditto's note therefor, that they also sold their stock to her, and she executed notes to them; but this evidence the court excluded.

Ditto was introduced in rebuttal, and asked if, on June 30, or at any other time, he made a proposition to Slaughter to buy his stock for his wife; and, over objection, he answered that he did not—the court, at the time, admonishing the jury that his evidence was only competent for the purpose of contradicting what Slaughter said.

Upon the conclusion of the evidence, the court instructed the jury, in substance, that if they believed that there was no valuable consideration for the execution of the note, or that it was signed by Mrs. Ditto under fraud or duress, and that the thousand dollars was obtained by fraud or duress, they should find for the defendant.

The jury returned a verdict finding that Slaughter was not entitled to anything on his note, but that Mrs. Ditto should recover from him \$1,000.00. From a judgment on this verdict Slaughter appeals, and asks its reversal upon the ground that the trial judge erred, (first) in refusing to permit Rinehart and Brown to testify that they sold some of the capital stock of the Owensboro Pants Company to appellee on the day it is alleged she purchased the stock from appellant; (second) in permitting appellee's husband to testify after she had elected to and did make herself a witness; (third) in giving and refusing instructions; (fourth) that the verdict is against the evidence, as there is no evidence showing that appellant ever threatened the husband of appellee, or that he practiced any fraud or duress upon her.

We think the evidence clearly establishes that the stock for which it is said appellee executed the note was, at the time, worthless, so

that it may safely be said there was no valuable consideration for the execution of the note, and it would be a manifest injustice to require appellee to pay for the stock. It is also clear that appellee, at the time she signed the note, did not know anything about the value of the stock, and all the circumstances point to the conclusion that she was induced to sign the note because of the representations made to her by her husband that unless she did sign it, Mr. Miller would not appear as counsel for her husband in the pending prosecution against him, and that appellant would testify for the Commonwealth. At the time the note was signed, the prosecution against her husband for arson had been called for trial before the county judge in the court house—the trial being delayed by the efforts of the parties to make arrangements about the execution of this note. The circumstances surrounding the sale of the stock in Mr. Miller's office, and the execution of the note immediately afterwards, strongly support the conclusion that Ditto was apprehensive that unless he procured his wife's signature to the note, that Slaughter would take some part in the prosecution against him; and that he prevailed on his wife to sign the note by making statements of this character to her. Under the circumstances, situated, as she was, it is easy to understand that she would willingly and readily believe any statements her husband might make, and do anything he asked her to do to help him out of the trouble he was involved in. Mr. Miller had no part whatever in the sale of the stock—nor anything to do with the conversation that took place between Slaughter and Ditto in reference to it—or with procuring Mrs. Ditto's signature to the note. His only connection with the matter consisted in the fact that the parties happened to be in his office.

The evidence proposed to be made by Rinehart and Brown was not competent, as neither of them sold Mrs. Ditto any stock in person, or had any conversation with her about the sale of their stock. It seems not improbable that Ditto was as anxious to pacify them as he was to make terms with Slaughter, to the end that he might have the good influence, or, at least, not their opposition, in the pending prosecution against him, and it is likely that he made some statements to his wife to induce her to sign their notes, as he took them with the Slaughter note to get her signature; but, upon this point, we express no opinion as the question is not before us, and only mention it to illustrate the fact that, in no aspect of the case, could the evidence of Rinehart and Brown that Mrs. Ditto bought their stock be competent, in the absence of evidence showing the circumstances under which Mrs. Ditto bought it, or any statements made by or to her at the time she signed the notes.

At the time Mrs. Ditto paid the \$1,000.00, she was laboring under the same condition of mind as when she executed the note, and from her statements was induced to make the payment by reason of the fact that she feared unless she did so, Mr. Slaughter would renew the prosecution of her husband on the charge of arson. Her payment of this money under the circumstances did not amount to a ratification of the contract, nor is she estopped by it from making defenses to the remainder of the note, or seeking to recover this sum back. Looking at it from her standpoint, and the jury were at liberty to accept her version as true, the entire transaction, so far as she was concerned, was fraudulent and without valuable consideration. She testifies that when she made this payment she did not know her legal rights, or that she had a valid defense against the note. Under these circumstances, her payment can not be deemed to be a waiver, estoppel or ratification.

In respect to the assigned error in permitting Ditto to testify in rebuttal as to what Slaughter said relative to the conversation in Mr. Miller's office—admitting that it was incompetent, under that provision

of the Code forbidding both the husband and wife from testifying, it could not have been prejudicial to appellant, because it was really immaterial. It threw no light whatever upon the only two questions involved in the case, which were, the want of consideration, and Mrs. Ditto's mental condition at the time she signed the note.

The case, for appellee, might well have been rested under the evidence upon the single proposition that there was no valuable consideration for the execution of the note, or the payment of the one thousand dollars; and, therefore, appellee was entitled to the judgment rendered in her favor.

The instructions presented to the jury the only issues in the case.

We find, in the record, no substantial error to the prejudice of appellant, and the judgment of the lower court is affirmed.

KENTUCKY UNION CO. v. COMMONWEALTH.

(Filed March 25, 1908—To be reported.)

1. Land—Forfeiture for Taxes—Redemption—Penalties and Interest—It was competent for the Legislature to provide in the revenue act of March 15, 1906, that the amount paid to remove cause of forfeiture, where land was sold for unpaid taxes, should be the taxes without interest or penalties for the years named and if in adding penalties and interest the Legislature exceeded its constitutional authority the act would be void only in so far as it exceeded such authority and the penalty and interest would be eliminated.

2. Same—Recovery of Land—Deed—Boundary—Exclusions—The rule is universal that where one seeks to recover land under a grant or deed which does not convey all the land within the boundary described he must show that the land sought to be recovered is within the boundary and without the exclusions.

3. Same—Petition—Allegations—In an action for the forfeiture of land for non-payment of taxes under the act of March 15, 1906, it is not necessary for the petition to describe more than the tract of land, the title to which is sought to be forfeited.

4. Large Boundary—Many Occupants—Judgment—Description—Partial Sale—In an action for the forfeiture of a large boundary of land on which there are many occupants, it is not necessary for the judgment to ascertain and describe the parts of the land held by the several occupants. If at the hearing it should appear that the title as to certain parts only of the tracts would pass to the purchaser under a sale, the statute would be complied with by a sale of the title covering those parts alone. In any event, it is the duty of the court to prescribe what parts thereof shall be sold, if less than the whole is to be sold.

5. Re-purchasing Land—Time Allowed—Under the provision of the act the defendant has until the close of the first term after the judgment of forfeiture is entered in which to file his petition and bond to purchase back the land, and it was error of the court to order a sale of the land before the time elapsed in which defendant could file such petition.

W. B. Dixon, Louis B. Wehle and Cleon K. Calvert for appellant.

Ira Fields and James H. Jeffries for appellee.

Appeal from Leslie Circuit Court.

Opinion of the court by Judge Lassing, reversing.

This appeal presents for consideration questions as to the constitutionality of article 3, of the Revenue and Taxation Act, approved March 15, 1906, and of practice and procedure thereunder.

On the 20th day of April, 1907, the Commonwealth of Kentucky, by Ira Fields, Commonwealth's attorney, in and for the thirty-third judicial district of Kentucky, which includes Leslie county, filed its petition in the Leslie Circuit Court against appellant, alleging, among other things, that on the 12th day of June, 1872, the Commonwealth of Kentucky granted to Stephen G. Reid, by letters patent, forty thousand acres of land in Perry, now Leslie county, Kentucky, a copy of the grant being filed with, and as a part of, the petition. The petition also described the land by metes and bounds, courses and distances, and alleged that the corporate defendant, appellant here, under, through and by virtue of, divers mesne conveyances, from the patentee, was the claimant of said tract of land under said patent.

The petition further alleged that appellant and its predecessors in title had failed to list said tract of land, or any part of it for assessment and taxation, as of September 15, 1901, September 15, 1902, September 15, 1903, September 15, 1904, and September 15, 1905, and had so failed to list the same as of each and all of said dates; and had failed to pay the taxes charged, and which should have been charged against said tract of land assessible as of said dates, and had failed to pay such taxes assessible as of any of said dates. The prayer was for judgment against appellant, forfeiting and transferring to the Commonwealth of Kentucky all of appellant's claims, title, right and interest in and to all of said tract of land, and for costs. By an amended petition the prayer was enlarged and asked for a sale of all the title, interest and claim of appellant in and to all of said tract of land.

Appellant appeared and filed general demurrer to the petition at September rules, 1907, which was overruled at the regular October term. The appellant elected to stand on its demurrer and declined to answer. At the same term the case was set down for hearing and trial before a jury, and upon a verdict in favor of plaintiff the court entered a judgment forfeiting and transferring to the Commonwealth the right, title, interest and claim of appellant in and to the said tract of land described in the petition and judgment; and further adjudged that the title so forfeited and transferred to the Commonwealth be sold by the master commissioner. The judgment contains the usual provisions for a sale by a master commissioner, and authorizes the commissioner to sell said tract of land as a whole or in parcels to suit purchasers.

By further provision of the judgment the master commissioner was directed not to advertise the sale until after the close of the regular February, 1908, term of court.

Complaining of errors in this judgment, appellant prosecutes this appeal.

Appellant, confessing as true the allegations of the petition, relies for reversal upon the alleged unconstitutionality of the act upon which the proceedings were based, and further claims that as the petition did not allege, nor the judgment ascertain, what parts of the forty thousand acres had been occupied, and taxes paid thereon by occupants, the petition is defective, and the judgment erroneous.

The questions thus presented for determination by this court are (1st) is article 3, of the revenue and taxation act, approved March 15, 1906, a constitutional exercise of legislative authority; (2d) is the judgment erroneous in that the petition fails to allege or the judgment to ascertain the various persons who had occupied and paid taxes on lands within said forty thousand acre boundary for five years next preceding the judgment of forfeiture; and (3d) did the court err in

entering judgment of sale at the same term at which the judgment of forfeiture was entered?

The constitutionality of this article was considered and upheld by this court in an exhaustive opinion written by Chief Justice O'Rear in *Eastern Kentucky Coal Lands Corporation v. Commonwealth*, 32 Ky. Law Rep., 129, 106 S. W., 260, and it is not necessary to again refer to the various objections there urged, and passed upon by the court. Upon further consideration, we are satisfied that the conclusions there reached are correct.

It is contended by appellant that under the act of 1906 a failure to list land for assessment and to pay the taxes thereon for the years 1902, 1903, 1904, 1905 and 1906 is visited with a different and heavier penalty than was provided by law in force during those years. It is by no means certain that the act accomplishes any such result; but if it did it would result in making void only the penalties and interest provided for the default, and would not affect any other portion of the act. The act expressly provides that it is enacted in detail and that each provision shall stand by itself unaffected by any other portion that for any reason might be invalid. The act is a comprehensive revenue measure and this result would follow had there been no such provision.

It was clearly competent for the Legislature to prescribe that the amount to be paid to remove cause of forfeiture should be the taxes, without interest or penalties, for the years named; and if, in adding penalties and interest, the Legislature exceeded its constitutional authority, the article would be void only in so far as it exceeded such authority; and the penalty and interest would be eliminated. The penalty and interest can be stricken out and that which remains is complete within itself, and capable of being executed in accordance with the apparent legislative intent. Similar objections were urged in *Hoke v. Commonwealth*, 79 Ky., 567, and *Muir's Adm'r v. City of Bardstown*, 120 Ky., 739, and in each case, where penalty was provided, the act was held void only to the extent of the penalty imposed.

No question, however, concerning the validity of the provisions of the act as to what penalties the appellant should pay for its delinquency during the years 1902, 1903, 1904, 1905 and 1906 arises in this case. It has not attempted either to list its land or offered to pay any taxes, though the act gave ample time, after it became a law, for compliance with its provisions. (*Mulvey v. Boston*, 83 N. E., 402; decided January 14, 1908; *Terry v. Anderson*, 95 U. S., 628; *Black on Tax Titles*, sections 279-286.) Had the appellant attempted to comply it could then have contested or disregarded any unconstitutional provision of the act.

As we held in the case of *Eastern Kentucky Coal Lands Corporation v. Commonwealth*, 32 Ky. Law Rep., 129; 106 S. W., 260, it was competent for the Legislature, in the exercise of the taxing power, to provide a forfeiture for a failure to list property for assessment and pay the taxes due thereon. The penalty of forfeiture provided by the act is not for a past delinquency, but for a failure to list and pay after the act went into effect, and within the time there provided. We are here concerned only with this feature of the act, and it has no semblance of an *ex post facto* law.

Appellant contends that, if the act is constitutional, the petition is defective, and that the general demurrer thereto should have been sustained, because the petition fails to disclose what parts, if any, of the land described in the petition is held by occupants who have paid taxes thereupon for the five years preceding the judgment of forfeiture; and that the judgment is erroneous because it does not segregate the parts to which the forfeited title would inure.

So far as disclosed by the record there is no part of the tract held by occupants. But the court judicially knows, and it was admitted in argument, that practically, if not quite, all the land described in the petition is adversely held by occupants under claim or color of title. The record shows only that the appellant is the owner or claimant of the title to the tract of land, which is specifically described, by metes and bounds, courses and distances, and that appellant has failed to comply with the provisions of the article with respect to the listing of it for taxes and the payment of taxes thereon. The petition contains all the allegations necessary to show that appellant was delinquent, and its title subject to forfeiture, and the demurrer thereto was, therefore, properly overruled. Nor is the judgment erroneous on that ground. Certainly the title to the tract of land described in the petition, and which is adjudged to be subject to forfeiture and sale, can be sold by the same description, the purchaser taking that which, under the article, passes at the sale. The doctrine of caveat emptor applies in this, as in other proceedings. And the purchaser, and not the occupant, as argued by counsel for appellant, would be required to show, in actions to recover under his purchase, that the land claimed by him was not of the excluded class. The rule is universal that where one seeks to recover under a grant or deed which does not convey all the land within the boundary described, he must show that the land sought to be recovered is within the boundary and without the exclusion. (Hall v. Martin, 89 Ky., 9.)

The act provides that the deed shall transfer to the purchaser the title and claim,

"So forfeited and transferred to and vested in, the Commonwealth, as remains in it after the operation of section 6 of this article, and shall so recite."

The article, taken as a whole, clearly shows that such was the legislative intent. It is not necessary for the petition to describe more than the tract of land, the title to which is sought to be forfeited.

After the judgment of forfeiture becomes final the main purpose to be conserved is the interest of the Commonwealth, and circumstances might arise or be shown to exist that would authorize different modes of executing it. We have no hesitancy in holding that it is not necessary for the judgment to ascertain and describe the parts of the tract held by occupants. If, at the hearing, it should be made manifest that the title as to certain parts only of the tract would pass to the purchaser under a sale, the statute would be complied with by a sale of the title covering those parts alone. In any event it is the duty of the court to prescribe what parts thereof shall be sold, if less than the whole is to be sold. Therefore, the judgment appealed from, in so far as it authorizes the commissioner to sell the tract as a whole or in parcels to suit the purchaser is erroneous.

Another error in the judgment of sale is that it was rendered at the regular October term, 1907, of the Leslie Circuit Court, the term at which the judgment of forfeiture was entered.

By section 4 of article 3 it is provided that "if before or during the term of circuit court, next succeeding the term at which a judgment of forfeiture may have been entered," the defendant in privity with the title, so vested in, and forfeited to, the Commonwealth, should file his counterclaim, accompanied by bond, and ask to be allowed to purchase back the property, he should be allowed to do so upon the terms prescribed in the article. The defendant, by the express provisions of the act, has until the close of the first term of court after the term at which the judgment of forfeiture is entered, in which to file this petition; and it was error for the circuit court to order a sale of the property before the time had elapsed in which the defendant could file his petition and bond to purchase back the property. It is

insisted that this premature entry of the judgment of sale is not error because it becomes inoperative if the defendant should, within the time authorized by the act, file its petition to purchase the property back. But the judgment of the court was a final order from which an appeal could be, and now is being, prosecuted, and the circuit court had no control over it, after final adjournment of the term at which it was entered. The judgment of sale, therefore, was erroneous.

It is earnestly insisted that the article in question is a repeal, to a certain extent, at least, of the statute against champerty. But in this we do not concur. The purchaser, in an action to recover the land, or part thereof, would still be required to prove his chain of title, as if there had been no forfeiture or sale. The utmost that could be claimed is that the commissioner's deed, made pursuant to a judgment of court, is not ordinarily subject to the provisions of the statute as against champerty. Conceding this to be true, the only link in the chain of title against which the plea of champerty could be interposed would be the commissioner's deed made pursuant to the sale directed by the judgment; and this plea would not extend to any link in the chain of title antecedent to the commissioner's deed. But, is the commissioner's deed, made under this article, subject to the plea of champerty?

In section three of the article in question, it is provided that:

"No other title, claim, or possession, or continuity thereof, whether owned or claimed by the defendant or by others, shall be forfeited, or in any manner affected by said proceeding."

And by section four of the article, it is provided that:

"No person except a defendant, and no defendant except as herein provided, shall be allowed to purchase back from the Commonwealth, the title so forfeited to, and vested in it, except such defendant as may, but for such forfeiture, establish, in such proceeding, a title thereto in himself, upon which he could maintain an action of ejectment."

As was stated in *Farmers' Bank of Kentucky v. Peter*, 13 Bush, 591:

"The purchaser takes what he gets. The rule of caveat emptor applies in all its vigor to a sale of real property."

The sale referred to, being a sale by a commissioner under decree of court.

From the provisions of the act above quoted, it is manifest that it was not the intention of the Legislature to take from an occupant any defense that he might theretofore have had, whether of champerty or otherwise. It is expressly stated, that no title, claim, possession, or continuity thereof, by whomsoever owned, shall, in any manner, be affected by said proceeding. We are, therefore, of the opinion, that the benefit of the plea of champerty is not only not taken from the occupant, but it is preserved to him as against the commissioner's deed itself, and that such deed does not come within the general rule that the plea of champerty is not available as against a commissioner's deed.

In *Commonwealth v. Rosenfield Bros. & Co.*, 118 Ky., 374, the court, quoting from *Endlich on Interpretation of Statutes*, section 295, says:

"Where the language of a statute, in its ordinary meaning and grammatical construction, leads to manifest contradiction of the apparent purpose of the enactment, or to some inconvenience or absurdity, hardship or injustice, presumably not intended, a construction may be put upon it which modifies the meaning of the words, and even the structure of the sentence. This is done sometimes by giving an unusual meaning to particular words, sometimes by altering their collocation, or by rejecting them altogether, or by interpolating other words—under the influence, no doubt, of an irresistible conviction that the Legislature could not possibly have intended what its

words signify, and that the modifications thus given are mere corrections of careless language, and really give the true intention. The ascertainment of the latter is the cardinal rule, or rather the end and object of all construction; and where the real design of the Legislature in ordaining a statute, although it be not precisely expressed, is yet plainly perceivable or ascertained with reasonable certainty, the language of the statute must be given such a construction as will carry that design into effect, even though in so doing the exact letter of the law be sacrificed, or though the construction be, indeed, contrary to the letter."

This rule is re-enunciated in an opinion of this court by Judge Barker, filed March 17, 1908, in the case of Morrell Refrigerator Car Co. v. Commonwealth of Kentucky. If it were possible to construe the act in question as contended for by appellant, with respect to champerty, which we do not hold, the rule announced by this court in the above cases would preclude such a construction. But there is nothing in the act indicating such an intention upon the part of the Legislature. Its whole purport is to the contrary, and by specific provision. It declares that the title, claim, or possession of the occupants, or the continuity thereof, should not, in any manner, be affected by the proceedings.

If the occupant has had five years' possession, coupled with the payment of taxes, the forfeited title devolves upon him; if he has not had possession for a sufficient length of time to cause a vestiture of title in him, he, nevertheless, is in possession; and as a sale of the forfeited title to the extent of his possession would be champertous, the title thereto remains in the Commonwealth, and the possession of such occupant, or the continuity thereof, is not in any manner affected thereby. The title to those parts not transferred to the occupant, or which is not adversely held, is alone the subject of sale, and the title to only such parts would pass upon a sale in gross.

The judgment is affirmed in so far as it adjudges a forfeiture of the title and claim of appellant, but for the reasons indicated and because it orders a sale of the land and not of the forfeiture of title, it is reversed for proceedings not inconsistent with this opinion.

Whole court sitting.

BOREING, &c. v. WILSON & MOSS.

(Filed March 25, 1908—To be reported.)

1. Judges—Affidavit of Disqualification—Sufficiency—An attorney appointed by the Governor as a special judge of a court, may properly refuse to vacate the bench upon an affidavit by a litigant that he and the opposing counsel of the litigant happen to be attorneys for the same railroad though in different parts of the State.

2. Same—Likewise a judge is not disqualified to sit in a case because he may be socially entertained by the opposing counsel of one of the litigants, or because he expressed an opinion upon a preliminary motion in the case after hearing the argument thereon and congratulated the opposing counsel on his argument on the motion. Or because of his supposed intention to appoint a receiver in the case, who was not friendly to a deceased party whose estate is involved in the action.

3. Partnership—Acts Constituting—Where three men mutually agree to go in together and buy a large tract of mineral and timbered land and hold it for a profit, each to furnish some of the money, and expense and to do certain work, and, after the sale of the land, each shall

have the money he advanced with 7 per cent. interest thereon and his expenses refunded, and to share equally in the balance of the sale money, they are partners in contemplation of law.

4. Settlement of a Partnership—Sharing of Profits—Where in the settlement of a partnership formed for the purchase and sale of land, it is shown that one of the partners sold 500 acres of the partnership land and 500 acres of his individual land in a body at an agreed consideration for the whole 1,000 acres, such partner was bound to account to his co-partners in the 500 acres for one-half of the price he received for the whole tract, and the fact that the partner in making such sale received a part of the consideration in corporation stock did not require his co-partners to accept such stock in payment for their interest in the 500 acres of partnership land sold.

5. Same—Interest Paid on Advancements—Like Interest on Settlement—Where, in the formation of a partnership, it is agreed that each partner shall be allowed eight per cent. interest on advancements made, which was enforced in the settlement of such advancements, it would be equitable and proper in the distribution of the proceeds of the partnership to require each of the partners, on final settlement, to account for eight per cent. interest on the amount due from each from the time the same was received.

D. B. Logan and Greene & VanWinkle for appellants.

Wm. Ayres for appellee Wilson.

J. R. Sampson for appellee Moss.

Appeal from Bell Circuit Court.

Opinion of the court by Wm. Rogers Clay, Commissioner, affirming.

In the spring of the year 1886, appellee John H. Wilson was engaged in the practice of law in Barbourville, Knox county, Kentucky. His services were secured by the Louisville and Nashville Railroad Company after that corporation had decided that it would construct a branch railroad from Corbin, on the main line of its Knoxville division, up the Cumberland river into the coal fields of Bell and Harlan counties, or through Cumberland Gap into the coal fields of Wise and Lee counties, Virginia. After appellee Wilson had learned that the road would be constructed, he could readily see that the coal bearing properties along the line of the proposed road would, of necessity, rapidly advance in price, and that the purchase of the lands at the low prices then prevailing, and before it became known that the road would be constructed, would prove a very profitable investment. Appellee had formed the acquaintance of his co-appellee, M. J. Moss, some time prior to 1886, who was engaged in the practice of law in Bell county, and was well acquainted with the inhabitants of that county, and especially the land owners along the line of the proposed railroad. Accordingly they agreed to go into an arrangement by which they would purchase lands and hold them until the prices advanced. Realizing that it would take a large sum of money to carry through the enterprise, they then proposed to Vincent Boreing, a wealthy and influential man in that section of the State, to join the enterprise. It was agreed between the parties to the arrangement that whatever cash was advanced or furnished by either was to be returned to him with interest, and the profits were then to be divided equally among them.

In pursuance of this arrangement, about 5,000 acres of land were purchased. Frequently Moss or Wilson would propose that they get together and draw up a contract accurately defining the rights

of each party to the lands in question; sometimes Boreing would make the same proposition. No such contract, however, was ever signed. The matter was permitted to drag along from year to year, and finally, in the year 1903, Vincent Boreing died.

Thereafter the appellee, Wilson, filed his petition in the Bell Circuit Court alleging the existence of a partnership between him and Moss and Boreing. To this petition, appellee Moss and the heirs, devisees and personal representatives of Vincent Boreing were made defendants. The petition, after setting forth the death of Boreing, the dissolution of the partnership by reason thereof, and the qualification of his administrators under the will, alleges that it was agreed, at the inception of the partnership enterprise, that Vincent Boreing should furnish the money necessary to acquire the lands, and that he (Wilson) and Moss should contribute in aid of the enterprise their services and assistance, and, when the land was sold, Boreing should receive the various sums of money which he had advanced from time to time in making the necessary purchases, as well as all reasonable and necessary expenditures in connection therewith, together with seven per cent. interest on said sums of money from the time of their payment by Boreing. The petition further states that it was also agreed that he (Wilson) and Moss should, out of the proceeds, receive from time to time such money, with a like rate of interest thereon, as either of them might have contributed or paid out towards the purchase of said lands, in surveying expenses or other expenses incurred in the acquisition of title thereto; that Boreing had paid on said lands \$30,000 or \$35,000; that he (Wilson) had paid \$2,000 to \$2,700, and that Moss had paid \$7,000 or \$8,000; but that the exact amount that each had paid was unknown to appellee. Appellee then asked a settlement of the partnership accounts, and a reference to the master commissioner for that purpose.

To appellee Wilson's petition, appellee Moss, on December 7th, 1903, filed his answer, counter-claim and cross-petition, making appellants cross-defendants, and joined in the prayer of appellee, Wilson, for a settlement of the partnership accounts. Appellee Moss also set forth in his answer and cross-petition the unsettled and uncertain state of the partnership accounts, as well as the fact that Boreing had furnished, in the purchase of the lands, \$30,000 or \$35,000, but that the exact amount was unknown to appellee. He also alleged that he had paid in about \$7,500, but that Wilson had paid in only about \$1,475. Both the petition of appellee Wilson and the answer and cross-petition of appellee, Moss, alleged that Boreing had received large sums of money in the way of rents and proceeds from the sale of lands and timber involved in the controversy, the exact amount of which they did not know. Among other items they alleged that Boreing had received \$20,000 for 500 acres of land which was sold by him out of the partnership property to the Bell County Coke & Improvement Company, and that he had also received \$3,000 for certain machinery on the Tuckehoe lease which he had sold to A. H. Melcon.

On January 13th, 1904, the appellants herein filed their answer to the original petition of appellee Wilson, and also their reply to the answer, counter-claim and cross-petition of appellee Moss, denying and putting in issue every material allegation of those pleadings. Thereafter certain amended pleadings were filed, and, among them, one by appellee Wilson, asking for the appointment of a receiver to take charge of the property during the litigation. Responsive pleadings were then filed and the issues joined on all the material allegations of the several amendments. The court appointed a receiver, qualified and is now in charge of the property. The parties then proceeded with the taking of testimony, and the special judge, Hon.

John McChord, called a special term of the court in the month of July of that year, at which to hear the case.

On July 28th, 1904, one of the administrators, John R. Boreing, presented and filed his affidavit with the clerk of the Bell Circuit Court, in which he claimed that appellants could not get a fair trial of their cause before said special judge. The latter decided that the affidavit was insufficient and declined to vacate the bench. After this affidavit was filed, the case was continued to the October term for further preparation, and was then submitted and tried. The court held that a partnership existed between Wilson, Moss and Boreing; that in the settlement Vincent Boreing's estate should be charged with the sum of \$3,000 for the machinery sold to A. H. Melcon, with eight per cent. interest on said sum from the time the money was paid; that said Boreing's estate should be charged with the further sum of \$20,000 for the land sold by Boreing to the Bell County Coke & Improvement Company, with eight per cent. interest thereon from the time of the receipt of said sum by Vincent Boreing. On October 29th, 1904, the court entered a judgment in accordance with his conclusion set out above. After the entry of this judgment, appellants filed their written motion asking the court to set aside certain parts thereof, and in support of the motion filed certain affidavits, together with the deed of conveyance executed by Vincent Boreing on the 23rd day of May, 1890, to the Bell County Coke & Improvement Company. Upon the hearing of appellants' motion the court refused to set aside any portion of the judgment entered. Of the judgment and of the refusal of the trial court to set certain portions thereof aside, appellants now complain.

This appeal involves the determination of the following questions: (1.) Did the special judge err in refusing to vacate the bench? (2.) Did the transaction between appellees and Vincent Boreing constitute a partnership? (3.) Was A. H. Melcon, who purchased the machinery on the Tuckahoe lease, competent to testify for appellees, and did the court err in charging the estate of Vincent Boreing with the sum of \$3,000 paid by said Melcon for said machinery? (4.) Did the court err in charging the estate of Vincent Boreing for the 500 acres of partnership land sold by Boreing to the Bell County Coke & Improvement Company, and fixing the sum to be charged at \$20,000? (5.) Did the court err in charging the estate of Vincent Boreing interest at the rate of eight per cent on said sums of \$3,000 and \$20,000 from the time said sums were received by him? (6.) Did the lower court properly overrule the motion of appellants to set aside those portions of the judgment respecting said items of \$3,000 and \$20,000, and to refer same to the commissioner for further proof?

First. On July 28th, 1904, appellant John R. Boreing, for himself and his co-appellants, filed the following affidavit in which he set forth legal grounds why the special judge should vacate the bench:

"The affiant, John R. Boreing, says that he is one of the defendants in the above styled cause and is the only one taking an active interest in the defense herein; that his co-defendants, Julia T. Williams, Sallie Boreing, Belle Young, James M. Boreing, May Melcon and this affiant are the only devisees of Vincent Boreing, deceased. The other defendants, to-wit: A. H. Melcon, J. M. Williams and Joseph Young are nominally defendants only, the husbands of affiant's married sisters.

"This affiant says he does not believe the Hon. John McChord, the special judge, appointed and commissioned herein to try this cause, by the Hon. J. C. W. Beckham, Governor of the Commonwealth of Kentucky, can or will give these defendants a fair and impartial trial of the issues herein, or that he can or will impartially try and decide

the issues herein between the plaintiff, J. H. Wilson and the cross-plaintiff, M. J. Moss, on one side and these defendants, the brother and sisters of this affiant and himself, on the other.

"This affiant's belief is based upon the following grounds:

"He says that since the last term of this court he has learned and he avers it to be true, that the said special judge, John McChord, is an attorney and representative of the L. & N. R. R. Co., a corporation owning and operating a line of railroad through Bell county, Kentucky, and through several other counties in the State of Kentucky, with its chief office at Louisville, Kentucky, which line of railroad extends through Marion county, Kentucky, in which said special judge resides; that one J. W. Alcorn, is likewise an attorney and representative for said L. & N. R. R. Co., and as such superintends, conducts and has charge of the litigation in which said railroad company is involved from Louisville, Kentucky, to Cumberland Gap, and has the right to direct and does direct and superintend and advise other attorneys engaged in the service of said L. & N. R. R. Co., from Louisville to Cumberland Gap, including said special judge, John McChord; that the cross-plaintiff, M. J. Moss, is the regular circuit judge of the 26th judicial district, of which district Bell county is a part, and that the said J. W. Alcorn practices law in the said 26th judicial district and in the Bell Circuit Court, giving his attention almost exclusively to the litigation of said L. & N. R. R. Co.; that he, the said J. W. Alcorn, likewise practices in the Laurel Circuit Court where this affiant and his brothers and sisters live; that the affiant, as president of the Bell Coke & Improvement Co., which is the owner of a part of the property claimed in the pending controversy to have been once owned by the alleged partnership alleged to have existed by and between the decedent, Vincent Boreing, the plaintiff, John Henry Wilson and cross-plaintiff, M. J. Moss, has caused an action to be instituted in the Laurel Circuit Court to recover of the said M. J. Moss five hundred dollars (\$500) alleged to be due said company on the subscription of said Moss to its capital stock; that the said J. W. Alcorn is one of the attorneys of said Moss in said action, and that although he does not sign the pleadings as attorney he in everything else represents said Moss as attorney in said cause, withholding his name from the pleadings. He aided in the preparation of the answer of said Moss in said cause while in Bell county, and prepared an affidavit of said Moss for delay in said cause, and presented and filed it in the Laurel Circuit Court, making at the time a speech to the court which plainly showed his personal animosity toward the affiant; and that the said J. W. Alcorn has on several other occasions manifested his inclination to be strongly adverse to the welfare of the estate of Vincent Boreing, and that he has, without fee or compensation, on several occasions opposed the successful winding up of said estate, and has on each and every occasion shown his bitter personal dislike and antagonism for and toward the said estate and those representing it and this affiant; that said Alcorn is a very warm personal friend of the said M. J. Moss, the said judge of the Bell Circuit Court, and his influence over the said judge is such that, in litigation in said court in which said company is involved and wherein said Moss presides as judge, the railroad company wins almost uniformly and the opposing litigants lose; that said company owns and maintains a branch of its railroad through Bell county and has various shops and its superintendent's division therein, and that it has almost continuously litigation in the Bell Circuit Court.

"Affiant further says that the said L. & N. R. R. Co., under contract with three of the lessors of the property in controversy in this action, has built a spur or a short railroad from the L. & N. main track at Four Mile, Kentucky, up Four Mile Creek and through and over the

property in controversy, and that the continuance of its operation is made to depend upon contingencies regarding the successful operation of said property as a coal mining property and most especially upon the construction of ambiguous contracts with the said L. & N. R. R. Co., regarding the construction of said spur or branch railway which ambiguous contracts this affiant believes and avers will, before the termination of this suit, be litigated in this very action in order to establish the relative rights of the said L. & N. R. R. Co., and this affiant and his brother and sisters, the heirs and devisees of said Vincent Boreing, in, to and concerning said spur or branch railway up Four Mile Creek. Affiant further says that the said spur or branch railway has not been fully paid for by the said lessors of the property or the property-owners, and that there will probably arise in this very suit a controversy between this affiant and the other heirs and devisees of Vincent Boreing and the plaintiff, John Henry Wilson, and the cross-plaintiff, M. J. Moss, and the said L. & N. R. R. Co., over the construction of said spur or branch railway, and the amount of its cost and construction and the manner of payment of same, and this affiant believes that an attorney for the L. & N. R. R. Co., could not, as judge in this case, wherein the interests of the said L. & N. R. R. Co. will probably become adverse to this affiant and his brother and sisters, who claim in this action to be the sole owners of the property in controversy, impartially or fairly decide this controversy and the issues which may place the said L. & N. R. R. Co., in a more advantageous position when said controversy between them and this affiant, his brother and sister arises, and in which the said special judge, John McChord, as a servant and attorney of said railroad company will, as affiant believes, be interested and will desire a coalition of the interests of said company and the interests of the plaintiff John H. Wilson and cross-plaintiff M. J. Moss, and especially that of the said Moss, because of his official position and power as circuit judge; that personally and socially the said special judge has shown toward the plaintiff Wilson and the cross-plaintiff Moss and his attorneys, J. R. Sampson and William Ayres, special favoritism and has seemingly, on the other hand, in minor matters in this cause, given these defendants no quarter in this proceeding up to the present time. And this affiant is informed and believes and avers that said judge has repeatedly stated and declared to persons outside of the courthouse and in private conversations that he had no doubt of the existence of a partnership between the decedent, Vincent Boreing, the cross-plaintiff, M. J. Moss, and the plaintiff, John H. Wilson, and that he had become satisfied of this fact before he had heard half of the testimony on the plaintiff's application for a receiver, tried last January, the main and about the only question to be tried in this cause and the only issue of any importance is whether or not a partnership actually existed between said parties. Whether or not a partnership was ever formed or ever existed is the vital issue in this cause, and this affiant and his brother and sisters feel that this issue can not be fairly or properly tried by a judge who has already formed and expressed his opinion that such a partnership did exist. That affiant, just after the trial of the motion for receiver herein tried at the January term, 1904, of this court, at the Edwards House, in Pineville, Kentucky, heard the said special judge, John McChord, congratulate said William Ayres, attorney for plaintiff Wilson, upon his able presentation of the grounds and cause made for receiver in this cause, and in his congratulatory address to said Ayres he said that before said Ayres was half through the presentation of his side (said McChord) was of the opinion that a partnership in fact did exist between the decedent, Vincent Boreing, the plaintiff, John H. Wilson, and the cross-plaintiff, M. J. Moss, and that a receiver should be ap-

pointed therein on that ground to take charge of the partnership property; and when said Ayres had finished his speech he was conclusively convinced of the same. Said judge was thanked very much for the compliment by said Ayres in garceful terms, and this affiant was informed and believes that said special judge made similar statements at other times and to other persons regarding this case.

"Affiant further says that he is reliably informed and believes it to be true that the said special judge, John McChord, has been approached for the purpose of having C. W. Metcalf appointed special commissioner in this cause for hearing proof and settling the alleged partnership accounts between the plaintiff, Wilson, the cross-plaintiff, Moss, and Vincent Boreing's estate, and that said judge has promised to make said appointment in event it is determined by him, the said special judge's decision that a partnership ever existed between said plaintiff, Wilson, cross-plaintiff, Moss, and Vincent Boreing, and that affiant believes that said special judge has already from his expressions of opinion, made outside of the court and in conversations, determined to adjudge and decide that said partnership did exist, and that the appointment of Metcalf is to follow as one of the steps in this case. Said C. W. Metcalf is also a practicing attorney in the Bell Circuit Court, and is the attorney for the L. & N. R. R. Co. in Bell county, Kentucky. He was a bitter political enemy of the late Vincent Boreing in his lifetime, and carried said political feeling so far that it became personal hate and malice. The said Metcalf is also governed and controlled as attorney for the L. & N. by J. W. Alcorn. Upon the recommendation of the cross-plaintiff, M. J. Moss, and in possession of a letter from said Moss to the Governor of the Commonwealth of Kentucky, in February, 1904, the said Metcalf on a personal call to said Governor was appointed special judge of the 26th judicial district of Kentucky, to hold the February term of the Letcher and Perry Circuit Courts, while the cross-plaintiff, Moss, was in Bell county preparing this case for trial, and giving his own deposition as a witness. Metcalf, as affiant believes, can not but feel that he owes favors to the said cross-plaintiff, Moss, for these acts performed in his favor, enabling him to become special judge as aforesaid. In addition to these facts the said Metcalf, like other lawyers employed for the L. & N. R. R. Co., desires that the interests of judges and other officers of courts charged with duties in the administration of justice and the L. & N. R. R. Co., shall not run counter to each other, but act in harmony and for each other's mutual assistance and benefit. Affiant does not believe said Metcalf, under such circumstances, would be a proper person to hear proof, or could fairly decide upon matters of account in this case, and that said judge has determined to appoint him. Affiant has learned these facts since the last term of court and within the last week.

"The application for the appointment of receiver was tried when the defendants had no time or opportunity for preparation of the defendants' side of the case and at a time when defendants' attorney, D. B. Logan's office had just been destroyed by fire and his office furniture, books and papers turned upside down in a heap and said attorney overworked and illy prepared for the presentation of a defense to the motion. These facts were known to the judge as well as to the plaintiff Wilson and cross-plaintiff Moss and their attorneys, and the necessity for a receiver, affiant believes was wholly lacking and that his appointment was improvident and entails cost alone without benefit to the owners of the property in controversy, and that the application for a receiver was made alone to annoy the defendants and this affiant.

"This affiant expects to file grounds and make a motion for conclusion of this cause to enable defendants to prepare this cause for

trial. The grounds and reason for the motion will be fully stated in the affidavits in support thereof, and this affiant does not believe that the present special judge, the Hon. John McChord, will impartially or fairly try or decide the said motion because of reasons hereinbefore stated. Affiant said the foregoing statements are true as he verily believes:

"Wherefore, this affiant and his co-defendants ask that upon consideration of these reasons the special judge decline to hear or try further motions herein or to try this case, and for other proceedings according to law and the practice of this court."

Passing the question whether or not this affidavit was filed in time, we will proceed to the discussion of the grounds relied upon. It will be observed that the first point relied upon by appellant John R. Boreing in his affidavit is that both the special judge and J. W. Alcorn are attorneys for the Louisville & Nashville Railroad Company; that Alcorn is superior in authority to the special judge, and has been indirectly assisting appellee, Moss, in an action brought against him by the Bell County Coke & Improvement Company, to recover \$5,000 alleged to be due by him on a subscription to its capital stock; that Alcorn in a speech in that case had shown personal hostility towards the affiant and an inclination to be strongly adverse to the welfare of the Vincent Boreing estate. These might be reasons why J. W. Alcorn, if appointed special judge, should not act; but we can not conclude, merely because the special judge and J. W. Alcorn happened to be attorneys for the same railroad, though living in different parts of the State, that whatever hostility J. W. Alcorn had would be transferred to the special judge. By such allegations no hostility on the part of the special judge is shown, but a mere probability that the hostility of a co-employee of the same railroad might be imparted to the special judge.

The second point is that the Louisville and Nashville Railroad Company, under contract with certain lessors of coal lands in controversy in this action, had built a spur track up Four Mile Creek, and it was possible that litigation might arise with that railroad in connection with those matters, and if such controversy should arise, the special judge would not impartially or fairly decide the matters involved in this litigation. If a reason such as this were sufficient to require a special judge to vacate the bench, we doubt if any special judge would ever be able to preside in a case which he was appointed to try. This allegation contains no fact showing hostility, prejudice or bias, but sets forth a mere conjecture that by some possibility, nebulous and remote, there might arise in the future—no one knows when—a controversy either in this action or in some other, between the Louisville & Nashville Railroad Company and the appellants and appellees respecting that railroad spur. Because of that remote contingency, we are asked to conclude that the special judge was disqualified from sitting in this case. It is hardly necessary to say that such an allegation states no grounds disqualifying the special judge. The mere statement of the proposition carries with it its own refutation.

The next point is that the special judge had shown favoritism, both personally and socially, towards appellees, Moss and Wilson, and their attorneys. This is not the kind of favoritism that disqualifies a judge from acting; it is only judicial favoritism that disqualifies a judge. The time has not come in this State when the ordinary courtesies and amenities of life are to be dispensed with. From time immemorial, it has been customary for visiting judges to be entertained by members of the bar. Wherever a judge is called there are necessarily some lawyers with whom he is on terms of intimacy, more or less pronounced. The fact that he seeks the company of those who

are most congenial can not be construed as an evidence of judicial corruption. It is no infrequent thing for members of the bar throughout this State, who practice before this court, to be entertained by members of the court while in attendance thereon; and we may further say it not infrequently happens that immediately after a visiting practitioner before this court has been thus entertained, his host has gone to the consultation room, and, after a consideration of his case, has noted that his side was without merit. Our opinion of the bar of this State is too high for us to conclude that a man called to the high position of a judge will render an unfair or corrupt decision merely because of social courtesies extended him. Neither the acceptance nor the refusal of an invitation to dine can be considered as an evidence of such bias or friendship as to indicate a lack of judicial integrity.

But counsel for appellant rely particularly upon the allegation in the affidavit that affiant was informed, and believes and charges, that the special judge had repeatedly stated and declared to persons outside the court house and in private conversation, that he had no doubt of the existence of a partnership between Boreing, Wilson and Moss, "and that he had become satisfied of this fact before he had heard half of the testimony on plaintiff's application for a receiver tried last January;" that whether or not a partnership existed was a vital issue in the case, and that this issue could not be fairly and properly tried by a judge who had already formed and expressed his opinion that such partnership did exist; that the special judge stated to William Ayres, one of the attorneys for appellees, that before he was half through the presentation of his side, he (the special judge) was of the opinion that a partnership did in fact exist, and that when said Ayres finished his speech he was conclusively convinced of same; that said special judge was thanked very much by said Ayres for the compliment in graceful terms. For the purpose of determining whether or not the facts above alleged are sufficient to disqualify the special judge, we must take into consideration the fact that appellees in this action sought not only a settlement of the partnership affairs, but asked that a receiver be appointed to take charge of the partnership property. Upon the hearing of this application, almost the same evidence was heard as upon the final submission of the case. For the purpose of determining whether or not a receiver should be appointed, the special judge heard evidence and argument upon the question whether or not a partnership existed. He concluded that there was a partnership, and, because upon this hearing he complimented the attorneys for the appellees upon their presentation of their side of the case, and also stated to various parties that he was satisfied before he had heard half the testimony, and before Ayres was half through his argument, that there was a partnership, it is contended that the special judge thereby prejudiced the main issue which was thereafter to be determined in this case, and consequently became disqualified from further acting. If this were the law, then every time a judge passes upon a preliminary motion, or sustains or overrules a demurrer, thus indicating his views of the case, he would be disqualified from further sitting in the case. If appellants' contention were sound, it would then be impossible for any one judge to try a whole case; every time he indicated his ruling upon any question involved it would be apparent that he had prejudged the case so far as that point was concerned. We can not concur in such a view, nor can we hold that because the special judge complimented one of the attorneys upon his able presentation of the case, he thus became disqualified from further acting in the case.

The last point relied on in the affidavit is the allegation that the special judge intended to appoint C. W. Metcalf special commissioner for the purpose of hearing proof and settling the partnership accounts; that Metcalf was a personal enemy of appellants' father, Vincent Boreing, and was also under great obligations to appellee, Moss. At the time the affidavit was filed the appointment of a commissioner had not come up for action by the court. If the special judge had really contemplated the appointment of Metcalf, there is nothing to show that he knew of the latter's disqualification by reason of his personal hostility towards Vincent Boreing. The facts stated were good reasons why Metcalf should not be appointed commissioner; these could be relied upon when the court determined to make the appointment. The allegation did not show any disqualification on the part of the special judge, but merely set forth reasons why Metcalf should not be appointed commissioner.

A careful reading of the whole affidavit leads to the conclusion that it does not come up to the requirements of the law. In *German Insurance Co. v. Landrum*, 88 Ky., 433, the rule is thus stated: "While the Legislature has said that if any affidavit is made by the litigant, that the judge will not afford him a fair trial, he shall not preside, the facts upon which this general averment is made must appear, and they must be such as brings the case within the legislative meaning." In this case no such facts are stated. The affidavit is made up of mere inferences, suspicions and conjectures, and does not comply with the provisions of the Code as interpreted by this court. We are, therefore, of the opinion that the special judge did not err in refusing to vacate the bench.

Second. Did the transaction between appellees and Vincent Boreing constitute a partnership?

The record in this case consists of about 2,000 pages of typewritten matter. A large part of the evidence is embraced in letters which passed between Boreing, Wilson and Moss. Several disinterested witnesses gave their depositions. Wilson and Moss each testified. At the time their testimony was given, Vincent Boreing was dead. Exceptions were sustained to that portion of their testimony which related to things said or done by, or transacted with Vincent Boreing. It was contended below that, while neither Moss nor Wilson could testify for himself, each could testify for the other. The trial court did not take this view of the case. On this appeal we are asked to review this action of the trial court, and hold that this ruling was improper. No cross-appeal, however, was prayed by, and granted to appellees, and we, therefore, deem it unnecessary to determine this question.

It would extend this opinion to too great length to give anything like a brief abstract of the testimony. Suffice it to say that the writings signed by Vincent Boreing, and the letters which passed between him and Moss and Wilson, show conclusively that the contract between them was that lands along the route of the proposed extension of the Louisville & Nashville Railroad Company were to be purchased for their joint benefit; that the legal title thereto was to be taken in the name of Vincent Boreing and held by him in trust for himself, Moss and Wilson; that the information with reference to the proposed line of railway was to be furnished by Wilson; that Wilson and Moss were to do the greater portion of the work in connection with the selection of the lands, the perfection of the titles, &c.; that the main portion of the capital necessary to finance the enterprise was to be furnished by Vincent Boreing; that before there was a division of profits, the amount of money furnished by each party, with interest of not less than seven per cent. was to be returned. These sums

words signify, and that the modifications thus given are mere corrections of careless language, and really give the true intention. The ascertainment of the latter is the cardinal rule, or rather the end and object of all construction; and where the real design of the Legislature in ordaining a statute, although it be not precisely expressed, is yet plainly perceivable or ascertained with reasonable certainty, the language of the statute must be given such a construction as will carry that design into effect, even though in so doing the exact letter of the law be sacrificed, or though the construction be, indeed, contrary to the letter."

This rule is re-enunciated in an opinion of this court by Judge Barker, filed March 17, 1908, in the case of Morrell Refrigerator Car Co. v. Commonwealth of Kentucky. If it were possible to construe the act in question as contended for by appellant, with respect to champerty, which we do not hold, the rule announced by this court in the above cases would preclude such a construction. But there is nothing in the act indicating such an intention upon the part of the Legislature. Its whole purport is to the contrary, and by specific provision, it declares that the title, claim, or possession of the occupants, or the continuity thereof, should not, in any manner, be affected by the proceedings.

If the occupant has had five years' possession, coupled with the payment of taxes, the forfeited title devolves upon him; if he has not had possession for a sufficient length of time to cause a vestiture of title in him, he, nevertheless, is in possession; and as a sale of the forfeited title to the extent of his possession would be champertous, the title thereto remains in the Commonwealth, and the possession of such occupant, or the continuity thereof, is not in any manner affected thereby. The title to those parts not transferred to the occupant, or which is not adversely held, is alone the subject of sale, and the title to only such parts would pass upon a sale in gross.

The judgment is affirmed in so far as it adjudges a forfeiture of the title and claim of appellant, but for the reasons indicated and because it orders a sale of the land and not of the forfeiture of title, it is reversed for proceedings not inconsistent with this opinion.

Whole court sitting.

BOREING, &c. v. WILSON & MOSS.

(Filed March 25, 1908—To be reported.)

1. Judges—Affidavit of Disqualification—Sufficiency—An attorney appointed by the Governor as a special judge of a court, may properly refuse to vacate the bench upon an affidavit by a litigant that he and the opposing counsel of the litigant happen to be attorneys for the same railroad though in different parts of the State.

2. Same—Likewise a judge is not disqualified to sit in a case because he may be socially entertained by the opposing counsel of one of the litigants, or because he expressed an opinion upon a preliminary motion in the case after hearing the argument thereon and congratulated the opposing counsel on his argument on the motion. Or because of his supposed intention to appoint a receiver in the case, who was not friendly to a deceased party whose estate is involved in the action.

3. Partnership—Acts Constituting—Where three men mutually agree to go in together and buy a large tract of mineral and timbered land and hold it for a profit, each to furnish some of the money, and expense and to do certain work, and, after the sale of the land, each shall

have the money he advanced with 7 per cent. interest thereon and his expenses refunded, and to share equally in the balance of the sale money, they are partners in contemplation of law.

4. Settlement of a Partnership—Sharing of Profits—Where in the settlement of a partnership formed for the purchase and sale of land, it is shown that one of the partners sold 500 acres of the partnership land and 500 acres of his individual land in a body at an agreed consideration for the whole 1,000 acres, such partner was bound to account to his co-partners in the 500 acres for one-half of the price he received for the whole tract, and the fact that the partner in making such sale received a part of the consideration in corporation stock did not require his co-partners to accept such stock in payment for their interest in the 500 acres of partnership land sold.

5. Same—Interest Paid on Advancements—Like Interest on Settlement—Where, in the formation of a partnership, it is agreed that each partner shall be allowed eight per cent. interest on advancements made, which was enforced in the settlement of such advancements, it would be equitable and proper in the distribution of the proceeds of the partnership to require each of the partners, on final settlement, to account for eight per cent. interest on the amount due from each from the time the same was received.

D. B. Logan and Greene & VanWinkle for appellants.

Wm. Ayres for appellee Wilson.

J. R. Sampson for appellee Moss.

Appeal from Bell Circuit Court.

Opinion of the court by Wm. Rogers Clay, Commissioner, affirming.

In the spring of the year 1886, appellee John H. Wilson was engaged in the practice of law in Barbourville, Knox county, Kentucky. His services were secured by the Louisville and Nashville Railroad Company after that corporation had decided that it would construct a branch railroad from Corbin, on the main line of its Knoxville division, up the Cumberland river into the coal fields of Bell and Harlan counties, or through Cumberland Gap into the coal fields of Wise and Lee counties, Virginia. After appellee Wilson had learned that the road would be constructed, he could readily see that the coal bearing properties along the line of the proposed road would, of necessity, rapidly advance in price, and that the purchase of the lands at the low prices then prevailing, and before it became known that the road would be constructed, would prove a very profitable investment. Appellee had formed the acquaintance of his co-appellee, M. J. Moss, some time prior to 1886, who was engaged in the practice of law in Bell county, and was well acquainted with the inhabitants of that county, and especially the land owners along the line of the proposed railroad. Accordingly they agreed to go into an arrangement by which they would purchase lands and hold them until the prices advanced. Realizing that it would take a large sum of money to carry through the enterprise, they then proposed to Vincent Boreing, a wealthy and influential man in that section of the State, to join the enterprise. It was agreed between the parties to the arrangement that whatever cash was advanced or furnished by either was to be returned to him with interest, and the profits were then to be divided equally among them.

In pursuance of this arrangement, about 5,000 acres of land were purchased. Frequently Moss or Wilson would propose that they get together and draw up a contract accurately defining the rights

of each party to the lands in question; sometimes Boreing would make the same proposition. No such contract, however, was ever signed. The matter was permitted to drag along from year to year, and finally, in the year 1903, Vincent Boreing died.

Thereafter the appellee, Wilson, filed his petition in the Bell Circuit Court alleging the existence of a partnership between him and Moss and Boreing. To this petition, appellee Moss and the heirs, devisees and personal representatives of Vincent Boreing were made defendants. The petition, after setting forth the death of Boreing, the dissolution of the partnership by reason thereof, and the qualification of his administrators under the will, alleges that it was agreed, at the inception of the partnership enterprise, that Vincent Boreing should furnish the money necessary to acquire the lands, and that he (Wilson) and Moss should contribute in aid of the enterprise their services and assistance, and, when the land was sold, Boreing should receive the various sums of money which he had advanced from time to time in making the necessary purchases, as well as all reasonable and necessary expenditures in connection therewith, together with seven per cent. interest on said sums of money from the time of their payment by Boreing. The petition further states that it was also agreed that he (Wilson) and Moss should, out of the proceeds, receive from time to time such money, with a like rate of interest thereon, as either of them might have contributed or paid out towards the purchase of said lands, in surveying expenses or other expenses incurred in the acquisition of title thereto; that Boreing had paid on said lands \$30,000 or \$35,000; that he (Wilson) had paid \$2,000 to \$2,700, and that Moss had paid \$7,000 or \$8,000; but that the exact amount that each had paid was unknown to appellee. Appellee then asked a settlement of the partnership accounts, and a reference to the master commissioner for that purpose.

To appellee Wilson's petition, appellee Moss, on December 7th, 1903, filed his answer, counter-claim and cross-petition, making appellants cross-defendants, and joined in the prayer of appellee, Wilson, for a settlement of the partnership accounts. Appellee Moss also set forth in his answer and cross-petition the unsettled and uncertain state of the partnership accounts, as well as the fact that Boreing had furnished, in the purchase of the lands, \$30,000 or \$35,000, but that the exact amount was unknown to appellee. He also alleged that he had paid in about \$7,500, but that Wilson had paid in only about \$1,475. Both the petition of appellee Wilson and the answer and cross-petition of appellee, Moss, alleged that Boreing had received large sums of money in the way of rents and proceeds from the sale of lands and timber involved in the controversy, the exact amount of which they did not know. Among other items they alleged that Boreing had received \$20,000 for 500 acres of land which was sold by him out of the partnership property to the Bell County Coke & Improvement Company, and that he had also received \$3,000 for certain machinery on the Tuckehoe lease which he had sold to A. H. Melcon.

On January 13th, 1904, the appellants herein filed their answer to the original petition of appellee Wilson, and also their reply to the answer, counter-claim and cross-petition of appellee Moss, denying and putting in issue every material allegation of those pleadings. Thereafter certain amended pleadings were filed, and, among them, one by appellee Wilson, asking for the appointment of a receiver to take charge of the property during the litigation. Responsive pleadings were then filed and the issues joined on all the material allegations of the several amendments. The court appointed a receiver, who qualified and is now in charge of the property. The parties then proceeded with the taking of testimony, and the special judge, Hon.

John McChord, called a special term of the court in the month of July of that year, at which to hear the case.

On July 28th, 1904, one of the administrators, John R. Boreing, presented and filed his affidavit with the clerk of the Bell Circuit Court, in which he claimed that appellants could not get a fair trial of their cause before said special judge. The latter decided that the affidavit was insufficient and declined to vacate the bench. After this affidavit was filed, the case was continued to the October term for further preparation, and was then submitted and tried. The court held that a partnership existed between Wilson, Moss and Boreing; that in the settlement Vincent Boreing's estate should be charged with the sum of \$3,000 for the machinery sold to A. H. Melcon, with eight per cent. interest on said sum from the time the money was paid; that said Boreing's estate should be charged with the further sum of \$20,000 for the land sold by Boreing to the Bell County Coke & Improvement Company, with eight per cent. interest thereon from the time of the receipt of said sum by Vincent Boreing. On October 29th, 1904, the court entered a judgment in accordance with his conclusion set out above. After the entry of this judgment, appellants filed their written motion asking the court to set aside certain parts thereof, and in support of the motion filed certain affidavits, together with the deed of conveyance executed by Vincent Boreing on the 23rd day of May, 1890, to the Bell County Coke & Improvement Company. Upon the hearing of appellants' motion the court refused to set aside any portion of the judgment entered. Of the judgment and of the refusal of the trial court to set certain portions thereof aside, appellants now complain.

This appeal involves the determination of the following questions: (1.) Did the special judge err in refusing to vacate the bench? (2.) Did the transaction between appellees and Vincent Boreing constitute a partnership? (3.) Was A. H. Melcon, who purchased the machinery on the Tuckahoe lease, competent to testify for appellees, and did the court err in charging the estate of Vincent Boreing with the sum of \$3,000 paid by said Melcon for said machinery? (4.) Did the court err in charging the estate of Vincent Boreing for the 500 acres of partnership land sold by Boreing to the Bell County Coke & Improvement Company, and fixing the sum to be charged at \$20,000? (5.) Did the court err in charging the estate of Vincent Boreing interest at the rate of eight per cent on said sums of \$3,000 and \$20,000 from the time said sums were received by him? (6.) Did the lower court properly overrule the motion of appellants to set aside those portions of the judgment respecting said items of \$3,000 and \$20,000, and to refer same to the commissioner for further proof?

First. On July 28th, 1904, appellant John R. Boreing, for himself and his co-appellants, filed the following affidavit in which he set forth legal grounds why the special judge should vacate the bench:

"The affiant, John R. Boreing, says that he is one of the defendants in the above styled cause and is the only one taking an active interest in the defense herein; that his co-defendants, Julia T. Williams, Sallie Boreing, Belle Young, James M. Boreing, May Melcon and this affiant are the only devisees of Vincent Boreing, deceased. The other defendants, to-wit: A. H. Melcon, J. M. Williams and Joseph Young are nominally defendants only, the husbands of affiant's married sisters.

"This affiant says he does not believe the Hon. John McChord, the special judge, appointed and commissioned herein to try this cause, by the Hon. J. C. W. Beckham, Governor of the Commonwealth of Kentucky, can or will give these defendants a fair and impartial trial of the issues herein, or that he can or will impartially try and decide

the issues herein between the plaintiff, J. H. Wilson and the cross-plaintiff, M. J. Moss, on one side and these defendants, the brother and sisters of this affiant and himself, on the other.

"This affiant's belief is based upon the following grounds:

"He says that since the last term of this court he has learned and he avers it to be true, that the said special judge, John McChord, is an attorney and representative of the L. & N. R. R. Co., a corporation owning and operating a line of railroad through Bell county, Kentucky, and through several other counties in the State of Kentucky, with its chief office at Louisville, Kentucky, which line of railroad extends through Marion county, Kentucky, in which said special judge resides; that one J. W. Alcorn, is likewise an attorney and representative for said L. & N. R. R. Co., and as such superintends, conducts and has charge of the litigation in which said railroad company is involved from Louisville, Kentucky, to Cumberland Gap, and has the right to direct and does direct and superintend and advise other attorneys engaged in the service of said L. & N. R. R. Co., from Louisville to Cumberland Gap, including said special judge, John McChord; that the cross-plaintiff, M. J. Moss, is the regular circuit judge of the 26th judicial district, of which district Bell county is a part, and that the said J. W. Alcorn practices law in the said 26th judicial district and in the Bell Circuit Court, giving his attention almost exclusively to the litigation of said L. & N. R. R. Co.; that he, the said J. W. Alcorn, likewise practices in the Laurel Circuit Court where this affiant and his brothers and sisters live; that the affiant, as president of the Bell Coke & Improvement Co., which is the owner of a part of the property claimed in the pending controversy to have been once owned by the alleged partnership alleged to have existed by and between the decedent, Vincent Boreing, the plaintiff, John Henry Wilson and cross-plaintiff, M. J. Moss, has caused an action to be instituted in the Laurel Circuit Court to recover of the said M. J. Moss five hundred dollars (\$500) alleged to be due said company on the subscription of said Moss to its capital stock; that the said J. W. Alcorn is one of the attorneys of said Moss in said action, and that although he does not sign the pleadings as attorney he in everything else represents said Moss as attorney in said cause, withholding his name from the pleadings. He aided in the preparation of the answer of said Moss in said cause while in Bell county, and prepared an affidavit of said Moss for delay in said cause, and presented and filed it in the Laurel Circuit Court, making at the time a speech to the court which plainly showed his personal animosity toward the affiant; and that the said J. W. Alcorn has on several other occasions manifested his inclination to be strongly adverse to the welfare of the estate of Vincent Boreing, and that he has, without fee or compensation, on several occasions opposed the successful winding up of said estate, and has on each and every occasion shown his bitter personal dislike and antagonism for and toward the said estate and those representing it and this affiant; that said Alcorn is a very warm personal friend of the said M. J. Moss, the said judge of the Bell Circuit Court, and his influence over the said judge is such that, in litigation in said court in which said company is involved and wherein said Moss presides as judge, the railroad company wins almost uniformly and the opposing litigants lose; that said company owns and maintains a branch of its railroad through Bell county and has various shops and its superintendent's division therein, and that it has almost continuously litigation in the Bell Circuit Court.

"Affiant further says that the said L. & N. R. R. Co., under contract with three of the lessors of the property in controversy in this action, has built a spur or a short railroad from the L. & N. main track at Four Mile, Kentucky, up Four Mile Creek and through and over the

property in controversy, and that the continuance of its operation is made to depend upon contingencies regarding the successful operation of said property as a coal mining property and most especially upon the construction of ambiguous contracts with the said L. & N. R. R. Co., regarding the construction of said spur or branch railway which ambiguous contracts this affiant believes and avers will, before the termination of this suit, be litigated in this very action in order to establish the relative rights of the said L. & N. R. R. Co., and this affiant and his brother and sisters, the heirs and devisees of said Vincent Boreing, in, to and concerning said spur or branch railway up Four Mile Creek. Affiant further says that the said spur or branch railway has not been fully paid for by the said lessors of the property or the property-owners, and that there will probably arise in this very suit a controversy between this affiant and the other heirs and devisees of Vincent Boreing and the plaintiff, John Henry Wilson, and the cross-plaintiff, M. J. Moss, and the said L. & N. R. R. Co., over the construction of said spur or branch railway, and the amount of its cost and construction and the manner of payment of same, and this affiant believes that an attorney for the L. & N. R. R. Co., could not, as judge in this case, wherein the interests of the said L. & N. R. R. Co. will probably become adverse to this affiant and his brother and sisters, who claim in this action to be the sole owners of the property in controversy, impartially or fairly decide this controversy and the issues which may place the said L. & N. R. R. Co., in a more advantageous position when said controversy between them and this affiant, his brother and sister arises, and in which the said special judge, John McChord, as a servant and attorney of said railroad company will, as affiant believes, be interested and will desire a coalition of the interests of said company and the interests of the plaintiff John H. Wilson and cross-plaintiff M. J. Moss, and especially that of the said Moss, because of his official position and power as circuit judge; that personally and socially the said special judge has shown toward the plaintiff Wilson and the cross-plaintiff Moss and his attorneys, J. R. Sampson and William Ayres, special favoritism and has seemingly, on the other hand, in minor matters in this cause, given these defendants no quarter in this proceeding up to the present time. And this affiant is informed and believes and avers that said judge has repeatedly stated and declared to persons outside of the courthouse and in private conversations that he had no doubt of the existence of a partnership between the decedent, Vincent Boreing, the cross-plaintiff, M. J. Moss, and the plaintiff, John H. Wilson, and that he had become satisfied of this fact before he had heard half of the testimony on the plaintiff's application for a receiver, tried last January, the main and about the only question to be tried in this cause and the only issue of any importance is whether or not a partnership actually existed between said parties. Whether or not a partnership was ever formed or ever existed is the vital issue in this cause, and this affiant and his brother and sisters feel that this issue can not be fairly or properly tried by a judge who has already formed and expressed his opinion that such a partnership did exist. That affiant, just after the trial of the motion for receiver herein tried at the January term, 1904, of this court, at the Edwards House, in Pineville, Kentucky, heard the said special judge, John McChord, congratulate said William Ayres, attorney for plaintiff Wilson, upon his able presentation of the grounds and cause made for receiver in this cause, and in his congratulatory address to said Ayres he said that before said Ayres was half through the presentation of his side (said McChord) was of the opinion that a partnership in fact did exist between the decedent, Vincent Boreing, the plaintiff, John H. Wilson, and the cross-plaintiff, M. J. Moss, and that a receiver should be ap-

commissioner for the purpose of hearing proof and reporting thereon. They insist that the trial court should have awarded them a new trial, not only on this ground, but because of the facts alleged in certain affidavits and contained in the deed of Vincent Boreing to the Bell County Coke & Improvement Company, dated May 3, 1890, purporting to convey a certain boundary of land, whose area is not stated, in consideration of \$25,000.00, of which \$12,500.00 was paid and \$12,500.00 was to be paid in twelve months from March 1, 1890. We have carefully read the affidavits pro and con, and are of the opinion that the questions relating to the \$3,000 and \$20,000.00 transactions were taken up, heard and discussed by the trial court with the distinct understanding that he should then and there pass thereon. Besides, the order of submission shows that the case was submitted on exceptions to certain depositions and "for hearing and trial in chief." Under these circumstances, without such an agreement and understanding between counsel for appellants and appellees, the trial court would have been justified in passing upon the questions referred to. It is quite evident from the record that the appellants were at all times relying upon the fact that, Vincent Boreing being dead, it would be impossible for appellees to establish their contentions. There is nothing to show that the evidence referred to in their affidavits, in support of their motion for a new trial, could not have been secured in time for the final hearing. The deed referred to was on record, and a copy thereof could have been readily secured. No good reason is shown why it was not secured in time for the hearing. Besides, the affidavit of R. C. Ford, who lived in Pineville, and whose deposition could readily have been taken, tends rather to support the conclusion reached by the trial court. He says that "the price was to be \$55,000.00 for 1,000 acres, and was sold by the acre, and if land fell short, then V. Boreing was to rebate at rate of \$55.00 per acre for such shortage." This does not show that any higher price was placed upon one acre, than upon another. With this affidavit before him, the court could not help reaching the conclusion that, in fixing the value of the land at \$40.00 per acre, or \$15.00 per acre less than this affidavit shows was the agreed price, he made no error in favor of appellees. The deed in question, it is claimed, covered only 125 or 150 acres of the land sold to the Bell County Coke & Improvement Company. It is the contention of appellants that the remaining 850 or 875 acres are shown by this deed to have been valued at \$30,000.00. The deed can not, however, be regarded as conclusive of the value fixed. It is not shown that either Moss or Wilson had any knowledge of its provisions at the time it was executed; and certainly it was not binding on them. Besides, the affidavit of Ford completely nullifies the recitals of the deed. We are of the opinion, therefore, that the trial court did not err in refusing to grant a new trial, and again referring the case to the commissioner to take further proof in regard to the items of \$3,000.00 and \$20,000.00.

Upon a case involving so many questions of law and fact, and consisting of such a voluminous record, we think the trial court displayed admirable judgment in the conclusions he reached. After a careful examination of the entire record, we are of the opinion that it contains no error prejudicial to the substantial rights of the appellants.

Wherefore, the judgment is affirmed.

Whole court sitting, except Judge Barker.

SCHULTE v. LOUISVILLE & NASHVILLE R. R. CO., &c.

(Filed March 25, 1908—To be reported.)

1. Pleadings—Filing Amendments During Trial—Discretion of Court—Trial on Merits—The trial court has a large discretion in allowing amended pleadings to be filed during the progress of the trial, and this discretion should be exercised with great liberality when the purpose of enabling the party offering it is to obtain a fair trial of the case on its merits.

2. Injury to Personal Property—Negligence—Interest on Damages—Discretion of Jury—Exemplary Damages—Where personal property is injured by negligence, wrongful or unlawful acts and the owner is deprived of its possession and use, he is entitled, in a suit for damages for its loss, to recover its value with interest thereon in the discretion of the jury, but this rule can not be applied when it is sought to recover unliquidated damages, or in cases where no certain sum is claimed, and the jury may assess any amount in their discretion; and in cases where exemplary damages are recovered the plaintiff is not entitled to interest thereon.

3. Property—Injured—Damages for Its Use—Special Plea—Where a party desires to recover for the value for the loss of the use of property injured it should be specially pleaded, and where damages are sought for the injury done the property, as well for the deprivation of its use, interest is not allowable, as the recovery for the use takes the place of interest.

4. Railroads—Gates Across Highway—Protection to Public—Joint Use by Different Railroads—Liability for Injury—Where a gate is necessary across a street in a city for the protection of the traveling public across a railroad track, it is the duty of every railroad company using the track to protect the public from injury from its trains, and each company, and the owner of the track, is jointly and severally liable to the public for injuries committed by its trains due to failure to perform this duty, and the duty of protecting such crossing can not be delegated to one of the companies using the track, or to the owner, so as to absolve the company whose trains commit the injury from liability to the person injured.

5. Gates Raised—Invitation to Cross—Presumption—Care Required—When gates are maintained at a crossing, and are closed when trains are approaching and kept open for traffic when they are not, the fact that they are up and open is an invitation to the public to cross, and persons have a right to assume they can do so without danger by using ordinary care for their safety.

Robt. C. Simmons for appellant.

Galvin & Galvin for appellee Cov. & Cin. Elevated R. R. Transfer & Bridge Co.

S. D. Rouse and Benjamin D. Warfield for appellee L. & N. R. R. Co.

Appeal from Kenton Circuit Court.

Opinion of the court by Judge Carroll, affirming.

The appellant brought this suit against the Louisville & Nashville Railroad Co. and the Covington & Cincinnati Elevated Railroad Co., averring that while his servant was driving a wagon and team of horses along Twelfth street, in the city of Covington, his horses and wagon were struck by a locomotive engine, operated by the Louisville & Nashville Railroad Co., at a point where the railroad crossed Twelfth street, the collision demolishing the wagon, killing one of the horses

and crippling the other, and causing the loss of all the dairy products in the wagon, to his damage in the sum of \$2,200.

Each of the defendants filed answers, traversing the averments of the petition, and the Covington & Cincinnati Elevated Railroad Co. in addition, pleaded contributory negligence on the part of Philip Roth, the employe of appellee, who was driving the wagon. Appellant filed a reply to the answer of the Louisville & Nashville Railroad Co., but failed to file one to the answer of the Covington & Cincinnati Elevated Railroad Co.

The case went to trial before a jury, and the evidence conduced to show that Roth was driving at an ordinary gait, that when he approached the railroad tracks the gates maintained on each side of it for the purpose of warning travelers and preventing them from crossing when a train was approaching, were up. That he did not hear any engine bell ringing or whistle blown or receive other warning as he came near the track, and the gates being up, he drove along, not suspecting any danger, and did not know of the approach of the train which was running about twenty-five miles an hour until his team was on the track. The railroad employe who had charge of the gates, and whose duty it was to close or put them up or down, was talking to a man nearby, and neglected to close the gates. The railroad track was owned by the Covington & Cincinnati Elevated Railroad Co., and the gate keeper was its employe, but the trains of the Louisville & Nashville Railroad Co. were operated over it.

Upon the conclusion of the evidence for plaintiff, the Covington & Cincinnati Elevated Railroad Co. asked for a peremptory instruction, upon the ground that there was no denial of the plea of contributory neglect in its answer. Thereupon the attorney for plaintiff offered to file a reply, and also to pay the costs of the trial up to that time, and to continue the case if the Covington & Cincinnati Elevated Railroad Co. desired it. These motions and requests were overruled, and the jury directed to return a verdict for the Covington & Cincinnati Elevated Railroad Co.

The trial proceeded against the Louisville & Nashville Railroad Co., when a verdict was returned against it for \$425, the actual loss sustained by appellant being some \$515, according to the evidence in his behalf, but less than this under the evidence for appellee—in short, the verdict was substantially correct.

A reversal is asked, first, because the trial court failed to allow a reply to be filed; second, in declining to instruct the jury that they might award interest on the value of the property destroyed from the time of its destruction; and also refusing to give an instruction on the subject of punitive damages; third, in failing to instruct the jury that they might allow damages for the use of the horse that was injured; fourth, in failing to instruct that the Louisville & Nashville Railroad Co. was responsible for the negligence of the gate watchman, and fifth, for errors in giving instructions.

It has been frequently held that unless the plea of contributory neglect in an answer is controverted of record or replied to, that the defendant is entitled to a judgment in his behalf on the pleadings, notwithstanding the fact that the plaintiff may have obtained a verdict. (L. & N. R. R. Co. v. Paynter, 26 Ky. Law Rep., 761; L. & N. R. R. Co. v. Copas, 16 Ky. Law Rep., 14; L. & N. R. R. Co. v. Mayfield, 18 Ky. Law Rep., 224; Brooks v. L. & N. R. R. Co., 24 Ky. Law Rep., 1318.) And when the plaintiff rested his case in the court below, the defendant upon the pleadings, as they stood, was entitled to the peremptory instruction requested, if the plaintiff had not, when the motion was made, offered to file a reply. The trial court has a large discretion in the matter of allowing amended pleadings to be filed during the progress of a trial; and this discretion should be exercised with great liberality when the purpose of the amendment is to enable the

party offering it to obtain a trial of the case upon its merits, and it is not tendered for delay or to obstruct justice. When, in the language of section 134 of the Code, an amendment offered during the trial "is in furtherance of justice," and it does not appear that the substantial or meritorious rights of the adverse party will be prejudiced by its filing, but that injustice will be done if it is rejected, the court should permit it to be filed upon such terms as will insure a fair trial and protect the rights of the parties. (Ford v. Providence Coal Co., 30 Ky. Law Rep., 698; Kearney v. City of Covington, 1 Met., 340; Washington Mfg. & Mining Co. v. Barnett, 19 Ky. Law Rep., 958.)

In the case before us, the court should have permitted the reply to be filed, requiring the plaintiff to pay the costs up to the time of the filing, and also continuing the case if the defendant desired a continuance.

In respect to the question of interest, we are of the opinion that the jury should have been instructed that if they found for plaintiff, they might, in their discretion, allow him interest on the sum found as the value of the property destroyed from the date of the injury—and as to the horse that was injured up to the time the owner was fully restored to his use and possession. Where personal property is injured, or destroyed, by negligent, wrongful or unlawful acts, and the owner is thereby deprived of its use and possession, in a suit to recover damages for the loss he is entitled to the value of the property and interest thereon in the discretion of the jury. If the recovery was limited to the value, he would receive no compensation for the deprivation of the use between the time of the injury and the trial, or the date he was restored to the use and possession if this happened before the trial; and the recovery would not be adequate recompense for the loss. This rule can not be applied when it is sought to recover unliquidated damages or in cases where no certain or fixed sum is claimed that may be awarded as compensation, and the jury are authorized to and may assess any amount in their discretion. In this class of cases the amount the plaintiff is entitled to recover can not be estimated at the time of the injury, or indeed until there has been a verdict and judgment. And in cases where exemplary damages are recoverable, and allowed, and the plaintiff gets more than compensation, he is not entitled to interest, as the interest and the exemplary damages would be, in a measure, double compensation. But, where personal property has been destroyed or injured, and the recovery is limited to compensation, the amount of damage sustained can be approximately if not accurately ascertained at the time and the parties can adjust the loss on a basis fairly susceptible of reasonable estimation. This rule is supported by the decided weight of authority, and meets with our approval. (Sedgewick on Damages, section 433; Sutherland on Damages, section 355; Joyce on Damages, section 1034; 22 Cyc., 1500; 16 Am. & Eng. Ency. of Law, page 1027.)

A contrary view seems to have been expressed by this court in *Ormsby v. Johnson*, 1 B. Mon., 80, but the better rule is the one that allows the jury in their discretion to award interest in cases of this character.

Appellant further insists that the jury should have been instructed in their discretion to award exemplary damages or punitive damages. There is some authority to the effect that exemplary damages may be recovered in actions where personal property has been injured or destroyed by gross negligence; but we are not disposed to apply this rule to negligence cases like the one under consideration, where it is sought to recover the value of property. Negligence, generally speaking, whether it be ordinary or gross, is merely an omission to perform a duty, although there may be instances where gross negligence is

of an affirmative character and amounts to an intentional wrong or a reckless disregard of the rights of others. But, strictly speaking, it is not an affirmative wrongful act, such as trespass, or other acts that are accompanied by circumstances of aggravation or attended by fraud, malice or intentional wrong. There is a marked distinction between personal injury cases or those involving loss of life, by negligence or wrongful act, and actions to recover the value of property injured or destroyed by negligence. In the former, the damages are not susceptible of accurate, or even approximate, estimation. No certain, or even satisfactory rule of compensation, can be laid down for the loss of an arm or a leg or a life. Therefore, the courts have permitted exemplary damages to be recovered when the negligence causing the personal injury or death was gross. But, where personal property is injured or destroyed, it can be replaced. The person damaged can be made whole. The loss he has sustained is capable of accurate, or at least approximate measurement, and when he has received the value of the property with interest thereon he has been compensated for the wrong done, and this is all that in negligence cases when property only is involved, and the elements of fraud, oppression, reckless or intentional wrong-doing are lacking, that he is entitled to unless it is sought to recover for the use. The case of *Kountz v. Brown*, 16 B. Mon., 577, relied on by appellants as allowing the jury to award exemplary damages in cases of this character, does not conflict with the views herein expressed. There the wrong committed was an affirmative wilful act, and the court said:

"In actions for forcible injuries, the general rule is that the jury may give exemplary damages, and certainly they may be told that they can do so where the injury, in their opinion, may have been wilful. It is not necessary to say whether the testimony was sufficient to authorize the conclusions that the injuries were committed wilfully, for if they were recklessly committed, as the jury clearly had a right to infer in regard to the last and principal injury, the law did not confine them to the actual injury, but authorized them to give exemplary damages. It is not alone for wilful trespasses that exemplary damages are authorized by law to be given, but they are authorized also for acts of wanton and reckless carelessness."

Along the same line is *South Covington & Cincinnati St. Ry. Co. v. McHugh*, 25 Ky. Law Rep., 1112. There, as in the *Kountz* case, the act complained of was more than a mere omission of duty. It was an affirmative wrong—a reckless disregard of life and property.

In the case before us, the only act of negligence committed was the failure of the gate watchman to close the gates. His conduct, although amounting to gross negligence, was not a wilful or intentional act, committed against appellee or his property. In other words, it was not an affirmative wrong, but an omission of duty. This distinction runs through all the cases that have come under our notice, where the question of allowing exemplary damages has come up in cases involving the injury or destruction of personal property. We do not mean to hold that exemplary damages are confined to injuries to the person, because they may be awarded in trespass or where there is injury to personal property, if it is attended by affirmative acts of aggravation or is the result of wilful or reckless or malicious conduct. (*Major v. Pulliam*, 3 Dana, 582; *Jennings v. Maddox*, 8 B. Mon., 430; *Andrews v. Singer Mfg. Co.*, 20 Ky. Law Rep., 1089; *Bowler v. Lane*, 3 Met., 311; *Slater v. Sherman*, 5 Bush, 203.)

Appellant also contends that he was entitled to prove the loss he sustained in being deprived of the use of the horse that was injured from the time of the injury until his recovery; and to an instruction allowing the jury to award damages of this character. In support of this contention, we are cited to *Sedgewick on Damages*, section 195,

and Joyce on Damages, section 1040. There are cases in which it would be proper to allow the plaintiff to recover the value of the use of the property of which he was deprived by negligence or wrongful act, but, if a party desires to recover for the value of the loss of the use, it should be specially pleaded. This element of damage can not be recovered under a general allegation of negligence as in the case before us. And where damages are sought for the injury done the property, as well as damages for the deprivation of its use, interest is not allowable, as the recovery for the use takes the place of interest. In other words, a party may sue for the injury done personal property, and the jury may, in their discretion, allow him interest on the sum found, and should be so instructed; or, he may sue for damages occasioned by the injury and also for the loss of the use, but he cannot recover interest as well as damages for the loss of the use.

As before stated, the railroad track, over which the trains of the Louisville & Nashville Railroad run, are owned by the Covington & Cincinnati Elevated Railroad Company, which corporation employs the gate watchman. The point is made whether or not the Louisville & Nashville Railroad Company is chargeable with the negligence of the watchman in failing to close the gates on the approach of one of its trains. We do not regard it material who employed or paid the gate watchman, or who owned the railroad tracks. If a gate was necessary for the protection of the traveling public at the crossing where this injury occurred, then it was the duty of every railroad company using the track to protect the public from injury by its trains; and each company, and the owner of the track, is jointly and severally liable to the public for injuries committed by its trains, due to a failure to perform this duty. The duty of protecting a crossing like this can not be delegated to one of the companies using the track, or to the owner of the track, so as to absolve the company whose trains commit the injury from liability to the person injured. (C. & O. R. Co. v. Osborne, 97 Ky., 112; L., H. & St. L. R. Co. v. Kesse, 31 Ky. Law Rep., 617; L., H. & St. L. R. Co. v. Illinois Central R. Co., 29 Ky. Law Rep., 265.)

We may also add that when gates are maintained at a crossing, and are closed when trains are approaching and kept open for traffic when they are not, the fact that they are up and open is an invitation to the public to cross; and persons desiring to cross have a right to assume that they can do so without danger of being struck by an approaching train, although this rule does not relieve the person desiring to cross from exercising ordinary care for his own safety, or from giving attention to other notice or warning of the approach of trains.

In L. & N. R. Co. v. Sights, 28 Ky. Law Rep., 186, in considering a similar question, this court approved the following instruction, that presents the duty owing by the traveler:

"The court further instructs you that, if you believe, from the evidence, that the flagman so stationed at said crossing at the time plaintiff approached the same, was not in his customary place of duty, then the plaintiff had a right to presume, in the absence of reasonable and timely warning to the contrary, that he would not be exposed to danger from approaching trains in driving near or crossing said track."

Although the court erred in refusing to permit a reply to be filed, and in declining to instruct the jury to award interest in their discretion, in other respects the appellant had a fair trial. He recovered substantially all that he was entitled to against either or both of the appellees, and it cannot be doubted that the judgment against the appellee, Louisville & Nashville Railroad Company, is collectible. It is true the jury might have allowed appellant interest on the recov-

ery, but whether they would or not is uncertain. The matter of interest that appellant might have recovered is too small and the probability of its recovery too indefinite to authorize us to reverse the case alone for this error.

Wherefore, the judgment is affirmed.

ARNETT v. PINSON, &c.

(Filed March 25, 1908—Not to be reported.)

1. Contracts Made in One State to be Performed in Another—Validity—Where Determined—While there is occasional conflict of authority as to which law prevails where a contract is made in one State and is to be performed in another, the authorities are uniform that where the contract is not only made in one State, but by its terms is to be performed there, its validity must be determined by the laws of the State where it is made, and is to be performed.

2. Same—Application to Peddlers' Notes—Section 4223, Kentucky Statutes, relating to peddlers' notes, has no extra-territorial effect. It does not apply to peddlers' notes executed and delivered in another State.

3. Common Law—Application in Different States—Presumption—In the absence of evidence to the contrary, the presumption is that the common law of the State where the contract is made is the same as that of the State where the contract is sued on, but this presumption does not extend to the statute laws.

4. Action on Notes—Defense Controverted—Burden of Proof—In an action in this State on two notes executed in West Virginia, the defendant pleaded: first, no consideration; second, that they were "peddlers' notes" and were not so endorsed on their face as required by Kentucky Statutes, section 4223; third, fraud, which plea was controverted of record. Held—That the burden was on the defendant to show that they were invalid under the laws of West Virginia, and were fraudulent and without consideration.

O'Neal & Carter for appellant.

G. W. Skaggs and Sullivan & Stewart for appellees.

Appeal from Lawrence Circuit Court.

Opinion of the court by William Rogers Clay, Commissioner, reversing.

Appellant, Elliott Arnett, instituted this action against appellees, J. W. Pinson and J. J. Wallace, on two notes of \$107.50 each, which appellees executed and delivered to appellant and Robert Dixon; the latter having sold and transferred his interest in the notes by written endorsement thereon to appellant. These notes were executed in Williamson, West Virginia, and were made payable at the Bank of Williamson in that State.

Appellees defended on three grounds: First, no consideration; second, that the notes were peddlers' notes, and did not have written across their face the words "peddlers' note," as required by section 4223, Kentucky Statutes; third, fraud and misrepresentation.

The trial court held that the burden of proof was on appellant. The latter then went upon the stand and testified that the notes sued on and attached to the petition were the same signed and delivered to him by appellees. The notes were then read in evidence, together with the endorsements thereon, and it appeared that they did not

have the words "peddlers' note" written on their face. Appellant further testified that the notes were made, signed and delivered to him in Williamson, in the State of West Virginia, and were assigned to him by Robert Dixon, in the State of Kentucky; that he had "purchased the State of West Virginia in which to sell patent window locks;" that the notes in question were executed for certain portions of that patent right territory in said State; that since the execution of the notes, appellees had moved into the State of Kentucky, and lived there when this suit was filed. At the close of appellant's testimony, the trial court peremptorily instructed the jury to find for appellees. Motion and grounds for a new trial were then overruled, and an appeal granted to this court,

While there is occasional conflict of authority as to which law prevails where the contract is made in one State and is to be performed in another, the authorities are uniform that where the contract is not only made in one State, but by its terms is to be performed there, its validity must be determined by the laws of the State where it is made, and is to be performed. (*Brown v. Todd's Adm'r*, 16 Ky. Law Rep., 697; *Steele v. Curle*, 4 Dana, 381; *Johnson v. Bank of U. S.*, 2 B. Monroe, 310.)

Counsel for appellees insist that this case comes within the well known exception to the above rule, to the effect that such contracts will not be enforced in the courts of another State if contrary to public morals, public policy, or the positive law of the latter. (*Parke v. Moore*, 115 Fed. Rep., 802.) It will be observed, however, that sections 4214 to 4223, Kentucky Statutes, relate only to peddlers doing business in this State. Section 4223 applies only to such peddlers' notes as are executed for patent right territory in the State of Kentucky. This section has no extra-territorial effect. It does not apply to peddlers' notes executed and delivered in another State. We, therefore, conclude that the validity of the notes in question must be determined by the laws of West Virginia.

Nor does the fact that the assignment from Robert Dixon to appellant was made in the State of Kentucky in any way affect the liability of appellees. The general rule is that the law of the State in which an assignment is made controls. Such defense, however, would be available only by the assignor. The assignment made by persons other than the makers of the note in this State could not make the contract, so far as they are concerned, subject to the laws of this State. (*Hyatt v. Bank of Kentucky*, 8 Bush, 192.)

Counsel for appellees insist that the presumption is that the laws of the State where the contract is made and to be performed are the same as those where the contract is sought to be enforced. This presumption, however, does not extend to statute laws. The presumption is that the common law of the State where the contract is made is the same as that of the State where the contract is sued upon, and in the absence of evidence to the contrary, the presumption is that the common law prevails in a sister State. (*Cope v. Daniel*, 9 Dana, 415; *Johnson v. Bank of U. S.*, 2 B. Monroe, 310.)

In one paragraph of appellees' answer they plead the invalidity of the notes, both under the West Virginia and the Kentucky law. They claim they were, therefore, entitled to judgment, because their allegations in regard to the West Virginia law were not denied. In this contention counsel are in error, for, by an order entered February 1, 1907, it is provided that the affirmative matters in all the pleadings are traversed of record. Under this state of case, it was necessary, therefore, for appellees to prove that the notes in question were invalid under the laws of West Virginia.

Moreover, appellees admitted the execution of the notes and sought to defeat a recovery thereon, not only by the plea that they were invalid under the laws of West Virginia, but also because of want of

consideration and fraud. As to each of these defenses, therefore, the burden of proof was on appellees, and the court erred in placing the burden on the appellant.

For the reasons indicated, the judgment is reversed, and cause remanded, for a new trial consistent with this opinion.

WARDEN v. MADISONVILLE, HARTFORD & EASTERN R. R. CO.

(Filed March 25, 1908—Not to be reported.)

1. Railroads—Contract for Constructing Roadbed—Conclusiveness of Contract—The fact that a contract by a railroad company with a contractor employed to construct its road bed only called for one track, is not conclusive that the railroad company did not intend to build another track thereon.

2. Eminent Domain—Necessity to be Shown—Circumstances to be Considered—There must always exist necessity for the appropriation of land sought to be condemned for railroad purposes, and in determining this necessity, the court should take into consideration all the facts and circumstances in the case. The right to condemn is not confined to the land that may be absolutely required at the time of the taking, but extends to so much as the present plans and purposes of the railroad company show will be reasonably necessary to construct and operate the road in accordance with such plans.

W. Scott Morrison for appellant.

Glenn & Simmerman and Benjamin D. Warfield for appellee.

Appeal from Ohio Circuit Court.

Opinion of the court by William Rogers Clay, Commissioner, affirming.

This is the second appeal of this case; the opinion on the first appeal will be found in 31 Ky. Law Rep., 234. In that opinion this court said:

"On the return of the case to the circuit court, the court will set aside the order sustaining the demurrer to so much of the answer as denied the incorporation of the plaintiff and will hear proof as to the incorporation and as to the necessity of the strip of land proposed to be taken. A copy of the articles of incorporation duly certified will make out a prima facie case for the plaintiff as to its incorporation. If the proof shall satisfy the court that the strip of land is necessary for the purposes of the railroad company, and that the railroad company has been properly incorporated, he will then enter a judgment upon the verdict of the jury. The verdict of the jury will stand, as there was no error in the proceedings before the jury, and the questions to be determined are purely questions of law for the court, but which must be determined by the court before a judgment taking the defendant's property for the plaintiff's use can properly be entered."

Upon the return of the case, proof as to the organization of the company met the requirements of the former opinion of this court, and of such evidence of incorporation no complaint is made on this appeal. The only question now before us concerns the necessity for railroad purposes of the strip of land condemned. Before proceeding to state the evidence, we will advert to a few authorities construing the word "necessity" in connection with condemnation proceedings.

In 15 Cyc., 632, the rule is thus stated:

"To authorize the condemnation of any particular land by a company to which the power has been delegated, a necessity must exist for the taking thereof, for the uses and purposes of the party instituting the proceedings, and this must be made to appear. And it is never permissible for a company or individual to appropriate more land than is necessary for its use. There is, of course, a prohibition against excessive appropriation or the taking of any land not within the scope of the purposes required. The moment the appropriation goes beyond the necessity of the case, it ceases to be justified on the principles which underlie the right of eminent domain. Nevertheless, necessity, within the meaning of this rule, does not mean an absolute, but only a reasonable necessity, such as would combine the greatest benefit to the public with the least inconvenience and expense to the condemning party and property owner, consistent with such benefit, although it does not include the taking of land which may merely render the employment of the improvement more convenient or less expensive, or for a necessity which is merely colorable."

In the case of *Aurora G. Ry. Co. v. Harvey*, 53 N. E., 331, the Supreme Court of Illinois, in discussing the question of "necessity," said:

"Counsel for appellees contends that a 'necessity' required by the statute, in relation to horse and dummy railroad, means an 'absolute necessity'—a necessity so great that, in the case at bar, if it be physically possible for appellant to construct and maintain its railroad upon the highway, there is no right to condemn. We do not think that such a strict interpretation should be placed upon the language of the statute. * * * The safety, comfort and convenience of the traveling public require protection, and the policy of the State must be to compel railroad companies to so build their roads, to conserve the safety of its citizens to as high a degree as is reasonably attainable, in view of the character and exigencies of that mode of transportation.

"In the construction of statutes relating to the taking of private property, the word 'necessity' should be construed to mean 'expedient,' 'reasonably convenient' or 'useful to the public,' and can not be limited to the absolute physical necessity. This, we think, was certainly the intention of the Legislature when the act was passed. The view here expressed seems to be well supported by authorities." (*Hays v. Briggs*, 3 Pittsb., 504; *Commissioners v. Maesto* (Mich.), 51 N. W., 903; *Pettingill v. Porter*, 8 Allen, 1; *Cates v. Mayor, &c.*, 7 Cow., 585.)

In the matter of *Application of Staten Island Rapid Transit Railroad Co., &c.*, decided by the Court of Appeals of New York, 8 N. E., 548, that court said:

"It was conceded by the petitioner, upon the hearing, that the lands in question were not required for its present uses, and it is strenuously contended therefrom by appellant that the petitioner has not made a case for condemnation, or such a case as establishes a reasonable probability that such lands will be required for its uses in the future. It is quite obvious that the beneficial exercise of the power of acquiring property for public uses can not be enjoyed unless allowed in anticipation of a contemplated improvement; and it is, therefore, well settled in this State that the mere fact that the land proposed to be taken for a public use is not needed for the present and immediate purpose of the petitioning party, is not necessarily a defense to the proceeding to condemn it.

"The statute authorizing the formation of railroad corporations, confers power upon such as are organized under its provisions to acquire land by the exercise of the right of eminent domain, not only from individuals, but also from the State, for its prospective as well as present uses, provided, its necessities for such use in the immediate future are established beyond a reasonable doubt."

Our own court, in the case of Louisville & Nashville Railroad Co. v. Scamp, 30 Ky. Law Rep., 487, states the rule as follows:

"When land is condemned for railway purposes, the strip is taken, not with reference alone to the present needs of the company, but for all needs which the future may develop. The plaintiffs have, therefore, no cause of complaint that the defendant built the additional tracks referred to, or broke up its trains or stored its cars on these tracks."

From these authorities, we conclude that there must always exist necessity for the appropriation of the land sought to be condemned. In determining this necessity the court should take into consideration all the facts and circumstances of the case. The right to condemn is not confined to the land that may be absolutely required at the time of the taking, but extends to so much as the present plans and purposes of the railroad company show will be reasonably necessary to construct and operate the road in accordance with those plans.

By sub-section 4 of section 768, Kentucky Statutes, it is provided:

"Every company shall possess the following powers, and be subject to the following liabilities and restrictions:

"To lay out its road not exceeding one hundred feet in width, and if more than one track is laid, fifty feet additional for each track, and construct the same; and for the purpose of cuttings and embankments, and procuring stone, gravel or other material, or for the purpose of draining its road bed, to take, in the manner herein provided, such other lands in the vicinity of, or adjacent to, its road as may be necessary for the proper construction, operation and security of its road." * * *

In this action appellee seeks to condemn 200 feet of appellant's property. The statute gives the right to condemn 150 feet where there are to be two tracks. In addition to this, the railroad is given, for the purpose of cuttings, or embankments, and for procuring stone, gravel or other material, or for the draining of its road bed, the right to take other land as may be necessary for the proper construction, operation and security of its road.

The chief engineer of the appellee company testified that it was the intention of the company to build a double track on the land of appellant, where it was sought to condemn 200 feet, and for the purpose of this double track and making the fill and properly draining the road bed, the 200 feet of land was necessary; that the greater part of the strip, where the 200 feet was condemned, is across a bottom, where there is a considerable fill, and that the roadbed would require ditches on each side to drain and prevent its being injured by water; that the company would require, for the purpose of making this fill, dirt from each side of the road. He further stated that it was the intention of the company to put in a side track as soon as the main line was built. The witness also testified that the company had in view, although the exact location thereof had not been determined, the establishment of a depot at or near the land sought to be condemned, in which event there would be a necessity for additional tracks. Appellant testified and described the condition of the land as to cuts and fills. E. S. McMillen, the contractor in charge of the work, stated that the fill on the land was to be seven feet high, 30 feet wide at the bottom and 18 feet at the top; that some companies use 32 feet and some 40 feet for double track; that his contract was to put in one track, and the fills were made from the cuts. We do not think the testimony of the contractor, that his contract called for only one track, is at all conclusive of the contention that the railroad company did not intend to build another track. Taking the testimony as a whole, we are of the opinion that appellee showed that the land proposed to be taken was reasonably necessary for the purposes of the company. This is the view taken by the trial court, and the judgment is, therefore, affirmed.

NEWCOMB v. FIDELITY TRUST CO., &c.

(Filed March 25, 1908—Not to be reported.)

1. Wills—Construction—Intention of Testator—Favorable to Disposition of Entire Estate—That construction of a will will be favored, which disposes of the entire estate, and prevents the testator from dying intestate as to any part of it, when it is apparent from the whole will, that such was the intention of the testator.

2. Same—Estate by Implication—Presumption—The weight of authority is to the effect that an estate by implication will not be presumed or created by strained construction, but must grow out of the fair intentment of the instrument under consideration, looking at all its parts.

Lewis McQuown, Eli H. Brown, Jr., Benjamin Patterson and Geo. Bell for appellant.

Humphrey & Humphrey and L. R. Yeaman for appellees.

Appeal from Jefferson Circuit Court, Chancery Branch, First Division.

Opinion of the Court by Judge Carroll, affirming

The only issue of H. D. Newcomb by his first marriage now living or living at the death of Newcomb is the appellant, H. Victor Newcomb, H. D. Newcomb married a second time, and there was born of this marriage Warren S. Newcomb and H. Dalton Newcomb. In 1874, H. D. Newcomb died, leaving a will which was duly probated in Jefferson county. Warren S. Newcomb died without leaving descendants. In his will he did not undertake to dispose of any interest in the property involved in this controversy, but named as his residuary legatee Richard TenBroeck. Richard TenBroeck transferred any interest he might have in the trust fund in controversy to H. Dalton Newcomb. The widow died in 1905. After her death, H. Dalton Newcomb died without issue, and this litigation is between the executors of H. Dalton Newcomb and H. Victor Newcomb.

The trust fund in controversy was created by the fourteenth clause of the will of H. D. Newcomb. This clause reads as follows:

"I give and bequeath to John B. Smith and Thomas L. Barrett two hundred thousand dollars to be held by them in trust and safely and advantageously invested, so as to yield a semi-annual income, which, after paying all taxes and charges thereon, shall be appropriated and applied by said trustees to the continual support and maintenance of my wife, Mary Cornelia Newcomb, and her children, free from the control, use or enjoyment of any husband she might have. But neither the said trustees nor Mrs. Newcomb, nor any future husband, nor her child or children shall at any time have the power, right or authority in any way, manner or for any purpose, to encumber or anticipate the said fund or the said income or any part thereof for any purpose whatever. And in case these restrictions are violated, this bequest at once shall be void, and the fund hereby bequeathed shall become a part of my residuary estate; and in case of her death without child or children, issue of my marriage with her, living or leaving descendants, the said fund shall be a part of my residuary estate."

Indirectly bearing upon the question is the sixteenth clause of the will disposing of the residuary estate, and reading as follows:

"After all my debts are paid, and legacies hereby given are satisfied and the trusts hereby created are provided for as herein prescribed, it is my will that all the residue and remainder of my estate, real, personal and mixed, in possession and in action, owned by me at my

death, whether now belonging to me or hereafter acquired and where-soever being or situated, shall be divided as follows, to-wit: If my said wife, Mary Cornelia, dies without issue of my marriage with her surviving her (I having already given to my son, H. Victor Newcomb, over \$500,000), the said residue and remainder shall be equally divided between my said wife and my said son, H. Victor Newcomb, but if there should be a child or children, issue of my marriage with said Mary Cornelia, then I give to my said wife one-third of all my personal estate absolutely, and one-third of all my real estate for her life, and direct the whole of said residue and remainder of my estate to be equally divided between H. Victor Newcomb or his descendants and the children by my marriage with the said Mary Cornelia or their descendants."

And the first clause of the codicil, reading in part as follows:

"I devise and bequeath to my friends, John B. Smith and Thomas L. Barrett, of said city, as trustees and in trust for the use of the child or children of my present wife, Mary Cornelia Newcomb, one year after my death, \$100,000 for each child then living, to be by the said trustees safely and advantageously invested so as to yield an income, the net proceeds of which income, after paying all taxes and charges thereon, or so much thereof as may be necessary and proper in their judgment and discretion, may be appropriated and expended for the support and education of said child or children. * * * When each male child of those by this clause provided for arrives at the age of twenty-one years, he may receive the one-half of the whole fund then held for him, including increase, and the other half shall then be held by the trustees, and the income, proceeds and increase thereof invested and re-invested until such male child arrives to the age of thirty years, then the entire balance of the fund with the increase held for such child shall be paid over to him, * * * and if either of said male children herein provided for shall die without issue surviving him, then so much of his share of said fund yet in the hands of the trustees to pass to my heirs-at-law in like manner, and in case either trustee shall die or refuse to act, the other may appoint another to act with him to have the same powers as if here named as trustee under this clause, and so on until the trust is closed, keeping two competent trustees to act together."

After the death of the widow, Mrs. Cornelia Newcomb, this action was brought by the trustees under the fourteenth clause of the will for the purpose of securing a judicial determination of the meaning of the fourteenth clause, with reference to the testator's intention in the disposition of the principal of the trust fund thereby bequeathed. In this action H. Dalton Newcomb filed his answer, in which he asserted that the trust terminated with the death of his mother, Mrs. TenBroeck, and that he was entitled in fee to the bequest described in the fourteenth clause, and upon his death, pending the action, his executors asserted title to the entire fund. H. Victor Newcomb's contention is that H. Dalton Newcomb was not at his death or at any time entitled to the principal of the fund held by the trustees under the fourteenth clause of the will.

The chancellor adjudged that H. Victor Newcomb was not entitled to any part of the fund of two hundred thousand dollars created and provided for in the clause mentioned, and that the entire fund together with all the income which had accrued or will accrue thereon passed under the will of H. Dalton Newcomb to his executors. From this judgment, H. Victor Newcomb prosecutes this appeal.

Counsel for appellant in their brief state that:

"The sole question in the case is whether the fourteenth clause of the will disposed of the principal of the fund after the termination of the trust by the death of all of the beneficiaries who were the second wife and her children. If it does so dispose of the fund, we have no

case; if it does not so dispose of the fund, H. Victor Newcomb has an interest therein, either as residuary legatee or as the next of kin."

To put it in another way. H. Victor Newcomb's contention is that upon the death of the widow and her children born of her marriage with the testator, the fund mentioned in the fourteenth clause of the will became a part of the residuary estate; or, if not, that it was undisposed of by the will and passed to the next of kin, as in the case of intestacy, in which event H. Victor Newcomb, being the sole heir, would take the estate.

On the other hand, the executors of H. Dalton Newcomb insist that the testator intended, by the fourteenth clause of his will, to devise an absolute estate in the trust fund to his widow and her children, or a life estate to her with remainder in fee to her children, and hence H. Victor Newcomb has no interest in the fund.

There is no claim that the restriction:

"But neither the said trustees, nor Mrs. Newcomb, nor any future husband, nor her child or children, shall at any time have the power, right or authority in any way, manner or for any purpose, to encumber or anticipate the said fund or the said income or any part thereof for any purpose whatever. And in case these restrictions are violated, this bequest at once shall be void, and the fund hereby bequeathed shall become a part of my residuary estate," in the concluding provision of the fourteenth clause were violated, therefore the fund for this reason did not become a part of the residuary estate. It will be noticed that the testator gave to the trustees the trust fund, the income thereof, after paying all taxes and charges, to be appropriated to the support and maintenance of his wife and her children; stipulating that neither the trustees nor Mrs. Newcomb nor any future husband nor her child or children should at any time have the power, in any way or for any purpose, to encumber or anticipate the said fund or the income or any part thereof for any purpose whatever; and in the concluding words of this clause he said: "in case of her death without child or children, issue of my marriage with her, living or leaving descendants, the said fund shall be a part of my residuary estate."

Our construction of this clause is that the testator intended that the fund therein mentioned should be held in trust during the life of Mrs. Newcomb, the income thereof during her life to be applied to the support and maintenance of herself and children. But at her death, leaving children born of her marriage with the testator, the trust terminated, and the trust fund, together with any unexpended accretions thereof, vested in fee in the children. We think this construction is strengthened by the concluding words of the clause in which the testator declares that "in case of her death without child or children, issue of my marriage with her, living or leaving descendants, the said fund shall be a part of my residuary estate." It is true that there is no specific direction in this clause as to what disposition shall be made of the trust fund upon the death of the widow leaving children. But there is a bequest over in the event she died without children. The fee in the trust fund was disposed of, subject only to be defeated by the death of Mrs. Newcomb without leaving children. The estate was not limited to the life of Mrs. Newcomb and her children, nor are there any words indicating a purpose to so limit it; and when it is considered that the testator's will was carefully written and elaborate provisions made for carrying out his intentions, it would seem that if he desired to limit Mrs. Newcomb and her children to a life estate in this fund, he would have so declared. The fact that he did not is strong evidence of his intention that the fund, after the death of Mrs. Newcomb, should become the property of her children, and sufficient to raise a bequest by implication. It is plain that if Mrs. Newcomb died leaving children,

the fund should not become a part of the residuary estate; because the testator, in the concluding words of the clause in question, expressly provides that it shall only become a part of the residuary estate in the event of the death of the widow without child or children. This provision entirely eliminates the contention of appellants that any part of the fund went into the residuary estate. It would require a most unreasonable interpretation and one that would do violence to the plain language of the instrument to say that, although Mrs. Newcomb died leaving children surviving her, the trust fund should become a part of the residuary estate. It would be declaring exactly the opposite of what the testator said and meant, and be giving to his language a construction that it is not susceptible of. Only in one contingency could this trust fund become a part of the residuary estate, that contingency was the death of Mrs. Newcomb without leaving a child or children, and this contingency did not happen. As the fund did not go into the residuary estate, it only remains to determine whether the testator left it undisposed of, and died as to it intestate. The presumption is against this construction. That construction of a will will be favored which disposes of the entire estate and prevents the testator from dying intestate as to any part of it, when it is apparent from the whole instrument that it was the intention to dispose of the entire estate. In the absence of a contrary intention, we feel warranted in holding that under the general and well established rules upholding devises by implication that upon the death of Mrs. Newcomb the fee in the fund vested in H. Dalton Newcomb, her only surviving child. A contrary purpose can not be gathered from the will. Recognizing the fact that the weight of authority is to the effect that an estate by implication will not be presumed or created by strained construction but must grow out of the fair intendment of the instrument under consideration looking at all of its parts, we cannot escape the conclusion that the testator, although he did not in terms give to the children of Mrs. Newcomb the fee in the trust fund, intended that they should come into it at her death. And we find strong support for this construction in *Gill v. Logan*, 11 B. Mon., 231. In that case the testator gave to Robert S. Saunders in special trust for the daughter of testator, Elizabeth Logan, and her child, a farm and several negroes, and in another clause of his will directed that, with certain exceptions, the balance of his estate be divided between his children. It was contended that the devise to Saunders as trustee was not in fee simple but terminated upon the death of all the beneficiaries. In considering this point, the Court said:

"The legal title being placed in Saunders as trustee for Mrs. Logan and her children, without any specification of the duties of the trustee, or of the rights of the beneficiaries, except such as is contained in the word special, we regard him merely as holding the title for the use of the beneficiaries and can give no further effect to the word special than as indicating that the legal title was not intended to vest in the beneficiaries, or, at most, that as to the interest of Mrs. Logan, it was to be held for her sole and separate use, which latter construction would not affect any question now to be determined. But, upon the premises above assumed, the equitable estate being in the beneficiaries by the will, is subject to the same rules as to its limitation and devolution as if it were a legal estate. And, although by the common law a devise to a trustee, without words of inheritance in trust for certain beneficiaries, without such words would *prima facie* pass, but a life estate in both the legal and equitable estates, yet, as such words are dispensed with by our statute, and as there is nothing on the face of this will to show that a life estate only was intended to be limited, it follows that a fee simple passed both in the legal and equitable estate. And as there is no condition expressed and, as we think,

none implied, on which the devise is to be defeated or the estate to return to the testator's heirs or devisees, or in any manner to come within the control of his will, we think it clear that, so far as it vested in the trustee upon the testator's death, it became subject to the rules and power of the law as to the estate of the beneficiaries."

In *Booker v. Carlisle*, 14 Bush, 154, the testator, Winston, gave to his sister, Mary Booker, a tract of land for life, providing that at her death the title should vest in Y. O. Booker, for the support and benefit of the daughters of Mary Booker, and in case Y. O. Booker died before Mary, then the title to the land to vest in the daughters before named, the testator died, leaving surviving him his sister, Mary Booker, who died, leaving her son, Y. O. Booker, and his daughters in possession of the land. It was contended that, as no words were used in the will indicating that the fee in the land was devised for the benefit of the daughters of Mary Booker, that they only took a life estate; but the court said:

"We are of opinion that, by the will of Winston, the land in dispute was devised to Mary Booker for life, and at her death, the legal title was vested in Y. O. Booker in trust for the use and benefit of the daughters. * * * In *Gill v. Logan*, 11 B. Mon., 233, this court used the following language: 'When the title to land is conveyed to a trustee without any specification of the duties of the trust or the rights of the beneficiaries, he holds a fee under our statute for the use of the beneficiaries, and it is subject to the same rules as to its limitations and devolution as a legal estate, and though all the beneficiaries die, the estate does not revert, but passes by descent.'"

In *Webster's Trustee v. Webster*, 93 Ky., 632, the testator appointed a trustee to receive the estate devised to his daughter, the trustee to keep the same at interest and appropriate it to the support of his daughter. It was contended that the daughter took only a life estate, but the court said:

"The only limitation upon the absolute estate was the dying without living children; and it is believed that the testator meant that limitation to be the only one upon the absolute estate, and to confine its operation to the time of the distribution of the estate. The limitation clearly means that, should Euphema (daughter) have living children before distribution, she would take absolute estate, subject to be defeated if she and the children died before distribution. And, taking this clause in connection with the preceding ones quoted, there can be no manner of doubt that the estate devised was an absolute estate, subject to the one limitation indicated. The appointment of the trustee to take charge of the estate and to limit its expenditure upon Euphemia was evidently in view of the fact that the testator did not regard her as competent to take care of it, and the appointment is not incompatible with an absolute estate to the devisee."

In *Masterson v. Townsend*, ——— N. Y., ———, 10 L. R. A., 817, the court in construing a will in which it was claimed that there was no testamentary disposition of the estate created by the will after the re-marriage of the widow, upon which contingency, Peter Masterson contended that the estate vested in him; and the court said:

"This is a plain case of a devise by implication, whereby, upon the death of the testator, his brother, Peter, became vested with the title to the real estate, subject only to the trust provision made for the testator's widow. However incomplete the language to express the purpose of the testator, an intention and an understanding on his part are evident that his brother, Peter, should take as devisee the property which was the subject of disposition in that clause. What the testator has imperfectly done by way of expression is effectuated by the application of well known legal rules. * * * Courts have, from an early day, repeatedly upheld devises by implication where no gift of the premises seems to have made in the will in formal language."

In *Boston Safety Deposit & Trust Co. v. Coffin*, ———, Mass., 8 L. R. A., 739, the court said in construing a will somewhat similar to the one before us, that:

"When an intention to dispose of the whole of an estate appears, a partial intestacy should not be recognized unless the deficiencies in the expressions of the will are such as to compel it. * * * When the reading of a whole will produces a conviction that the testator must necessarily have intended an interest to be given which is not bequeathed by express or formal words, the court will supply the defect by implication, and so mould the language of the testator as to carry into effect, as far as possible, the intention which it is of opinion that he has on the whole sufficiently declared."

Numerous other cases along this line holding the same general doctrine might be produced, but we do not deem it necessary to cite them.

In the lower court the point was made by appellant that the testator intended to substitute for the trust fund mentioned in the fourteenth clause of his will the one hundred thousand dollar bequests named in the first clause of the codicil; and this contention was made the subject of a large part of the able and learned opinion of the chancellor. It is not, however, pressed on this appeal, and for this reason we have not felt it necessary to do more than mention it.

The conclusion we have reached is amply fortified by authority, and in our opinion, effectuates the intention of the testator.

Wherefore the judgment of the lower court is affirmed.

IRONS, &c. v. U. S. LIFE INS. CO. OF NEW YORK.

(Filed March 26, 1908—To be reported.)

1. Insurance Policies—Sale of—Interest Acquired—Assignment—Purchaser—Insurable Interest in Assured—A purchaser of a policy of insurance on the life of one in whom he has no insurable interest, except as creditor, will hold the proceeds of the policy, over and above his debt, in trust for the beneficiaries of the policy, and an assignment of the policy to such purchaser will operate, at most, only as a pledge that he will hold the proceeds over and above the amount he has paid for it, with interest, in trust for the beneficiaries of the policy.

2. Same—Judicial sale—Effect—The doctrine of constructive trusts applies no less to judicial sales than to private sales. Where property is impressed with a trust, the trust is enforceable as well against the purchaser at a judicial sale as at a private sale.

3. Same—In a judicial sale of a life insurance policy, the court making the sale does not inquire, sua sponte, whether the purchaser has an insurable interest in the life of the insured. The order confirming the sale, where no exceptions are filed, does not establish that the purchaser is not a trustee for the parties, nor that he has capacity to take the property absolutely; and, to show such fact in a subsequent suit, in no wise impeaches the judgment in the former suit.

G. W. Stone and J. S. Wortham for appellants.

Charles Carroll, J. C. Graham, Jess T. Gosnell and W. O. Jones for appellees Gosnell and Jones.

Augustus E. Willson and M. K. Yonts for appellee U. S. Life Ins. Co.

Appeal from Grayson Circuit Court.

Opinion of the court by Judge Lassing, affirming.

In 1890, Benjamin Wells, an unmarried man, caused his life to be insured for the sum of \$2,500.00 in the United States Life Insurance Company, of New York, the premiums to be paid in ten annual installments, and the money, at his death, to go and be payable to his sister, Lydia Spriggs Bunch, and her surviving children, share and share alike. At that time, Mrs. Bunch was a widow, with three small children, six, eight and ten years old, and all dependent upon her brother, Benjamin Wells, for a support. The premiums were regularly paid, when due, during each year, until the year 1900, when the last of the ten payments called for under the terms of the policy was paid, and the policy became a paid-up policy.

At that time the children of Mrs. Bunch were sixteen, eighteen and twenty years of age, respectively; they had no estate whatever; and their mother, for the alleged purpose of raising money to complete their education and to support them, instituted an equitable action in the Grayson Circuit Court for the purpose of securing an order for the sale of the paid-up policy of insurance. Prior to the institution of this suit, she had appeared in the Grayson County Court and had been, on her motion, appointed and qualified as guardian for her three children. She caused her brother, Benjamin Wells, and the United States Life Insurance Company, of New York, to be made parties defendant to this equitable action.

In this equitable suit she set forth fully the needs and necessities of her children, alleged that the policy of insurance was the only estate of any kind whatever owned by them, and that a sale of it was necessary in order to raise the funds needed to support and educate them. Her brother, Benjamin Wells, filed an answer, consenting to said sale, and joining in the prayer of the petition. The insurance company answered, asking that its interests be protected. Proof was taken by affidavits in support of the allegations of the petition, and it was also shown by the affidavit of Lydia Spriggs Bunch that she was forty-five years of age and had passed the change of life and could not bear further issue. Thereafter, the case was submitted and judgment was rendered in conformity with the prayer of the petition; the plaintiff, Lydia Spriggs Bunch, was appointed a special commissioner for the purpose of selling the policy. At the following term of court, she, as special commissioner, filed her report, setting forth the fact that she had sold same to appellees, Gosnell and Jones, for the sum of \$731.18. No exceptions having been filed to this report of sale, it was confirmed, and, acting under the direction given in the judgment ordering the sale, the company transferred to Gosnell and Jones, as purchasers, the policy of insurance.

In May, 1906, Benjamin Wells died. Proofs of loss were promptly furnished the company by Gosnell and Jones, and, on the 17th of May, 1906, the insurance company paid to them, in satisfaction and settlement of the policy, the sum of \$2,500, the full face value thereof. On August 16, 1906, Mary E. Irons, Minnie M. Dense and Benjamin Bunch brought suit in the Grayson Circuit Court against the United States Life Insurance Company, of New York, Jess T. Gosnell, W. O. Jones and their mother, Lydia Spriggs Stevenson, she having married again, setting up the facts as to the issuing of the policy of insurance in their favor, the judgment of the Grayson Circuit Court directing its sale, and the sale and transfer thereof to appellees, Gosnell and Jones, the death of their uncle, Benjamin Wells, and the payment of the money, as above recited, to them. The circuit court dismissed the petition, and the plaintiffs appeal.

Neither Gosnell nor Jones, when they purchased the policy, had any insurable interest in the life of Benjamin Wells. In a long line of decisions, this court had held that the purchaser of a policy of insurance on the life of another, in which he has no insurable interest, except as creditor, will hold the proceeds of the policy, over and

above his debt in trust, for the beneficiaries of the policy; and that where he has no insurable interest, the assignment will operate at most only as a pledge and that he will hold the proceeds of the policy over and above the amount that he has paid for it, with interest, in trust for the beneficiaries of the policy. (Basye v. Adams, 81 Ky., 368; Barbour v. Larue, 106 Ky., 546; Lee v. Ins. Co., 26 Ky. Law Rep., 577; Ins. Co. v. Brown, 23 Ky. Law Rep., 2070; Baldwin v. Hayden, 24 Ky. Law Rep., 900; Schlamp v. Berner, 21 Ky. Law Rep., 324; Bramblett v. Hargis, 29 Ky. Law Rep., 610.)

• The doctrine of constructive trusts applies no less to judicial sales than to private sales. If the purchaser, at a private sale, will hold the property in trust for another, the purchaser, at a judicial sale, under like circumstances, will equally so hold it. If the property is impressed with a trust, the trust is enforceable as well against the purchaser at a judicial sale as at a private sale. (Miller v. Antle, 2 Bush, 407; Roach v. Hudson, 8 Bush, 410; 2 Pomeroy's Equity, section 1052.)

If the appellants had been of age and had sold this policy to Gosnell and Jones, the latter, under the above authorities, would only take an interest in the policy to the extent of the amount which they paid for it, and interest. The court was applied to simply because the children were not of age. The action of the court supplied the want of capacity in the children by reason of their non-age, but the court only did for the children what they might have done for themselves if of age. What Gosnell and Jones took under their purchase is to be determined, not alone from the judgment of the court, but from their capacity to take. The court transferred the policy to them, but the effect of the transfer is to be determined by the law which regulates what interest they could take in such a policy. The transaction having been made under an order of the court, which had all the parties before it, Gosnell and Jones must be adjudged entitled, out of the policy, to the amount they paid, with interest. To give it greater effect, would be entirely to ignore the rule that where a purchaser, at a private sale, would hold as trustee, he equally holds as trustee where he purchases at a judicial sale, under like circumstances, the reason for the rule being that his title in both cases depends upon his capacity to take and that if he can not take the title in one case absolutely, he cannot take it in the other. When a proposed purchaser is reported to the court, it does not consider whether he has capacity to take the property, or what interest he can take, unless the question is raised by exception to the sale. This is a matter which he is to see to for himself. The court, unless objection is made, does not consider whether he is trustee for the parties and will hold the property for them. In the case of a sale of a life insurance policy, the court does not inquire, *sua sponte*, whether the purchaser has an insurable interest in the life of the assured. The order confirming the sale, where no exceptions are filed, does not establish the fact that the purchaser is not a trustee for the parties, or that he has capacity to take the property absolutely. If, in fact, he has capacity only to take a limited estate in it and hold the remainder in trust for the parties, to show this fact in a subsequent suit, in no wise impeaches the judgment in the former case. The question is, what he took under that judgment and he could not take any greater interest than he had capacity to take. If he had no insurable interest in the life of the assured, the law allowed no greater interest to be vested in him by his purchase than a lien for his money, with interest. Every reason for the rule exists in sales made by order of court as in private sales; for there is the same temptation in each case to wrong doing and a mere gaming venture.

We have not referred to section 678, Kentucky Statutes, as that is in the division of the statute applicable to co-operative insurance and

there is nothing in the section to show that it was intended to apply to other policies. The right of the mother can not be adjudicated in this action, as she has brought no suit.

Judgment reversed as to Gosnell and Jones, and cause remanded, with directions to the circuit court to adjudge Gosnell and Jones out of the proceeds of the policy \$731.18, with interest at 6 per cent. from May 10, 1900, and to adjudge to the plaintiffs three-fourths of the remainder, and for further proceedings consistent herewith.

As to the insurance company, the judgment is affirmed.

The whole court sitting.

KENTUCKY UNION COMPANY v. COMMONWEALTH.

(Filed March 26, 1908—Not to be reported.)

W. B. Dixon, Louis B. Wehle and C. K. Calvert for appellant.

J. H. Jeffries for appellee.

Judge Hobson delivered the following dissenting opinion.

For the reasons given in the dissenting opinion, filed this day in the case of Eastern Kentucky Coal Lands Corporation v. Commonwealth, I dissent from the opinion of the court herein.

EASTERN KENTUCKY COAL LANDS CORPORATION v. COMMONWEALTH.

(Filed March 26, 1908—Not to be reported.)

Wm. J. Hendrick, Hoppen & Berard, Hazelrigg, Chenault & Hazelrigg, Jno. K. Hendrick and R. L. Miller for appellant.

Hager & Stewart, T. H. Paynter, W. H. Wadsworth, D. W. Baird, Z. T. Vinson, E. W. Hines, C. C. McChord, N. B. Hays and C. H. Morris for appellee.

Judge Hobson delivered the following dissenting opinion.

When an act is not punishable under the law in existence when it is done, it can not be made punishable by the Legislature by a law subsequently passed; and, upon like principles, where an act is punishable in a certain way when it is done, the Legislature can not, by a subsequent law, add to the punishment or penalty. The Legislature can not deny to any one the equal protection of the laws; and, in my judgment, article 3 of the Revenue Act of 1906 is void, both on the ground that it is ex post facto legislation, and that it denies to the holders of land titles referred to the equal protection of the laws.

The act was approved March 15, 1906. It took effect about ninety days thereafter. The first section of the act makes it the duty of every owner or claimant of land to pay all the taxes which had been assessed or should have been assessed against him or those under whom he claims, as of the 15th day of September, 1901, 1902, 1903, 1904 and 1905. And, if it had not been assessed for any of these years, the act made it his duty to assess the land and pay the taxes, interest and penalty therein provided for. His failure to do this is made a cause for the forfeiture of his title, but this forfeiture

shall be extinguished if, on or before March 1, 1907, he lists the land and pays the taxes, with the interest and penalties provided by law in case of the redemption of land sold for the non-payment of taxes. When land is sold for the non-payment of taxes, a penalty of fifteen per cent. is added, and the taxes bear interest at the rate of ten per cent. So that the meaning of the act is that the owner of land who had failed to list it for the years named must list it after the act takes effect and pay a penalty of fifteen per cent., also interest on the taxes at ten per cent. per annum from the time he was delinquent, that is, from the time the land should have been assessed. By the law in force up to the time this act took effect, the owner of land, which had been omitted from assessment, might voluntarily have it assessed at any time and pay the taxes without interest or penalties. If he failed to list it voluntarily, and a proceeding was instituted against him under section 4241 of the Kentucky Statutes, he was liable to a penalty of twenty per cent., which went to the officer instituting the proceeding; but, even in this case, he was not liable for interest at ten per cent. on the taxes; and if he made the assessment voluntarily, without a proceeding being instituted against him, he was not liable for the penalty of twenty per cent. While the act gives him until March 1, 1907, to list his property and pay the taxes, from the moment the act took effect the only way that he could escape the forfeiture of his title was to pay not only the taxes but the interest and penalty. The act does not give him a certain length of time to list his property and provide that if he fails to list within that time he shall be subject to the penalty, but it imposed the penalty upon all who are delinquent in listing their land, and who would escape the forfeiture of their title by listing it after the act takes effect. It is said that so much of the act as imposes the penalty for the past delinquency may be rejected, and that the balance of the act may stand; that this is not a case in which that rule can be applied, for the reason that the act forfeits the title of all persons who had failed to list their land for the years named, and the only way in which they can escape the forfeiture is by paying the taxes with interest and penalty. If they do not pay the taxes, interest and penalty, the forfeiture stands. If that part of the act which provides for the extinguishment of the forfeiture is invalid, then there is no way in which the owner can escape the forfeiture. Besides, this is an essential part of the whole scheme of the act, and it cannot be presumed that the Legislature would have passed the act without this. The forfeiture of the titles of the owners is the purpose of the act. There could not be a clearer case of legislative intention to punish retrospectively.

. By the general law, the person owning land at the time it should be assessed is not only liable for the taxes, but remains bound therefor; by this article the present owner's land is forfeited to the Commonwealth for the non-payment of taxes by the former owner. By the general law, if the occupant of land pays the taxes thereon, he is entitled to recover of the owner the amount so paid, with interest, and has a lien on the land therefor; by this article, the fact that the land has been listed for taxation and the taxes paid by the occupant, does not prevent the forfeiture as therein set out. By the general law, land may be assessed retrospectively at any time not later than five years, but not to prejudice the rights of purchasers acquired in the meantime; by this article, the purchaser is required to pay the taxes with interest and penalty. By the general law, if the owner sells the land after the 1st of February of the year in which the taxes are due and payable, it is the duty of the owner to pay the taxes; by this article the purchaser's title is forfeited if he does not pay them. By the general law, where property has been sold for taxes, the

owner may redeem it within two years; by this article, the owner forfeits his title to the land if he fails to assess it and pay the taxes thereon as therein provided. By the general law, if the owner fails to assess his property, it may be assessed retrospectively, but the taxes are then collected as other taxes; by this article, the taxes are not collected as other taxes, but must be paid at once with interest and penalties, to avoid a forfeiture of the title. By section 4 of this article, before the defendant may redeem, he must pay not only the amount of unpaid taxes charged, but those that ought to have been charged against those under whom he claims for fifty years preceding the filing of the counterclaim. No such provision is found in the general law relating to other property, and there is no provision in the general law for double taxation of the same property, and the payment of the taxes by each claimant where there are two claimants to it.

A reading of the article shows that it was a deliberate attempt on the part of the Legislature to deny the equal protection of the laws to the owners of the land title referred to, and to provide, as to the holders of these land titles, an entirely different system from that provided for the holders of other species of property. It is, therefore, in my judgment, void, both under the Constitution of this State and the Constitution of the United States.

For these reasons I dissent from the opinion of the court.

WELCH v. COMMONWEALTH.

(Filed March 26,, 1908—Not to be reported.)

1. Witnesses—Party Accused—Incriminating Testimony—Commission of Separate Offense—When the accused testifies as a witness in his own behalf, he stands as any other witness and can not be required to disclose public offenses committed by him other than that for which he is on trial.

2. Same—Motive—Evidence of—On the trial of one for malicious shooting, the motive, being a material element of the shooting, may be shown by facts proven, though they involve the commission of another offense by the defendant, but such proof must be established by other witnesses than the defendant.

A. R. Burnam & Son and J. Tevis Cobb for appellant.

James Breathitt, N. B. Hays, Chas. H. Morris, T. B. McGregor and R. H. Crooke for appellee.

Appeal from Madison Circuit Court.

Opinion of the court by Judge Hobson, reversing.

S. E. Welch was indicted on the charge of shooting P. D. McBride, maliciously and with intent to kill him. He was found guilty of shooting in sudden heat and passion; his punishment was fixed at a fine of \$500 and imprisonment in the county jail for one year. His motion for a new trial was overruled, and he appeals.

On the trial of the case, the defendant was sworn as a witness in his own behalf and testified to facts showing that the shooting was done in his necessary self-defense. On cross-examination he was asked if he had had any improper relations with Mrs. Fish, at whose house the shooting occurred, and if these relations did not continue down to the time of the shooting. To these questions he objected, on the ground, among other things, that he could not be compelled to incriminate himself. The court overruled his objections and he, in

effect, answered the questions in the affirmative, when required by the court to answer them. To this he excepted. The matter was gone into at great length and with minuteness. This testimony was made the theme of the closing argument for the prosecution, and so emphasized that the real charge against the defendant presented to the jury by the argument was this offense, as well as the one for which he was indicted.

It is provided, in section 11 of the Constitution of the State, defining the rights of the accused in criminal prosecutions, among other things, as follows:

"He cannot be compelled to give evidence against himself."

When the accused, in a criminal case, takes the stand as a witness in his own behalf, he stands as any other witness, but he has all the rights of any other witness. He can not be required to disclose public offense committed by him other than that for which he is on trial. A witness can not be required to give evidence against himself or to testify to facts showing he has committed a public offense. For, if he were required to answer questions relating to such a matter, his testimony could be used against him on the trial of a prosecution for the offense so disclosed. The manner in which a witness may be discredited is provided by law, and, among other things, it is provided that he may not be impeached "by evidence of particular wrongful acts," except that it may be shown that he has been convicted of felony. (Civil Code, section 597.)

The motive with which the shooting was done was a material element of the offense, and, to show motive, facts may be proved, though they involve the commission of another offense. (4 Elliott on Evidence, section 2720; 1 Wigmore on Evidence, section 304; 1 Jones on Evidence, section 144; O'Brien v. Commonwealth, 89 Ky. 362, 115 Ky., 608.)

But proof of such facts here must be made by other witnesses when they establish the commission of another offense; the defendant can not be required, over his protest, to bear witness against himself and thus subject himself to another prosecution.

On the whole record, we are satisfied the substantial rights of the defendant were prejudiced on the trial and that a new trial should be granted.

Judgment reversed and cause remanded, for a new trial.

SOUTH COV. & CIN. STREET RAILWAY CO. v. BESSE

(Filed March 26, 1908—Not to be reported.)

Street Cars—Swinging of Car on Curve—Collision with Passing Wagon—Injury to Driver—Liability—Every driver of a vehicle must know that the motorman of a street car can not control the hind end of a car at a curve, so as to keep it from swinging out as far as, by nature, it will go, and it is, therefore, incumbent on such driver of a vehicle in passing a car at a curve, to keep out of the way, and if he fails to do so, and is injured by the natural swing of the car, the fault is his own, for which no recovery can be had.

L. J. Crawford for appellant.

Auther C. Hall for appellee.

Appeal from Campbell Circuit Court.

Opinion of the court by Judge Hobson, reversing.

At the intersection of Berry street and Sixth street in Dayton, Ky., there are double tracks of the street railway. The street cars turn here from Sixth street into Berry street. Frank Besse, on October

5, 1906, was driving along Sixth street, and as he got to the intersection of Sixth street and Berry street, he met a street car going in the opposite direction. He was driving along on the other track of the street railway, and as the street car made the turn, the hind end of the car, as it turned on the curve, swung out beyond the track and thus came in contact with the hind end of Besse's wagon. By the collision he was thrown against the brake, and he brought this suit to recover for his injuries. A trial was had before a jury, who found for him, and fixed the damages at \$500. Judgment was entered upon the verdict, and the defendant appeals.

The evidence for the plaintiff showed that his wagon was struck by the hind end of the car while the wagon was within the rails of the other track of the railway company. It also showed that the motorman saw Besse as he passed him, but did not see him afterwards. The car was running about three miles an hour and there was no lurch of the car, and nothing more of a swing by the hind end than always occurred at that point when a car of this length passed; but the car was an unusually long one, and therefore the hind end swung out further as it turned than the hind end of a shorter car would do. The proof for the defendant was to the effect that Besse, after passing the motorman, drove between the tracks and got nearer to the car, thereby causing the collision. The defendant introduced proof showing that the hind end of the car never reached over as far as the other track.

It is the duty of those in charge of street cars to keep a lookout for persons and vehicles on the street, and to exercise ordinary care to avoid injuring them. It is the duty of those driving other vehicles to keep a lookout for the cars and to exercise ordinary care to keep out of their way. The street car must stay upon its tracks. In making a turn, as the trucks are not at the end of the car, the end must project more or less beyond the track, according to the length of the car and the degree of the curve. Every driver of a vehicle must know that the motorman can not control the hind end of the car at a curve so as to keep it from swinging out as far as, by nature, it will go. It is, therefore, incumbent upon the driver of a vehicle passing a street car to keep out of the way, and at curves to drive further from the car than at other points. He must expect the car to stay on its track, and he must expect that the end of the car will swing out in turning the curve, and if he does not make a sufficient allowance for the swing of the car and drives so close to it that the car, in turning, strikes the vehicle, the fault is his own and not that of the street car company. The motorman can not leave his track; the driver of the vehicle has the whole street to drive on and it is his fault if he does not drive far enough from the car to prevent the hind end of the car from hitting his wagon as he passes it. Under the proof the court should have instructed the jury to find for the defendant.

Judgment reversed and cause remanded, for further proceedings, consistent herewith.

COMINGOR v. LOUISVILLE TRUST CO., TRUSTEE IN BANKRUPTCY, OF SIMONSON, WHITESON & COMPANY.

(Filed March 26th, 1908—To be reported.)

1. Assigned Estate—Management—Duties of Assignee—Liability for Negligence—In the management of an assigned estate the assignee is bound to exercise the same care that an ordinarily prudent person would use in his own affairs under like circumstances, and for such losses, deficiencies or injuries as may be caused by his affirmative or

negative violation of this rule and the duties it imposes he is answerable for the loss thereby inflicted.

2. Same—Fraud of Assignee—Compensation—Where it is shown by the evidence that the assignee of an estate fraudulently accepted the position at the instance of the assignor with the view of aiding him in concealing his property and selling it to a pretended purchaser, who turned it over to the assignor at a greatly reduced price, the circuit court properly refused to allow him any compensation in his fraudulent management of the estate.

3. Action for Settlement—Jurisdiction of Chancellor—Necessity for Jury—In an action for the settlement of an assigned estate, where the assignee is charged with fraud, the issues of fact as to the questions of fraud and value are but incidental to the main purpose of the action to compel an accounting of the assignee, and the chancellor having exclusive jurisdiction thereof, such jurisdiction carries with it the power to decide all other issues raised without the intervention of a jury.

4. Claim—Affidavit and Demand—Failure to Make—Delay in Objecting—The failure of the plaintiff to comply with the statutory requisition as to affidavit and demand must be objected to by the defendant before he interposes his defense on the merits, by filing an affidavit showing that the preliminary proof and demand had not been made by the plaintiff and asking a rule for its compliance.

Alfred Selligman and W. M. Smith for appellant.

Geo. Weisinger Smith, Smith & Sprague and Barnett & Barnett for appellee.

Appeal from Jefferson Circuit Court, Chancery Branch, Second Division.

Opinion of the court by Judge Settle, reversing.

On December 5th, 1908, the firm of Simonson, Whiteson & Company, composed of D. G. Simonson, I. Whiteson and Leo Stern, conducting a merchantile business in the city of Louisville in a house known as the "Mammoth," made a deed of assignment to their book-keeper, the appellant, L. Comingor, conveying him for the benefit of their creditors the stock of merchandise and fixtures in the Mammoth store. The latter at once accepted the trust, executed bond with approved security, and duly qualified as such trustee, thereby undertaking to perform in a legal manner, the duties required of him in that capacity.

At the time of the assignment the cash value of the merchandise owned by the firm of Simonson, Whiteson & Company, was between \$100,000.00 and \$138,000.00, the fixtures and electric plant in and connected with the store about \$12,000.00, and there was due the firm in open accounts about \$7,000. Probably it would not be overstating the mark to say that the total assets of the firm then approximated \$150,000.00, and that its liabilities were nearly as great.

Appellant immediately procured the appointment of appraisers to appraise the assigned property. The appraisers completed their work in four days, placing the value of the property at the sum of \$71,656.56, which was much less than its actual value.

Three days after the filing of the deed of assignment, appellant brought suit in equity to settle his accounts as assignee. Only a few of the firm's creditors were made parties to this action; one of the largest creditors, the Louisville Banking Company, though conducting business just across the street from the Mammoth store, was not made a party to the action. Summons was executed upon only the members of the firm in question, but later, and by amended petition, two other creditors were made parties and served with summons. On December 10th, 1898, the assignee opened the store and com-

menced the sale by retail of the assigned property. Later he filed two petitions to obtain advice of the court. By the first he asked permission to sell the stock of goods by retail. By the second he reported large sales at prices above the values fixed by the appraisers, and averred that he still had on hand over \$5,000.00 worth of the assigned property. As a matter of fact, according to the weight of the evidence, the goods then on hand were reasonably worth as much as or more than \$70,000.00. On January 25th, 1899, appellant, in another petition, then filed, again asked advice of the chancellor and averred that there were only "remnants, odds and ends" left of the stock, a sale of which as a whole, would redound to the benefit of his assignors and their creditors. The order of sale was granted by the court, though none of the creditors, even those who were parties to the action, had notice of the request or order. The law firm of Kohn, Baird & Spindle, who represented a few creditors, not parties of record, had such notice, but did not concern themselves about it as their clients had theretofore agreed with appellant and Simonson, Whiteson & Company to accept fifty cents on the dollar in settlement of their demands.

The assignee thereupon caused to be inserted in small type and in an obscure column of the Louisville Evening Times, between a notice relating to false hair and another to false teeth, an abbreviated advertisement of the time and place of the sale to be made of the assigned merchandise and fixtures. The Times' foreman was directed by the assignee to insert the advertisement without display. It appeared in the Times on Friday and Saturday, January 27th and 28th, 1899, and the sale occurred on January 30th, which was Monday of the following week. As there was no issue of the Times on Sunday the advertisement was published but two days, Friday and Saturday. The goods and fixtures sold were purchased by Henry Stern, of New York, at the price of \$15,000.00. Henry Stern is a brother of Leo Stern, who was a member of the firm of Simonson, Whiteson & Company at the time of the assignment to Comingor. Shortly before the sale the three members of the firm of Simonson, Whiteson & Company, made an agreement in regard thereto with Henry Stern, which was reduced to writing by their attorney and signed by the parties, several months later. That writing reads as follows:

"We have agreed to divide equally between us all that may be left out of the assets of Simonson, Whiteson & Company, and what we may save from the wreck after paying the indebtedness of said firm to D. L. Newborg & Son and Stern, Falk & Co.

"Louisville, Ky., June 14th, '99.

"D. G. SIMONSON,

"I. WHITESON,

"LEO STERN."

Under the verbal agreement entered into before the sale, Henry Stern was to come to Louisville, and bid in the stock of goods and fixtures at not less than \$15,000.00, nor more than \$20,000.00. On the day of the sale and at the hour named in the advertisement, to-wit: 10 o'clock, a. m., Henry Stern was on hand, pursuant to the agreement referred to, and at 10:30 o'clock the goods and fixtures were knocked down to him at the price of \$15,000.00, which he at once paid to the assignee. The sale was consummated under unusual circumstances. The store was closed down to the hour fixed for the sale, and neither at the time indicated, previous thereto or during the sale was there any effort to attract the notice of the public, either by the customary ringing of an auction bell, the hanging out of a red flag, distribution of hand bills, or posting of a notice on the store door. While conducting the sale the auctioneer stood on the stairway leading from the first to the second floor of the store. In from five to twenty minutes

after the auctioneer reached the store the sale was consummated, Though all the time present, neither the assignors nor assignee exhibited the goods, called attention to their quality or value, or did anything to encourage bidding. All the while the goods on the first floor remained covered, and those in the basement and on the second, third and fourth floors were never shown the few persons, besides the parties in interest present.

The auctioneer did not have, nor had the assignee furnished him, an inventory of the property sold. There was no offer to sell the goods in lines or by lots, or to make a separate sale of the fixtures. But few persons were present and Henry Stern was practically the only bidder. According to the testimony of some of the persons in attendance, one or two of the spectators would have made bids, but Whiteson deterred them from doing so by requesting them not to take away his bread and meat; one prospective bidder was threatened with a choking if he persisted in bidding, and yet another was given a note of several hundred dollars he was owing Simonson, Whiteson & Company, to keep him from bidding.

On the day of the sale and upon his paying the assignee the amount of his bid, Henry Stern took possession of the goods and two days later placed them in possession of Leo Stern, Simonson and Whiteson, the first as manager, immediately following which, Henry Stern returned to New York, where he has since remained. While in charge of the goods and business left with him by his brother, Henry, Leo Stern replenished the stock to the amount of \$15,000.00, and during the six months of his management of the business he deposited in the German Bank of Louisville \$82,138.16, realized from the sale of the goods his brother purchased of the assignee of Simonson, Whiteson & Company, and the \$15,000.00 further stock, added thereto under his (Leo Stern's) management of the business.

On February 1st, 1899, or two days after the sale to Henry Stern, of the goods and fixtures of Simonson, Whiteson & Company by the assignee, the Louisville Banking Company, principal creditor of the firm, brought suit to set aside the sale of the property to Henry Stern, and to subject the same to the payment of the firm's debts; and shortly thereafter other creditors of the firm filed, in the United States District Court for the Western District of Kentucky, a petition in involuntary bankruptcy against Simonson, Whiteson & Company, and each member of the firm, and the company and members thereof were later duly adjudged bankrupts. Following this adjudication, the referee in bankruptcy issued rules against Comingor, assignee of Simonson, Whiteson & Company and his attorneys to show cause why the assignee should not pay to the trustee in bankruptcy \$3,398.90, the amount claimed by the assignee as commissions, also \$6,766.53, balance of the assets of the estate of his assignors admitted by him to be in his hands, and the further sum of \$3,000.00 which he claimed to have paid as a fee to his attorneys. The rule being made absolute as to the \$6,766.55, that sum was paid by the assignee into the Federal Court, but upon appeal to the Circuit Court of Appeals and later a writ of error to the Supreme Court, that tribunal reversed the judgment of the district court upon the ground that the assignee had a right to have his accounts settled in the State court, in which was still pending the action brought by him to obtain a settlement of his accounts. (*Comingor v. Louisville Trust Co.*, 184 U. S., 184).

Upon the conclusion of the litigation in the Federal Courts, the Louisville Trust Company, trustee in bankruptcy, by supplemental answer, cross-petition and counter-claim filed in the action in the Jefferson Circuit Court, asked to enforce a settlement of Comingor's accounts as assignee of Simonson, Whiteson & Company and to recover of him the amount he had or should have in his hands belonging to the estate of his assignors.

The circuit court, being of opinion that the questions of law and fact raised by the pleadings could be determined by the court without the cost and delay resulting from a reference to the commissioner, refused to order such reference. On the hearing the court below rendered judgment in favor of the Louisville Trust Company, trustee in bankruptcy, of Simonson, Whiteson & Company, against Comingor, assignee of the same firm for \$10,706.00, with six per cent. interest from July 5th, 1900, upon the ground that his negligence caused a loss to the estate of that amount; and for the further sum of \$5,398.90, with six per cent. interest from the 5th day of July, 1900. The sum last mentioned being the amount of commissions retained by him for services claimed to have been rendered as assignee, but which the court held he was not entitled to on the ground that his negligence caused a loss to the estate of his assignors to that amount, in addition to the larger sum first named. Comingor complains of the judgment, hence the appeal; and as appellee, Louisville Trust Company, was claiming in its answer and counter-claim a much larger sum than was recovered, it took a cross-appeal because of the failure of the circuit court to give judgment in its favor for the full sum claimed.

We are of opinion that the evidence appearing in the record clearly shows that there was a fraudulent agreement, entered into before the public sale of January 30th, 1899, between Simonson, Whiteson and Leo Stern on the one part and Henry Stern on the other, pursuant to which the stock of assigned goods and fixtures of the former were to be sold to the latter at greatly less than their value, to-wit: \$15,000.00, or not exceeding \$20,000.00; and that, after being purchased by Henry Stern, they were to be sold and the proceeds divided among Simonson, Whiteson and Leo Stern, after paying the claims of the preferred creditors named in the writing subsequently drawn to evidence the agreement.

Appellant's knowledge of the agreement and participation in the consequent fraud is, we think, also established by the evidence. His position as book-keeper of Simonson, Whiteson & Company, necessarily made him familiar with their business and rendered it practically impossible for them to execute the agreement in question without his knowledge and assistance. As the assignment was necessary to carry out the fraudulent agreement it is most natural that the firm should have selected their book-keeper and confidential friend to act as assignee, if, as the evidence in the record tends to show was the case, they knew he would further their purposes. Their attorneys represented appellant until he disposed of the assigned property, but in this court he has been and is represented by other counsel who had no connection with the assignment or disposition of the assigned property. One of his first acts as assignee was to put it out of the power of the appraisers to fairly value the property and assets that came to his hands, for he and his assignors so arranged and concealed the goods and fixtures and juggled inventories and price lists, as to prevent a fair appraisement. The circumstances attending the advertisement and sale of the goods and fixtures to Henry Stern could not have been accidental, and would not have prevailed without appellant's assistance or connivance. No surer means could have been adopted to carry out the fraudulent scheme contemplated by his assignors and Henry Stern than those resorted to by appellant in procuring from the court, without notice to the creditors and by a suppression of the true facts in respect to the value of the goods, the order of sale, and the illegal manner of advertising and conducting the sale.

In the petition filed by appellant for "advice" and to obtain of the court the order of sale, he admitted phenomenal sales of the assigned goods and represented that he still had in the store "over \$5,000.00," worth of goods which he wished to sell as "remnants, odds and ends."

When the petition was filed he knew that the goods, fixtures and accounts then in the store amounted in value to not less than \$70,000.00. In addition it appears from the record that appellant's attorney who advised him in all matters connected with the assignment wrote the agreement in question.

It further appears from the evidence that appellant did not file in the county court or clerk's office an inventory of the assigned estate, or schedule of the debts of his assignors.

From all the evidence before us we can not doubt appellant's knowledge of the fraudulent agreement, or his participation in its execution. If he did not know of the fraudulent agreement and the manner in which it was consummated, he was extraordinarily negligent, for the evidences thereof manifested themselves in his presence and in connection with his duties as assignee, from the time of his appointment down to the beginning of this litigation; in view of which his failure to detect it, is inexplicable and unpardonable.

In our opinion appellant should have realized a much larger sum from the sale of the goods and fixtures than he received.

Without adopting the estimate of any particular witness, we are satisfied that the great weight of the evidence is to the effect that the stock of goods sold by appellant to Henry Stern was at the time of the sale worth at cost prices not less than \$50,000.00 and the fixtures not less than \$10,000.00, making the total value of goods and fixtures \$60,000.00. Deduct from this amount 40 per cent. or \$24,000.00, for depreciation in the value of the stock and fixtures, and the \$15,000.00 received by appellant in the sale to Henry Stern, and there will be left \$21,000.00 with which appellant is justly chargeable. In addition he should be charged with \$3,398.90, the commissions retained by him for services rendered as assignee, making a total of \$24,398.90, for which, with interest from July 5th, 1900, appellee should have recovered judgment in the court below.

No doctrine is better settled than that an assignee, or other trustee, in the management of the estate entrusted to him is bound to exercise the same care that an ordinarily prudent person would use in his own affairs under like circumstances, and for such losses, deficiencies or injuries, as may be occasioned by his affirmative or negative violation of this rule, and the duties it imposes, he is answerable for the loss thereby inflicted. (Perry on Trusts, sec. 770; Pom. Eq. Juris., sec. 1070.) In Pomeroy's Equity Jurisprudence, section 1079, it is said:

"It might be supposed that the term 'breach of trust', was confined to willful and fraudulent acts which have a quasi criminal character, even if they have not been made actual crimes by statute. The term has, however, a broader and more technical meaning. It is well settled that every violation by a trustee of a duty which equity lays upon him, whether willful and fraudulent, or done through negligence, or arising through mere oversight or forgetfulness, is a breach of duty."

Upon the facts furnished by the record before us, and under an application of the just rule above stated, appellant's management of the estate entrusted to him was highly reprehensible, and such as to manifest bad faith and gross misconduct, which this court can not ignore or condone, even to the extent of allowing him compensation for any part of the services he claims to have rendered as assignee.

The circuit court's action in refusing him compensation was, therefore, proper, for a trustee guilty of fraud or misconduct in the management of the estate is not entitled to contemplation. (Perry on Trusts, section 919; 4 Cyc., 257.)

We do not think appellant's contention that he should have had a trial by jury of the questions of fact raised by the pleadings is tenable. The Constitution secures to a litigant the right of trial by jury, only in cases where such right existed at common law. (O'Connor, &c.

vs. Henderson Bridge Co., 95 Ky., 643; Ford vs. Ellis, 21 Ky. Law Rep., 1838; Carder vs. Weisenburg, 95 Ky., 138; Reese, Adm'r vs. Youtsey, 24 Ky. Law Rep., 603.) In view of expensive testimony having been taken by deposition in the case as prepared, it would have been an abuse of discretion on the part of the lower court to direct an issue out of chancery. Moreover, the action is not one on appellant's bond, but to settle his accounts as assignee. The issues of fact as to the questions of fraud and value were but incidental to the main purpose of the action, which was to compel an accounting and settlement of the assignee, and the chancellor having exclusive jurisdiction thereof, such jurisdiction carried with it the power to decide all other issues raised, without the intervention of a jury.

Appellant's contention that appellee, Louisville Trust Company, trustee in bankruptcy, has no right to assert in this action the claim in controversy, is without merit. Its right to do so was recognized by the Supreme Court in the case of *Comingor v. Louisville Trust Company*, 184 U. S., 184; and it would be an anomalous change of base to permit appellant, after defeating appellee in the Federal Courts upon the ground that he has the right to settle his accounts as assignee in the State court, to insist that appellee can not assert its right of action against him in the latter court, where he forced it to go. Section 21, Civil Code, allows a trustee in bankruptcy to sue in his own name without joining the beneficiary. Manifestly, if in this case there should be a recovery against appellant, it should be applied to the payment of the debts of Simonson, Whiteson & Company; and the trustee in bankruptcy, as the representative of the firm's creditors, would be and is entitled to receive it; for which reason it had the right to enter its appearance in the action to assert its rights. In addition, appellee was expressly authorized by an order of the Federal District Court to sue and recover of appellant the claim herein litigated, and section 47, Bankruptcy Act of 1898, made it its duty to do so.

Appellant has no just ground of complaint of the action of the circuit court in overruling his exceptions to the depositions of appellee. Under section 1008, Kentucky Statutes, and rule 12 adopted by the Jefferson Circuit Court, the depositions were properly taken upon interrogatories. As Simonson's deposition seems to have been taken after the filing of the answer and not within twenty days from the service of summons, and he is not united in interest with appellee and the deposition was not taken in his own behalf, under the rule in question it was properly admitted in evidence.

Appellant further complains that there does not appear in the record the statutory affidavit purging appellee's claim. Obviously, the objection comes too late. The cause of action stated by appellee's pleadings against appellant was complete, without an allegation that payment of the claim sought to be recovered had been demanded of appellant before suit, or that such demand had been accompanied by the statutory affidavit as to the absence of usury, &c. Failure of the plaintiff to comply with the statutory requisition as to affidavit and demand, must be objected to by the defendant before he interposes his defense on the merits of the case, by filing an affidavit showing that the preliminary proof and demand had not been made by the plaintiff, and then asking a rule against him to produce evidence of his compliance with the necessary prerequisites. If such evidence be not produced in response to the rule, the court will dismiss the action. (*Thomas, Ex'or v. Thomas*, 15 B. Mon., 182; *Gough's Adm'r v. Alvey & Co.*, 10 Ky. Law Rep., 590; *Rigny v. Peely*, 13 Ky. Law Rep., 93; *Cockrill v. Mize*, 11 Ky. Law Rep., 637; *Rogers v. Mitchell's Ex'or*, 1 Met., 24; *Lyon's Ex'tx v. Logan County*, 25 Ky. Law Rep., 1668.)

Appellant did not pursue the course above indicated, and having

allowed the case to proceed to judgment, he is estopped to complain of appellee's failure to comply with the statutory requisition of affidavit and demand.

For the reasons indicated, the judgment is affirmed on the original and reversed on the cross-appeal, and cause remanded, with directions to the lower court to enter judgment in appellee's behalf against appellant for \$24,398.90, with interest from July 5th, 1900; and for further proceedings consistent with this opinion.

Whole court sitting.

KENNEDY v. FULTON MERCANTILE CO., &c.

(Filed March 26th, 1908—Not to be reported.)

1. Contracts—Made in Name of a Company—Liability of Individuals—Persons who make a contract are bound by it although they make it in the name of a company.

2. Same—Proposed Corporation—Failure to Organize—Liability as Partners—Where those who propose to form a corporation make a contract in the name of the proposed corporation, they are bound as partners upon the contract when the corporation is not organized.

Lee & Hester for appellant.

Herschel T. Smith for appellees.

Appeal from Fulton Circuit Court.

Opinion of the court by Judge Hobson, reversing.

In September, 1906, D. B. Horn, W. C. Gammons, George Bruce, M. P. McDowell, J. B. McDowell, S. A. Bolton, and M. I. Bolton agreed among themselves to form a corporation to be known as the Fulton Mercantile Company, to conduct a mercantile business in Fulton, Ky., the company to have a capital of \$3,500. After having gotten a subscription of about \$3,500, the subscribers had a meeting at which they elected a president and a secretary and appointed a committee to confer with J. C. Kennedy about renting a brick store house. The committee, after a number of meetings with Mr. Kennedy, finally made the following written contract by authority of the other subscribers:

"Articles of agreement by and between J. C. Kennedy of the first part, and the Fulton Mercantile Company of the second part: Witnesseth, That the party of the first part this day rents to the party of the second part his entire brick building in front of Paschall Block and the Iron Warehouse in the rear and all appurtenances thereto, for which the party of the second part agrees to pay to the party of the first part six hundred dollars (\$600) per year, said amount to be paid 1-12 at the end of each month. Said Kennedy is to keep buildings in good repair. Said Mercantile Company is to be responsible for any damage done to buildings by them or their employes, except the necessary wear and decay of same. Said Mercantile Company is to keep the Iron Warehouse in proper repair for same so long as said company uses it. The arches cut in the brick wall by M. P. McDowell are to be properly replaced by said Fulton Mercantile Company at expiration of said company's lease if so desired by said J. C. Kennedy. Whatever fixtures furnished by said Mercantile Company may be removed by said company at expiration of lease if said Kennedy should not want to purchase same. On above terms, party of the first part is to let party of the second part have the build-

ings for five years, beginning October 1, 1906. Witness our hands this September 7th, 1906.

"J. C. KENNEDY,
"THE FULTON MERCANTILE CO.
"Per M. P. McDOWELL, Sec."

Witness:

"A. H. MOHUNDRO."

On January 3, 1907, Kennedy brought this suit against them charging that they had taken possession of the property and had had the use of it but had paid no part of the rent and had not kept the premises in repair, to his damage in the sum of \$100. He prayed judgment against them for the rent due, \$150 and \$100 damages. The defendants answered, pleading in substance that it was agreed between them and Kennedy that the contract was not to take effect or be binding unless they organized the corporation; that by mistake of the draftsman this part of the agreement was left out of the contract; and that they had failed to organize the corporation by reason of the fact that the necessary subscriptions to the stock could not be secured. Proof taken and on final hearing the circuit court dismissed Kennedy's petition. From this judgment he appeals. Kennedy made Earl Boaz and Aud Boaz, also defendants to his petition, but the proof clearly shows that they subscribed for stock after the contract with Kennedy was made, and that they had nothing to do with the making of the contract. The court properly dismissed the petition as to them as they were strangers to the contract; but as to the other defendants a more difficult question is presented. To state all the evidence in detail, would unduly extend this opinion and we shall content ourselves with a statement of the facts which control the case. The witnesses introduced by the plaintiff to show that it was agreed that the contract was not to be binding unless the corporation was organized and that this was left out of the contract by mistake do not testify that they said this to Kennedy or that he agreed to it. They say that this was understood; but the facts that they state only go to show that both parties then assumed that the corporation would be organized. They show that they asked Kennedy to subscribe for stock in the corporation and that they informed him that the stock was not made up; but there is nothing in what they said to indicate a doubt on their part that the stock would be made up. On the contrary Kennedy testifies emphatically that nothing of the sort was said or understood. The contract was under discussion some days before it was made. Their first proposition to Kennedy was not accepted. When their second proposition was accepted, time was taken to reduce the contract to writing. The first draft of the contract was not acceptable to Kennedy; a second draft was then made and before it was signed, A. H. Mohundro was called in to witness it. He read the contract aloud twice before it was signed and testifies without contradiction that nothing was said in his presence about the contract not being binding unless the corporation was organized. The defendants took possession of the property; they repaired the warehouse and after they failed to organize the corporation, Geo. Bruce who had his stock in the storeroom, and now testifies that the contract was conditional, went to see Kennedy and proposed to pay him rent at \$20 a month for the room which he occupied. Kennedy declined to take it and they then called in a justice of the peace as an adviser for them both, Bruce telephoning for him. When he came, both of them stated the case to him and neither one of them then said anything about the contract being conditional. In addition to all this, the evidence satisfies us that the corporation was not organized because the defendants fell out among themselves. Horn wished to put in a stock valued at \$1,600 on his subscription and Bruce was to put in his

stock. Some difficulty arose between them about these matters which led to the abandonment of the scheme. The proof does not show that Kennedy took possession of any part of the rented premises or rented it out; on the contrary it shows that he was careful to do nothing to waive his contract rights under his lease. The fact that the defendants took possession of the property and improved the warehouse is conclusive to our minds that they assumed that they would organize the corporation, and after they had done this, their obligation to Kennedy could not be affected by their falling out among themselves and by reason of this failing to organize. A written contract deliberately entered into and intelligently made should not be set aside or modified unless on satisfactory proof of mistake. After the parties themselves treated the contract as absolute by taking possession of the property and improving it, they can not be released from their obligation on such inconclusive proof as we have here to the effect that the contract was conditional and was not binding unless the corporation was organized.

There is nothing to sustain the charge that the property was damaged; but under the proof Kennedy was entitled to judgment for the installments of rent due at the time the petition was filed. Persons who make a contract are bound by it, although they make it in the name of a company. Where those who propose to form a corporation make a contract in the name of the proposed corporation they are bound as partners upon the contract when the corporation is not organized; and we think the fair effect of all the proof is that the defendants assumed that they would form the corporation and made the contract with Kennedy upon this assumption. When they did this, they took the risk that the corporation should be organized.

The judgment appealed from as to Earl Boaz and Aud Boaz is affirmed but as to the other defendants, the judgment is reversed and cause remanded, for a judgment as above indicated.

NIOUM V. COMMONWEALTH.

(Filed March 26, 1908—To be reported.)

1. New Trial—Newly Discovered Evidence—Probable Effect on Another Trial—To entitle one to a new trial on the ground of newly discovered evidence, such evidence should be of such a controlling and decisive character as to convince the court that it will probably have a preponderating influence upon another trial.

2. Same—Foreigner—Trial for Felony—Appointment of Interpreter—Authority of Court—A foreigner on trial for maliciously cutting another, who does not understand the English language, and had to have an interpreter to translate his testimony to the jury, is not entitled to a new trial after conviction, on the ground that there is no statute in this State authorizing the appointment of an interpreter except in bastardy cases (sec. 181) and courts of continuous session (sec. 1034.) Courts in the absence of statutory authority have the inherent power to appoint an interpreter when the ends of justice require it.

3. Same—Failure to Swear Interpreter—Absence of Objection—Consideration on Appeal—Where an interpreter was permitted by the court to be used on the trial of one for felony, who was introduced and used by the defendant to translate his testimony to the jury, the fact that he was not sworn, to which no objection or exception was made by defendant until the filing of his grounds for a new trial, such error or oversight can not be considered on appeal.

4. Same—Qualification of Interpreter—Where an interpreter was introduced by a defendant on trial for a felony and used by him to interpret his testimony before the jury, to which no objection was made by the Commonwealth, the court had a right to assume that he was qualified to act, and it was not error in the court to fail to examine into his competency as an interpreter.

5. Arraignment of Defendant—Showing of Record—Grounds for New Trial—On the trial of one for a felony, the fact that the record fails to show that the defendant was arraigned, or that a formal arraignment was waived, or that his plea was entered, is not cause for reversal, unless such failure is made a ground for a new trial.

Allan D. Cole, G. W. Adair and Virgil McKnight for appellant.

James Breathitt, Thos. B. McGregor and Charles H. Morris for appellee.

Appeal from Mason Circuit Court.

Opinion of the court by Judge Settle, affirming.

The appellant, Demetri Nioum, was indicted, tried and convicted in the Mason Circuit Court for maliciously shooting and wounding Thomas James, and his punishment fixed at three years' confinement in the penitentiary. Appellant was refused a new trial, of which, and the judgment of conviction, he now complains.

Appellant and James are Greeks, both came from Bulgaria to the United States and later to Maysville, Kentucky, where they entered the service of the Chesapeake and Ohio Railway Company, the former as a common laborer in railroad construction, the latter as an interpreter of the Greek or Bulgarian language, there being a number of persons, beside appellant, from Bulgaria in the employ of the railway company, unable to speak or understand the English language.

It appears from the evidence that the wives of James and appellant are first cousins; that the two men were excellent friends while they lived in Bulgaria, and continued so after they came to Maysville until about one week before the shooting of James by appellant, at which time the latter had a difficulty with some of his fellow workmen which resulted in his quitting the service of the railroad company and going to Cincinnati where he remained for a week and then returned to Maysville. James seemed to have interfered at the time of the difficulty, but whether for or against appellant is not clear; he did, however, render him some assistance in getting from the railway company, the wages due him. Unless appellant entertained ill-will against James for something done by the latter at the time of his (appellant's) difficulty with his fellow workmen, the record fails to furnish a motive for the shooting and wounding of James.

The facts as to the shooting and wounding of James were in brief as follows: In April, 1907, James and two associates, Crager and Hughes were on the bank of the Ohio river, engaged in the pastime of shooting at a mark. Another man, Harrison, was also present, but did not take part in the target practice. The lock of the pistol with which the shooting was done got out of repair, and while James, Crager and Hughes were trying to fix it, appellant came up and, without warning, shot James; the ball entering his neck immediately below the jaw and passing out on the opposite side, within one sixteenth of an inch of the carotid artery, making a very dangerous and well nigh fatal wound. After firing the shot, appellant ran from the ground and while running fired another shot at James, but without effect. He then left Maysville for Cincinnati and a few days after was arrested not far from Maysville.

Shortly after appellant's difficulty with his fellow workmen, and before the shooting of James, he inquired of the latter whether he had a gun. The shooting and wounding of James was admitted by appellant at the time of his arrest and again as a witness on the trial, but on each occasion he claimed to have been drunk at the time of the shooting and unconscious of the act.

Appellant's motion for a new trial was based on the grounds: 1st. That the circuit court erred in admitting and rejecting evidence. 2nd. That the verdict of the jury was influenced by passion or prejudice. 3rd. Newly discovered evidence material to the defense, ascertained after the trial, and which he could not with reasonable diligence have discovered in time to produce at the trial. 4th. That the verdict of the jury is not sustained by sufficient evidence and is contrary to law. 5th. Accident or surprise which ordinary prudence could not have guarded against.

The 2nd and 4th grounds can be considered together and summarily disposed of. There is not a fact or circumstance presented by the record that tends in the remotest degree to indicate that the jury were influenced by either passion or prejudice, and the fact that they fixed appellant's punishment at three years' confinement in the penitentiary, when they might have made it five, would seem to indicate that their sympathies were to some extent, enlisted in appellant's behalf, on account of his ignorance of the English language and friendless condition. Instead of there being no evidence, or not a sufficiency of evidence to support the verdict, the contrary is certainly true. Leaving out of consideration appellant's admission of guilt, the testimony of the Commonwealth, which was contradicted by that of appellant in no material particular, so demonstrated his guilt as to remove any vestige of doubt and close every loophole of escape. The evidence introduced by appellant, other than his own testimony, failed to furnish any proof that he was, by reason of intoxication at the time of shooting and wounding James, mentally incapable of understanding the nature and enormity of the act, and the fact that he ran away so swiftly from the scene would seem to indicate that he was not intoxicated to an appreciable extent. It also manifests that the verdict was not contrary to law. During the trial no objection was made, or exception taken by appellant to the instructions given by the court, and no criticism of them is to be found in the briefs of his counsel; in view, therefore, of the convincing proof of appellant's guilt, and the admittedly correct presentation by the instructions, of all the law of the case, we are unable to perceive any ground for appellant's complaint that the verdict was or is contrary to law.

The complaint made in ground number 1, of the admission of incompetent, and the rejection of competent evidence, on the trial by the court below, is unsupported by the record. We have failed to find that any competent evidence was excluded by the court, or that appellant excepted to any ruling of the court excluding evidence. The evidence admitted on the trial which appellant insists was incompetent, was the alleged false interpretation of his testimony given the jury by one Nick Poppes, introduced by appellant as interpreter, and the contents of a letter written by appellant in Greek, or Bulgarian, to Kosta and Nickles, of Cincinnati, soon after the shooting of James, which Poppes translated into English and read to the jury at appellant's request.

As to the alleged misinterpretation by Poppes of appellant's testimony and of the letter to the jury, it seems sufficient to say, that no objection was made by appellant at the time, to Poppes' interpretation of his testimony, or of the letter read to the jury; indeed, his

complaint as to these matters was first made in the motion and grounds for a new trial, which, in view of section 281, Criminal Code, will prevent this court from considering it.

It is argued, however, that appellant's ignorance of the English language and consequent inability at the time of testifying to detect the alleged false interpretation given his testimony and the letter by Poppes to the jury in English, prevented him from then making his objections thereto known to his counsel or the trial court, but that when, after the trial, he discovered for the first time that Poppes had, to the prejudice of his substantial rights, falsely interpreted his testimony to the jury, and falsely interpreted the letter written to Kosta and Nickles, this after acquired information being newly discovered evidence of which he was by accident deprived on the trial, entitled him to a new trial upon the third and fifth grounds filed in support thereof.

We find in the record the affidavits of appellant, his chief counsel and one Sam Roberts, giving the facts intended to show the alleged newly discovered evidence and how and when it was discovered by appellant. The affidavits of appellant and his counsel in substance recite that appellant tried to secure the services of an interpreter of Cincinnati, other than Poppes, to act in that capacity at his trial; that information came to him that the person to whom he wrote was not in Cincinnati and could not attend the trial, but that he had sent to act as interpreter in his place, the witness Poppes, who though unknown to appellant, was introduced by him as interpreter on the trial. Affiants, however, gave it as their belief that Poppes had not in fact been sent by the other interpreter to act in his place, but that his attendance at the trial had been procured by James, whom appellant had shot and wounded. That Poppes, by fraud or mistake, had misinterpreted his testimony and the letter to Kosta and Nickles to the jury, and this fact was first made known to appellant by Sam Roberts after the trial, by the latter's translating into Bulgarian and reading to him the typewritten manuscript made from the notes of the stenographer taken in short hand at the trial; and that Roberts is a competent interpreter of the Greek or Bulgarian language and can likewise readily translate the English into Greek and Bulgarian.

The affidavit of Roberts contains the statement that he is a baker by occupation, a native of Bulgaria, and the master of twelve languages, including Bulgarian or Greek; that he had not seen the letter from appellant to Kosta and Nickles, but had read to appellant in Bulgarian from the stenographer's transcript, the interpretation given on the trial by Poppes of appellant's testimony and of the letter in question "and finds from the defendant (appellant) Demetri Nioum, that said interpretation is false and not true."

None of the affidavits disclose how much, or what part of the testimony of appellant was falsely interpreted by Poppes, nor do they indicate in what particular, or to what extent, the letter appellant wrote Kosta and Nickles, was falsely interpreted by Poppes. If the affidavit of appellant or that of Roberts contained a true translation into English of the letter, a comparison of such translation with that given by Poppes found in the bill of evidence, would prove the deception, if any was practiced. The affidavits fail to set forth in substance, or at all, the facts constituting the alleged newly discovered evidence or to show their materiality, and are based wholly upon what appellant claims he is now prepared to say he testified on the trial without disclosing a true interpretation of the testimony as he claims he gave it.

The affidavits also fail to show that Poppes is not a competent interpreter, or to impeach his interpretation of appellant's testimony, nor do they, except by indirection, attack Poppes' integrity. They ex-

press the belief of one of the affiants, that Poppes' attendance at the trial to act as interpreter was instigated or procured by James, the Commonwealth's witness, but state no facts to support such belief. In our opinion, the affidavits were wholly insufficient to authorize the new trial asked by appellant. To entitle one to a new trial upon the ground of newly discovered evidence, the discovered evidence should be of such a controlling and decisive character as to convince the court that it will probably have a preponderating influence upon another trial. As said in *Torian, &c. v. Terrell*, 29 Ky. Law Rep., 306:

"Applications for a new trial are addressed to the sound discretion of the court, to be exercised according to the rules and usages of law, and the court should regard the substantial justice of the case, equally remote from favoring negligence, or exacting unreasonable diligence."

Poppes' translation of the letter written by appellant to Kosta and Nickles, which appears in the record, reads as follows:

"Messrs. Kosta and Nickles:

"I am in Maysville, Ky., out in the woods. I am two days up am not sure whether the police will come to catch me or not. And now one says go to New York. I am up here and never eat nothing for two days and I have just waited up here. I am scared to go to the city, because, I shot my cousin. I have that check over and I have some money coming to me in C. H. & D. depot and if you can get it send it to my wife and children in the old country."

A comparison of the foregoing letter with the testimony of appellant given on the trial and interpreted by Poppes will show no substantial difference between them, and as the original was found on the person of appellant at the time of his arrest, and he admitted writing it, no reason can be urged against its competency. It was not, however, more prejudicial than appellant's own testimony, for it contains no other admissions of his guilt than he made as a witness.

Appellant and Poppes, his interpreter, were sworn and introduced as witnesses in the former's behalf, after the Commonwealth introduced its evidence in chief, and it is now argued by his counsel that "the record does not show that the appellant had interpreted to him, or was enabled to understand or that he knew an oath was administered to him." Simply stated this is a mere declaration that appellant was not legally sworn before giving his testimony. If this were true, we do not think he can complain that the Commonwealth allowed him to give his testimony without requiring him to be sworn, or having interpreted to him the meaning of the oath, administered before giving it. It does not lie in his mouth to say that his testimony was less accurate or truthful than it would have been, if he had understood the meaning of the oath; moreover, a complete answer to the argument is to say, that the record also fails to show that an objection was made or exception taken by appellant's counsel as to this matter at the time, nor was it assigned as error on the motion and grounds for a new trial, consequently this court is prevented by section 281, Criminal Code, from considering it on appeal.

It is likewise insisted for appellant that the use of interpreters in the courts of this State, is restricted by the Kentucky Statutes to bastardy cases (sec. 181) and courts of continuous session (sec. 1034.) While it is true the Kentucky Statutes contain no other provisions in respect to the appointment of an interpreter than those referred to, the courts, in the absence of statutory authority, have the inherent power to allow the use of interpreters when the ends of justice require it. If this were not true, persons charged with crime or having valuable property interests involved in litigation, and who,

by reason of their inability, or that of some of their witnesses, to speak or understand the English language, would, in the absence of an interpreter, be prevented from asserting or protecting their rights and thereby subjected to the grossest injustice. It is also sufficient to say of this, and the further complaint of appellant that the record contains no order appointing Poppes interpreter, that no objection was made or exception taken to the action of the court in permitting him to act in that capacity, before or at the time he so acted; nor was the matter called to the attention of the court in the motion and grounds for a new trial; therefore, it will not be considered by this court.

It is also complained by appellant that the record fails to show that Poppes was qualified to act as interpreter. This complaint would be well founded, but for the fact that the interpreter was introduced and used on the trial by appellant. This being manifest, and no objection being made by the Commonwealth to his introduction, the court had the right to assume, as it doubtless did, that both parties were satisfied as to his qualifications and capacity to act as interpreter; consequently, there was no occasion for an examination of the interpreter to ascertain his qualifications.

Obviously, it is the duty of the court to ascertain whether one offered as an interpreter is qualified to act as such, but the failure on the part of the court to perform such duty, can not be urged for a reversal where, as in this case, the necessity for its performance was obviated by the recognition of the interpreter's fitness, manifested by both the Commonwealth's attorney and defendant. Besides, this ground of complaint was not made to the court below in proper time, or presented in the grounds for a new trial. (Section 281, Criminal Code; *Rutherford v. Commonwealth*, 78 Ky., 639; *Val Dalsen v. Commonwealth*, 28 Ky. Law Rep., 340.)

Appellant's final contention is that he was not legally arraigned. It is not claimed that the record fails to show a waiver of formal arraignment, or that a plea of not guilty was entered, but contended that it does not show that the purpose and meaning of the arraignment and plea were interpreted to, or understood, by appellant. The question here raised has time and again been decided by this court, adversely to appellant's contention; the most recent case being *Bischoff v. Commonwealth*, 29 Ky. Law Rep., 770. The opinion contains a review of all the cases in this State bearing on the question, and adheres to the conclusion expressed in most of them, viz: That the failure of the record to show that the defendant was arraigned, or that a formal arraignment was waived, or that his plea was entered, whether of guilty or not guilty, is not cause for reversal, unless such failure is made a ground for a new trial. (*Bischoff v. Commonwealth*, and authorities therein cited.)

The record in the case before us does not show, nor is it claimed by appellant, that he objected or excepted to the failure of the court below to have the nature and object of the waiver of formal arraignment or of his plea of not guilty, interpreted to him, or that such failure was made a ground for a new trial.

For the reasons indicated, the judgment is affirmed.

FALLS CITY WOOLEN MILLS v. PIKE, BY, &c.

(Filed April 15, 1908—Not to be reported.)

Grounds for New Trial not in Record—Sufficiency of Petition—As appellant's motion and grounds for a new trial are not in the record, the court can not know what errors were complained of in the lower

court. Such being the condition of the record and the petition being sufficient to support the judgment, it will not be disturbed.

O'Neal & O'Neal for appellant.

L. F. Withers and Charles F. Ogden for appellees.

Appeal from Jefferson Circuit Court, Common Pleas Branch, Third Division.

Opinion of the court by Judge Settle, affirming. .

This is an appeal from a judgment entered upon a verdict awarding appellee, an infant, \$600 damages for an injury to his arm and hand, sustained by their being caught in a machine in appellant's manufacturing establishment where appellee was employed as a servant; it being averred in the petition and proved on the trial, that the machine in question was a dangerous one, and that appellee was injured because of the negligence of appellants in requiring him—a raw and inexperienced youth—to work at such machine, without advising him of its dangerous character, instructing him in his duties, or how to avoid contact with the machine and the consequent danger and injury likely to result from such contact.

The answer contained a traverse and plea of contributory negligence, which plea was denied by reply, thereby completing the issues.

As appellant's motion and grounds for a new trial, filed in the court below, are not to be found in the record, we are unable to learn what errors were complained of in that court. We are also unadvised as to the grounds relied on by appellant for a reversal of the judgment, no brief having been filed in this court by its counsel.

Such being the condition of the record the only question to be determined by this court is, whether or not the petition is sufficient to support the judgment. Of this there can be no doubt. Therefore, the judgment is affirmed.

JACKSON, &c. v. JACKSON.

(Filed April 15, 1908—Not to be reported.)

Lands—Divisional Lines—This is a controversy over a divisional line, the instructions fairly submitted the question to the jury, the evidence was conflicting, and the verdict of the jury will not be disturbed.

J. P. Alexander for appellants.

S. Hodge for appellee.

Appeal from Caldwell Circuit Court.

Opinion of the court by Judge Hobson, affirming.

Appellants, Margaret Jackson, &c., brought this suit against appellees, Hugh Jackson, &c., to recover a strip of land in controversy between them. The defendants claim title to the land under a patent issued to Ninian Edwards on a survey made February 4th, 1805, containing 400 acres of land. The deeds under which the plaintiffs claim call for the line of the Ninian Edwards survey; so the only question in the case was the location of that line. The jury found for the defendants; the court entered judgment upon the verdict and the plaintiffs appeal.

The court instructed the jury that they should find for the plaintiffs if the dividing line between the defendants and the plaintiffs was as claimed by the plaintiffs and that they should find for the defendants if the line was located as claimed by them. Both parties claimed to the same corner at one end of the line, the controversy being a triangular piece of land on the south side of the Edwards survey. The court also instructed the jury that, in locating the line, course and distance must yield to natural objects, found on the land. The evidence was conflicting, but we can not say on the whole proof that the verdict is palpably against the evidence. The instructions of the court aptly submitted to the jury the question of fact in dispute between the parties. On the whole record we see no reason for disturbing the verdict of the jury. The course and distance called for in the patent would run the line as claimed by the plaintiffs rather than as claimed by the defendants; but the weight of the evidence shows that the corner stood at the point claimed by the defendants, and therefore the course and distance must yield to the marked corner found on the ground.

Judgment affirmed.

DOORES v. COMMONWEALTH.

(Filed April 16, 1908—Not to be reported.)

Local Option—Interstate Commerce—The appellant did not violate the local option statute in shipping whisky from Nashville, Tennessee, where it was paid for, to Burksville, Cumberland county, and the fact that he conducted a whisky business in Bowling Green did not lessen his right to do so. He had a legal right to take advantage of the interstate commerce law in a case like this and what a man has a legal right to do is not a trick or device in the meaning of the Kentucky Statutes.

Porter & Sandidge for appellant.

James Breathitt, Tom B. McGregor and Chas. H. Morris for appellee.

Appeal from Cumberland Circuit Court.

Opinion of the court by Judge Barker, reversing.

The appellant, J. T. Doores, was indicted by the grand jury of Cumberland county, charged with the offense of retailing whisky in a local option district. A trial resulted in his being found guilty and his punishment fixed at a fine of one hundred dollars, of which he now complains.

The appellant introduced no evidence in his own behalf on the trial below, resting his defense upon the testimony of the Commonwealth. The uncontradicted facts are: That Doores is engaged in the whisky business, both at Bowling Green, Kentucky, and Nashville, Tennessee; that prior to the indictment a citizen of Cumberland county, Kentucky, W. A. Gossage, sent a written order to the appellant, at Nashville, Tennessee, for a gallon of whisky, enclosing a check to pay for it and the expressage from Nashville to Burksville, Kentucky. Gossage received the whisky from the express company at Burksville, where local option prevails.

Was the defendant guilty of an offense under the local option statute? The whisky was sold in Nashville, and its shipment to Burksville was interstate commerce. Doores had a right to do business in Nashville, Tennessee. The fact that he also did business in

Bowling Green, Kentucky, did not in any way lessen this right. He had a right to sell whisky in Nashville to anybody who would buy it from him, and under the Constitution of the United States he could ship it to his consumer in Cumberland county, Kentucky. The principle involved in this case in nowise differs from that involved in *C., N. O. & T. P. R. R. Co. v. Commonwealth*, 31 Ky. Law Rep., 954, and the question here is concluded by the reasoning of the opinion in that case.

There is no doubt that Doores opened his branch house in Nashville, Tennessee, for the purpose of taking advantage of the interstate commerce clause of the Constitution of the United States, which enables him to retail liquor in the manner shown in this record; but this is a legal right, and can not in any sense be considered a trick or device in the meaning of the Kentucky Statute. What a man has the legal right to do is not a trick or device. The interstate commerce clause of the Constitution of the United States prevents the operation of the Kentucky Statutes on transactions such as the one at bar; and that clause can not be abrogated by calling the transaction under it a bad name. A peremptory instruction to find the defendant not guilty should have been given the jury at the close of the State's testimony.

For the reasons given, the judgment is reversed for proceedings consistent herewith.

COMMONWEALTH v. WHITE.

(Filed April 16, 1908—Not to be reported.)

1. Indictments—Descriptive of the Offense Charged—This indictment is defective in that it fails to describe the instrument claimed to be a deadly weapon. It might have been a pistol, or it might have been some other weapon. Under such an indictment a defendant is not apprised of the circumstances he is required to meet.

2. Same—Not Sufficient to Charge Breach of Peace—Nor is such an indictment sufficient to charge a breach of the peace, for it is not clear from the language used which of the features of the statute it was intended to cover.

James Breathitt, Thos. B. McGregor, Chas. H. Morris and Wm. Lewis for appellant.

Appeal from Clay Circuit Court.

Opinion of the court by Chief Justice O'Rear, affirming.

The indictment in this case was drawn in the following language:

"The grand jury of Clay county, in the name and by the authority of the Commonwealth of Kentucky, accuse Larkin White of the offense of willfully assaulting another person with a deadly weapon, committed in like manner and form as follows, viz: The said Larkin White, did, on the 9th day of May, 1907, in the county, circuit and State aforesaid, and in less than one year next before the finding of the indictment herein, unlawfully and willfully point a deadly weapon at W. O. B. Lipps, and use same in a threatening and boisterous manner, and thereby greatly interrupting and disturbing him, and putting him in fear, against the peace and dignity of the Commonwealth of Kentucky."

It was framed under section 1308, Kentucky Statutes, which provides that "if any person shall draw a deadly weapon, or shall point any deadly weapon at another," &c. The question for decision is

as to the sufficiency of the indictment. The rule is that "where the words of the statute are descriptive of the offense the indictment will be sufficient if it shall follow the language and expressly charge the exact offense of the defendant." But this rule applies only to offenses which are complete in themselves, when the acts set out in the statute have been done or performed. (Davis v. Commonwealth, 13 Bush, 318; Ward v. Commonwealth, 14 Bush, 233; Mitchell v. Commonwealth, 88 Ky., 349; Commonwealth v. Tanner, 5 Bush, 316.)

We think this indictment is defective in that it fails to describe the instrument claimed to be a deadly weapon. It might have been a pistol; it might have been a dirk, a sword, or a heavy murderous bludgeon. Under this indictment the defendant would not be apprized of the circumstances that he would be required to meet and rebut at the trial. It is not direct and certain, under section 124 of the Criminal Code.

It is claimed in the case at bar that the deadly weapon used by the accused was a 45 caliber pistol. Such an instrument is a deadly weapon. But the defendant should have been informed of the fact that the Commonwealth would attempt to prove that he used such weapon. The statement in the indictment that the defendant "did unlawfully and willfully point a deadly weapon at W. O. B. Lipps" is a conclusion of the pleader, in so far as it refers to the character of the weapon. The weapon may be deadly or not, according to its nature or to the manner of its use. (Commonwealth v. Duncan, 92 Ky., 595.) The weapon should be so described in the indictment that the fact that it is a deadly weapon as used must appear from the language of the charge. Whether a particular weapon such as a club, or stone, is deadly, would be a question of fact to be determined by the jury, and the fact whether it is such is to be submitted under appropriate instructions; but where the weapon charged is a pistol, a gun, a sword, or bowie knife, upon proof of that fact, under an appropriate charge contained in the indictment, a prima facie case would be made out for the prosecution. But the defendant is not required to introduce any evidence until he is first charged in appropriate language with having drawn or pointed a weapon which from its description or manner of use would be a deadly weapon. Nor is the prosecution allowed to supplement a defective charge in the indictment by sufficient proof. In this case the evidence for the State that the accused pointed a 45 calibre pistol at the prosecuting witness, did not help out the case for the State. The proof and allegations must substantially agree. The failure of allegation is as fatal as the failure of proof. The court was not at liberty, upon such a record, to submit the case to the jury, but properly instructed them peremptorily to find for the defendant, the Commonwealth not offering to re-commit the case to the grand jury in order that a sufficient indictment might be framed.

Nor is the indictment good as charging a breach of the peace, although in the descriptive part of the indictment it is stated that the defendant "used same in a threatening and boisterous manner." The descriptive part of the indictment is always construed with relation to the charging part. The defendant in this case was charged with the statutory offense (section 1308, Kentucky Statutes), of drawing a deadly weapon upon another or pointing a deadly weapon at another, or using, holding or flourishing a deadly weapon in a threatening or boisterous manner. It is not clear from the language used in the indictment which of the features of the statute was intended to be covered by it. There is no provision in the statute against "willfully assaulting another person with a deadly weapon." Still we are inclined to construe the language in the accusative part of this indictment, where the word assaulting is used, as being the equivalent of drawing a deadly weapon upon another, or pointing it at him. Under

this construction, which is as favorable to the Commonwealth as the language would seem to admit, the clause in the descriptive part that the weapon was used in a threatening and boisterous manner, was a part of the description of the specific offense charged above, and which the defendant was notified that he would be called upon to answer.

The judgment of the circuit court being in conformity with this opinion, is affirmed.

CLARK v. COMMONWEALTH.

(Filed April 16, 1908—Not to be reported.)

Appeals—Dismissal of—This appeal is dismissed because of the failure of appellant to file the record within the time prescribed by the Code.

J. W. Wright for appellant.

James Breathitt and Chas. H. Morris for appellee.

Appeal from Clay Circuit Court.

Opinion of the court by Judge Barker, affirming.

The appellant was indicted by the grand jury of Clay county charged with the offense of carrying concealed a deadly weapon. On a plea of not guilty the trial resulted in a verdict of guilty and the infliction of a fine of twenty-five dollars and ten day's confinement in the county jail. The judgment of the court was entered on this verdict on the 21st day of January, 1908. On the 23d day of January motion and grounds for a new trial were filed and overruled by the court, and on the same day an appeal was prayed to this court and granted. The record was filed in this court on the 28th day of March, 1908, more than sixty days after the rendition of the judgment.

Section 348, of the Criminal Code, provides: "The appeal must be prayed during the term at which the judgment is rendered, and shall be granted upon the condition that the record be lodged in the clerk's office of the Court of Appeals within sixty days after the judgment."

The motion of the Commonwealth, to dismiss the appeal because of the failure of the appellant to file the record within the time prescribed by the Code, must be sustained (*Commonwealth v. Howard*, 4 Ky. Law Rep., 674; *Stratton v. Commonwealth*, 84 Ky., 190; *Adkins v. Commonwealth*, 102 Ky., 94; *Mackey v. Commonwealth*, 80 Ky., 345; *Stamper v. Commonwealth*, 30 Ky. Law Rep., 1296; *Farris v. Commonwealth*, 31 Ky. Law Rep., 118), and it is so ordered.

ALSIP, &c. v. MORGAN.

(Filed April 16, 1908—Not to be reported.)

Wills—Construction of—A will providing that "all my estate, both real and personal," shall descend to my wife "her life time, to manage and dispose of as she may see cause," invested her with an absolute estate. To limit it to a life estate, it would be necessary to take from the other parts of the will their fair and legitimate meaning. The will does not stop with the words "her life time," but in invest-

ing her with the power "to manage and dispose of it as she may see cause," she is clothed with the power to convey the fee.

L. L. Pence and R. L. Pope for appellants.

R. L. Stephens for appellee.

Appeal from Whitley Circuit Court.

Opinion of the court by Judge Carroll, reversing.

The only question in this case is whether or not Polly Alsip was limited to a life estate in the land devised to her in the following will:

"I, Alexander Alsip, being of sound mind and disposing memory, do publish this my last will and testament, to-wit: I will and bequeath to my wife, Polly Alsip, all my land and farming implements belonging thereto, in short, all my estate, both real and personal, her life time, to manage and dispose of as she may see cause."

Polly Alsip was the sole object of the testator's bounty. No other person is mentioned or referred to in the will. There is no devise over, no estate in remainder. With the exception of the words "her life time," there is no expression tending to show that he did not give her the absolute and unquestioned fee in the estate. The words "her life time" are not left unexplained, nor do they convey the idea that the testator intended to limit her interest to a life estate. Following these words, she is given the right to manage and dispose of the estate as she may see cause. To limit her interest to a life estate, it would be necessary to take from the other parts of the will their fair and legitimate meaning. What the testator intended, was that his wife should take all his estate, with the right to dispose of all or any part of it in any manner she saw proper. If the will had ended with the words "her life time," it would be manifest that the testator intended to invest his wife only with a life estate, but it does not stop there. Following these words is the power "to manage and dispose of as she may see cause." There is no limitation whatever upon her power of alienation. She took more than a life estate and was clothed with the power to convey the fee.

In Page on Wills, section 466, the rule generally adopted in the construction of wills similar to the one under consideration is thus stated: "Under ordinary circumstances, a man makes a will to dispose of his entire estate, or, at least, of his estate as it exists at the time he makes the will. If, therefore, a will is susceptible of two constructions, by one of which the testator disposes of the whole of his estate, and by the other of which he disposes of a part of his estate only, and dies intestate as to the remainder, the courts will prefer the construction by which the whole of the testator's estate is disposed of, if this construction is reasonable and consistent with the general scope and provisions of the will." (Snider v. Baer, 13 L. R. A., 359.)

This construction is in harmony with section 2342 of the Kentucky Statutes, which provides that: "Unless a different purpose appear by express words or necessary inference, every estate in land created by deed or will, without words of inheritance, shall be deemed a fee simple or such other estate as the grantor or testator had power to dispose of."

And is supported by Dills v. Adams, 19 Ky. Law Rep., 1169, in which it was held that Mrs. Dills took the fee, the will providing that: "After all my just debts are paid, I will all my real estate, consisting of lands and lots, and all my personal assets, to my beloved wife, Anna Dills, * * * her natural life, for her support and maintenance, and to be disposed of at her pleasure."

And *Constantine v. Moore*, 23 Ky. Law Rep., 369, in which the court held that *Cascada F. Constantine* took the fee under a will, reading: "In consideration of the love and affection I have for my beloved wife, *Cascada F. Constantine*, I give and bequeath unto her all my property I may die possessed of, of every description, real, personal and mixed, to have the same for her benefit, to control the same during her life as she may see proper, free from the claim of every person or persons, and to dispose of the same as she may see proper at her death."

The will before us is easily distinguishable from the will construed in *Pedigo v. Botts*, 28 Ky. Law Rep., 196, and the line of cases cited therein, for the reason that in the *Pedigo* and similar cases there was a devise over. Here, there is none.

The judgment of the lower court holding that *Polly Alsip* took only a life estate is reversed, with directions for further proceedings in conformity with this opinion.

LOUISVILLE & NASHVILLE R. R. CO. v. GILMORE'S ADM'R.

(Filed April 16, 1908—Not to be reported.)

1. Railroads—Lookout—Negligence—At the time of appellee's intestate's death, the bell was being rung, the train was making a loud noise, it was about 5 o'clock in the afternoon, in July, and the slightest care, as the evidence shows, on the part of the deceased, would have enabled her to escape. The fireman had been keeping a lookout, but at the time had withdrawn to coal the engine. And it can not be said that because he withdrew to perform this duty that appellant was guilty of negligence.

2. Same—Whether it was because of intestate's deafness, or that her mind was so intent upon something else, it was her misfortune that she failed to hear it. She walked in front of an approaching train at such time as that no diligence on the part of those in charge of the train could have prevented or discovered her peril.

Helm & Helm, Benjamin D. Warfield and H. L. Stone for appellant.

Forcht & Field and Dodd & Dodd for appellee.

Appeal from Jefferson Circuit Court, Common Pleas Branch, Third Division.

Opinion of the court by Wm. Rogers Clay, Commissioner, reversing.

T. M. Gilmore, administrator of *Julia Gilmore*, instituted this action against appellant, *Louisville & Nashville Railroad Co.*, to recover damages for the death of *Julia Gilmore*, which is alleged to have resulted from the negligence of appellant. From a judgment for \$5,000 in favor of appellee, this appeal is prosecuted.

The death of *Mrs. Gilmore* occurred under the following circumstances: Appellant maintains double tracks between *Louisville* and *Cincinnati*, which, in the former city, parallel *Frankfort avenue*, a public thoroughfare, for a distance of about two miles, the street being on the south and the tracks on the north. Running northwardly from *Frankfort avenue* and crossing appellant's tracks are various public streets. One of these streets, *Bailey avenue*, which is located about three-fourths of a mile within the eastern limits of *Louisville*, extends from *Frankfort avenue* two squares northward to *Field avenue*. At the time of the accident double tracks were also maintained on *Frankfort avenue* by the *Louisville Railway Co.* These tracks,

at a point opposite Bailey avenue, merge into a single track, and then thereafter continues eastwardly for several hundred feet, and then changes into a double track opposite Crescent avenue. About 160 feet west of Bailey avenue is an alley extending from the north to the right of way of appellant on the south, and opening thereon. Immediately opposite the mouth of this alley, and on the south side of Frankfort avenue, is Moore's drug store. At the time of the accident there was a plank opposite the mouth of the alley, which led across a ditch on the north side of appellant's right of way. On the south side of appellant's right of way there was a ditch, across which a log or cross-tie was placed. Beginning at a point some 200 or 300 feet east of Bailey avenue the tracks of appellant describe a curve, the outer rim being to the north and ending between Bailey avenue and the alley. On the line between Frankfort avenue and the right of way are telephone, telegraph, electric light and trolley poles. The street is slightly elevated above the tracks. At a point about 1,000 feet east of the place of the accident the elevation is about 5 feet.

The death of Mrs. Gilmore occurred about 5 o'clock on the afternoon of July 4, 1905. The testimony shows that she left the rear of her premises and crossed the tracks of appellant and Frankfort avenue, and went to Moore's drug store, on the south side of Frankfort avenue. Leaving the drug store, at which time it was broad daylight, she allowed an interurban car of the Pewee Valley line to pass. At the time there was a Fourth of July picnic in progress at a Catholic institution in the neighborhood, and a great many street cars of the Louisville Railway Co. were passing two and fro. Children of the neighborhood were shooting fire-crackers and torpedoes on the sidewalk and in the street adjacent to the drug store, and considerable confusion prevailed. Mrs. Gilmore walked rapidly across the street, a distance of 64 feet; thence 20 feet more on to the first or southernmost track of appellant; thence 10 feet more, close to, but not on the second track, where she was struck. The train that struck Mrs. Gilmore was a freight train consisting of an engine, 22 loaded and 2 empty cars, and a caboose. It was on time and was running at about 12 to 15 miles per hour. When the accident occurred the engineer was keeping a lookout, and the bell of the engine was ringing. The fireman was also on a lookout until the engine was within a few feet of Bailey avenue. After looking ahead and seeing no one either on or approaching Bailey or Hite avenues, he stepped down in the deck to put coal in the furnace. As he ceased shoveling and stepped to the gangway he saw the body of Mrs. Gilmore fall from the pilot beam. He then notified the engineer, and the train was stopped.

The evidence conduces to show that the pathway leading from the mouth of the alley across appellant's tracks to Moore's drug store had been used by the public for such a length of time as to raise the presumption of knowledge or acquiescence on the part of appellant. It is not contended that the engineer saw, or could have seen Mrs. Gilmore in time to prevent the accident, for, being on a curve, his view to the left was cut off; but it is contended that it was the duty of appellant to keep a lookout for persons using the pathway in question, and that the negligence of appellant consisted in the fireman's withdrawing his lookout at a time and place where the lookout by the engineer was practically of no avail.

Assuming that the evidence was sufficient to impose upon appellant the duty of keeping a lookout at the place of the accident, was it negligence on the part of the fireman to coal the engine under the circumstances?

From the evidence in the case it appears that one of the principal duties—if not the chief duty—of the fireman is to fire the engine. Schedules must be maintained and trains run on time; otherwise

the safety of the passengers and employes would be greatly imperiled. In order that trains may keep their schedules and run on time, it is absolutely necessary that the engines be properly coaled. We are unable, therefore, to say that, because the fireman withdrew his lookout for the purpose of performing another duty equally important and necessary, the appellant was guilty of negligence. (*Louisville & Nashville Railroad Co. v. Creighton, &c.*, 106 Ky., 42.) Nor do we think it negligence on the part of appellant not to have had a third person present to assist in keeping a lookout when the fireman was otherwise engaged. The lookout required by law is a reasonable one to be kept by those in charge of the engine. Because of the condition of the tracks, or of the fact that obstructions sometimes intervene, it may be that such lookout will not always be perfect: but all the law requires, or should require, is that it shall be as good as the circumstances of the case will permit. To require an additional person to keep a lookout when the fireman is engaged in coaling the engine, would be to place almost the entire responsibility for accidents on the railroad company. The law does not go to this extreme. There is no liability where those charged with the duty of keeping a lookout keep such a lookout.

But even assuming the extreme position, that it was negligence on the part of the fireman to stop keeping a lookout while he fired the engine, the appellee could not recover unless Mrs. Gilmore's death was due to such negligence. The evidence shows that the train was running about 15 miles an hour. Mrs. Gilmore was walking rapidly across the street and tracks, moving at the rate of about 3 miles an hour. If the fireman then had been upon the lookout and had seen Mrs. Gilmore crossing the street, he would have had the right to presume that she would not step in front of the approaching train until it became reasonably apparent from her manner that she intended to do so. (*Ford's Adm'r v. Paducah City Railway*, 30 Ky. Law Rep., 644; *Johnson's Adm'r v. Louisville & Nashville Railroad Co.*, 91 Ky., 651.) There was a space of 13 feet between the north and southbound tracks of appellant. When Mrs. Gilmore reached the north rail of the southbound track she was 13 feet from the south rail of the northbound track. The engine was then about 65 feet distant. If the fireman had seen her at this point, and it was then reasonably apparent that she was unconscious of the approach of the train, he would then have had to call the attention of the engineer to the fact, and the engineer would then have had to blow the whistle or stop the train in time to have prevented the accident. This, we think, would have been a physical impossibility.

It may be that the accident happened because of Mrs. Gilmore's deafness, or it may be that her mind was so intent upon something else, or that her attention was so absorbed, that she failed to notice the approaching train. It was her misfortune that she failed to hear it. It was a large freight train, consisting of 24 cars and a caboose. The bell on the engine was being rung, the train itself was making a loud noise and the slightest care on her part would have enabled her to escape danger. The accident, deplorable and unfortunate though it was, was not due to any negligence on the part of appellant. It is simply a case of one's walking in front of an approaching train at a time when no diligence or efforts on the part of those in charge of the train could have discovered or prevented her peril.

We are, therefore, of the opinion that the trial court should have peremptorily instructed the jury to find for appellant. No other questions raised on this appeal are decided. The judgment is reversed and cause remanded, for proceedings consistent with this opinion.

HUESMAN, FOR USE, &c. v. DERSCH.

(Filed April 17, 1908—Not to be reported.)

1. Claim for Street Improvement—Assignment of Right of Action—H. has a right to prosecute an appeal from a judgment dismissing his petition, for the reason that the city to which he had assigned his claim was entitled to all of his rights, and the appeal was prosecuted in both his name and that of the city. A lien on land being asserted an appeal lies to this court although the amount is less than \$200.

2. Ordinances—All the members of the council voted for the ordinance attacked here, and, upon the authority of *Hedger v. Roebke*, 30 Ky. Law Rep., 1092, it is valid.

Orlando P. Schmidt for appellants.

Hall & McLean for appellee.

Appeal from Kenton Circuit Court.

Opinion of the court by Judge Hobson, reversing.

On June 25, 1904, the board of council of the city of Latonia enacted an ordinance directing the improvement of Golding street. A contract was let to Joseph Huesman for the work. He made the improvement; the work was accepted by the council and the cost was apportioned to the property holders. Thereupon Huesman brought this suit against Henry Dersch and the city of Latonia, Dersch having failed to pay his apportionment; judgment was prayed enforcing a lien on Dersch's property for the amount of the apportionment, and if for any reason, this could not be done, then judgment was asked against the city. An answer was filed by Dersch in which he pleaded that the ordinance had not been properly passed and that the apportionment had not been properly made. The case being submitted, the court dismissed the petition as against Dersch and gave judgment against the city. From this judgment Huesman and the city prosecute the appeal before us. In this court the appellee has entered a motion to dismiss the appeal and in support of that motion has filed a writing made between Huesman and the city by which Huesman assigned to the city, since the judgment in the court below, his claim against the property of Dersch, the city paying him the amount of the claim. It is insisted that Huesman has no further interest in the case, and that the city can not appeal.

Huesman had a right to prosecute his appeal from the judgment dismissing his petition against Dersch. When he subsequently assigned his right of action to the city, the city was entitled to all his rights, and the appeal before us being prosecuted, both in the name of Huesman and the city, the motion to dismiss it is overruled. In cases of this sort, as a lien on land is asserted, an appeal may be taken to this court, although the amount of the claim is less than \$200. (*Central Covington v. Busse*, 25 Ky. Law Rep., 2179; *Mackin v. Wilson*, 20 Ky. Law Rep., 218; *Bitzer v. O'Bryan*, 107 Ky., 590.) The judgment of the circuit court dismissing the plaintiff's petition as to the property owner was based on the ground that the ordinance was invalid because it had been passed by the council at only one meeting. All the members of the council voted for the ordinance. In *Hedger v. Roebke*, 30 Ky. Law Rep., 1092, decided by this court since this case was decided in the circuit court, it was held that such an ordinance is valid. The ordinance in this case was passed in the same way as the ordinance in that case. It is insisted for the appellee that the opinion in that case should be overruled, but we see

no reason for departing from the rule we then laid down. We, therefore, conclude that the circuit court erred in dismissing the plaintiff's petition.

As to the apportionment, if an error was made in this matter it may be corrected in the circuit court by a proper apportionment. The rule is that an answer complaining of an apportionment is bad unless it shows that under the proper apportionment a less amount would have been assigned to the defendant than was assigned to him. This the answer before us does not do, and, therefore, a demurrer to this part of the answer should have been sustained. (McHenry v. Selvage, 99 Ky., 232; Dumesnil v. Stone Co., 109 Ky., 1; Barber Asphalt Co. v. Gaar, 115 Ky., 334.)

Judgment reversed and cause remanded, for further proceedings consistent herewith.

CHARLES v. HURLEY, SR.

(Filed April 17, 1908—Not to be reported.)

P. B. Stratton for appellant.

Roscoe Vanover for appellee.

Appeal from Pike Circuit Court.

Opinion of the court by Judge Nunn, affirming.

This appeal is from a verdict and judgment in behalf of appellee for \$350, recovered in an action for slander.

The evidence is not in the record, nor is there a bill of exceptions; consequently, there is nothing for the court to consider except the sufficiency of the pleadings. This has been too often decided by this court to need citation of authorities. We have examined the petition and amended petitions and find that a cause of action is clearly stated therein in behalf of appellee, and we must presume that the evidence authorized the verdict.

For these reasons the judgment of the lower court is affirmed, with damages.

BOARD OF EQUALIZATION OF CAMPBELL COUNTY v. L. & N. R. R. CO.

(Filed April 15, 1908—Not to be reported.)

1. Railroads—Taxation—Assessment of Bridge Property—The question involved upon this appeal is as to the mode of assessment of appellee's bridge, whether it should be assessed by the railroad commission, or the local authorities in Campbell county. After the consideration of authorities cited, it is held that the power of the Legislature to vest in a state board the assessment of property for local taxation is no longer an open question, and further that the fact that the bridge in question is used for purposes other than the railroad's use of it, does not render it any less "railroad property."

2. Same—Question One of Ownership—The question here is one of ownership. If it is railroad property used in connection with the operation of a railroad, it is assessable by the railroad commission, and the fact that a portion of the bridge is used for other purposes does not give the local officers the right to assess it.

John W. Heuver and Brent Spence for appellant.

H. L. Stone, C. H. Moorman and Benjamin D. Warfield for appellee.

Appeal from Campbell Circuit Court.

Opinion of the court by Wm. Rogers Clay, Commissioner, affirming.

The question involved on this appeal is, whether or not the bridge formerly owned by the Newport & Cincinnati Bridge Company, but now the property of appellee by virtue of a conveyance executed by the former to the latter on July 26th, 1904, should be assessed for taxation by the Railroad Commission or by the local authorities in Campbell county.

The property in question was assessed by the Board of Equalization of Campbell county, at \$1,500,000. From this action of the board, an appeal was taken by the Louisville & Nashville Railroad Company, to the county court. There it was adjudged that the assessment was invalid, and that the same be stricken from the assessment book. From that judgment an appeal was prosecuted to the circuit court of Campbell county. There it was adjudged that, at the time of making the assessment, there was no power in the board of equalization, or in the county assessor, to assess the property in question, and that at said time all such power was in the railroad commission and not elsewhere. The judgment further directed that the assessment be stricken from the assessor's book, and that the sheriff of Campbell county collect no taxes thereon. From this judgment the Board of Equalization of Campbell county prosecutes this appeal.

For a number of years prior to the adoption of the present constitution, it was the settled policy of this State that railroad property should be assessed as an entirety. By an act of 1864 the railroads were assessed at \$20,000 per mile, and were required to pay annually the same rate of tax on that assessment as was levied by law on real estate. In the case of *Applegate v. Ernst*, 3 Bush, 648, the court held that fragmentary taxation of railroads would be unjust, injurious, and contrary to public policy, and that, under the above act, they were taxable for State revenue and were not a fit subject for local taxation. By an amended act, of March 17th, 1876, (1 Acts 1876, page 78) local taxation of railroads was authorized, and the assessment thereof by local assessors was provided for. Evidently this method of assessment was soon found to be unsatisfactory, for by an act of April 3rd, 1878 (1 Acts 1878, page 82), it was provided that the assessment of railroad property, whether for State, county or other purposes, should be made by a board of equalization appointed by the Governor for that purpose. By an act of April 19th, 1882 (1 Acts 1881-1882, page 66) the power of assessment was vested in a railroad commission.

In the case of *C., N. O. & T. P. R'y. Co. v. Commonwealth*, 81 Ky., 492, this court gives the reason why railroad property should not be assessed by the local officers of each county, but should be assessed by a central board, and in the opinion it is said:

"The principal object of the Legislature in having this board of commissioners to assess and supervise the taxing of such corporations was, that no injustice might be done the companies by subjecting their property to fragmentary assessments, subject to the revision of the supervising board of each county through which the road might run. Fragmentary taxation of the same line of road by a dozen or more different assessors would scarcely produce that uniformity in assessment so absolutely essential to produce equality in taxation, and the legislative purpose was to obviate such an objection and have a uniform assessment of this class of property, and no wiser suggestion

could have been well made than to place the valuation in the hands of intelligent free-holders, to be selected by the executive of the State, thus removing the question of value from local influences and prejudices that often result in imposing upon such corporations oppressive burdens."

Thus it will be seen that, at the time of the adoption of the present Constitution in 1891, it was the settled policy of the State that local taxation of railroads should be based entirely upon the assessment made by the railroad commission.

Section 182 of the Constitution adopted in 1891 is as follows: "Nothing in this Constitution shall be construed to prevent the General Assembly from providing, by law, how railroads and railroad property shall be assessed and how taxes thereon shall be collected. And, until otherwise provided, the present law on said subject shall remain in force." Thus it will be seen that the framers of the Constitution recognized the propriety of providing that railroad property should be assessed in a manner different from the assessment of property generally. Prior to the adoption of the present Constitution, it was differently assessed, and by the section above referred to, the power was expressly given to the General Assembly to provide, by law, how railroads and railroad property should be assessed; and it was further provided that the law then in force should remain until it should be changed by the Legislature. Since that time the Legislature, instead of changing the system, has practically continued it in force, and such continuation has been repeatedly recognized and enforced by this court. (Louisville & Nashville Railroad Co. v. City of Louisville, 16 Ky. Law Rep., 796; Commonwealth, By, &c. v. Union R. T. Co., 26 Ky. Law Rep., 23.)

By the act of March 16th, 1906 (Acts of 1906, page 139), it is provided that "the president or chief officer of each railroad company, or other corporation owning or operating a railroad line, in whole or in part, in this State, and all railroad bridge companies owning or operating the bridge spanning a river constituting the boundary of this State shall, on or before the first of August in each year, return to the Auditor of Public Accounts of the State, under oath, the total length of such railroad, including the length thereof beyond the limits of the State," &c. Counsel for appellant insist that this act does not place the power in the railroad commission to assess for taxation the bridge in question. It is unnecessary to determine whether or not the expression "all railroad bridge companies" includes the bridge of appellee. The record shows that the bridge in question was conveyed to appellee in the year 1904, and is now the property of appellee. By the acts in force prior to the act of 1906, all railroad property was subject to taxation by this State, and the assessment thereof was to be fixed by the railroad commission alone. It was not intended that any property belonging to a railroad company should be exempt from taxation. In our opinion, therefore, the bridge in question, being owned by appellee, was taxable even prior to the act of 1906; and being taxable as railroad property, it was proper that the assessment thereof be made by the railroad commission.

It is contended by counsel for appellant that, under section 181 of the Constitution, the Legislature can not vest in the railroad commission power to assess for taxation property not strictly "railroad property," as that section provides that "the General Assembly shall not impose taxes for the purposes of any county, city, town or other municipal corporation, but, may, by general laws, confer on the proper authorities thereof, respectively, the power to assess and collect such taxes;" it being argued that it is clear by this language that the power is constitutionally vested in the local authorities, and can

not be placed elsewhere, the only exception being in regard to railroads and railroad property; and it is insisted that "railroad property," within the meaning of this constitutional provision, is only such property as is necessarily incident to the operation of a railroad. In this connection, our attention is called to the fact that the bridge in question is used not only for the purpose of accomodating the trains of appellee, but that it has two tracks upon which street cars run; also a wagon-way and paths for foot passengers. In the first place, we may say that the construction placed upon section 181 by counsel for appellant, is not the one adopted by this court.

In the case of *South Covington & Cincinnati Street Railway Co. v. Town of Bellevue*, 105 Ky., 283, this court said: "The fallacy of this argument lies in the meaning given to the word 'assess.' In the place used, it means to levy a tax, and does not mean the valuation of property for taxation. That the constitution makers did not intend to forbid the valuation of property for local taxation by the State board is apparent from their continuing in force that method of valuation of railroads for taxation, and which is now in force." Again, the power of the Legislature to vest the State board with power to assess tangible property for local taxation by counties, cities, towns and taxing districts was upheld in *City of Louisville v. Louisville Public Warehouse Co.*, 107 Ky., 184. In that case, this court held that the city assessor of Louisville had no power to assess distilled spirits in bonded warehouses, but that the assessment of such property must be made by the State Board of Valuation and Assessment, not only for State, but county, city, town and district taxation.

From these authorities it will be seen that the power of the Legislature to vest in a State board the authority to assess either tangible or intangible property for local taxation is no longer an open question. Furthermore, the fact that the bridge in question is used for other than railroad purposes does not make it any the less "railroad property." So long as the railroad is permitted to, and does, own the bridge, it should be taxed as any other railroad property. It is suggested that, under section 192 of the Constitution and section 567 of the Kentucky Statutes, the appellee has no power to own or operate a structure of this character. It does not appear from the record, however, that by owning and operating the bridge in question the appellee has engaged in a business other than that expressly authorized by its charter or the law under which it was organized, nor that it holds any real estate except such as is proper for carrying on its legitimate business; nor does it appear that the bridge has been owned by appellee for a longer period than five years, nor is there anything in the record to indicate what appellee's charter rights are with respect to owning or operating a bridge of this character. Furthermore, we could not determine in this proceeding the question, whether or not appellee has the right to own and maintain a bridge of the character of the one in question.

Counsel for appellant cite several cases in support of the position that a bridge like the one under discussion is not "railroad property," and should not, therefore, be assessed by the railroad commission; among them, the cases of *St. Louis & S. V. R'y. Co. v. Williams*, (Ark.), 13 S. W., 796; *St. Joseph & G. I. R. Co. v. Devereux, Sheriff*, 41 Fed. Rep., 14; *Chicago & Alton R. Co. v. People, Ex Rel.*, 29 L. R. A., 69; *State v. Mississippi River Bridge Co.*, 19 S. W., 421, and *Cass County v. Chicago, B. & Q. R. Co.*, 41 N. W., 246.

In the case of *St. Louis & S. V. R'y. Co. v. Williams*, supra, it was contended that the bridge in question should be assessed for taxation to the appellant railway, on the theory that it was used by said railway. In the opinion the question is thus stated: "The question

is, does the railway own or operate the bridge as a part of its road, or is it owned or operated independently?" In passing upon this point the court said: "There is nothing to show that the railway company is the substantial owner of the bridge by reason of owning the stock, and the case is therefore unlike that of *State v. Depot Company*, 43 N. W. Rep., 840, which the appellant relies upon."

In the case of *St. Joseph & G. I. R. Co. v. Devereux, Sheriff*, supra, it does not appear how the bridge was acquired by the appellant, whether by purchase or by acquisition of all its stock. The court, in holding the bridge subject to taxation, said: "It is a costly structure, used for purposes of general travel; and the fact that the railroad company has its rails upon it and runs its cars across it does not destroy its character as an independent structure."

In the case of *Chicago & Alton R. Co. v. People, Ex Rel.*, supra, appellant claimed the right to assess as railroad property a bridge. Its claims of ownership of this property was based on a lease. The lease was forever, provided the lessee should keep and perform its terms and conditions, but if it failed, the lessor had the right to re-enter and take possession of the property. The decision turned on the ownership of the property. The court said: "Whether objector had the right to demand that the assessment should be against it as for railroad property, in our view of the case, depends upon the ownership of the property. If the railroad company was the owner, it could not be lawfully assessed under section 1, chapter 120, supra, but only by the State Board of Equalization, as railroad track." And, again, in holding the property subject to local taxation, the court said: "Either from necessity or of its own volition, appellant has never become the absolute owner of the property, but has left the real title to the same in the Mississippi Bridge Company, and it is therefore subject to taxation against the latter by the township assessor of the town in which it is located."

In the case of *State v. Mississippi River Bridge Company*, supra, it was held that "a railroad bridge may lawfully be segregated, for the purpose of taxation, from a railway line in connection with which it is used, where its ownership is separate from the railway." It was held that the bridge should be taxed to the bridge company, as the legal title was in that company. In the opinion it is said: "It is clear, from this statement of the substance of the instrument, that, notwithstanding the long term of tenancy may normally endure, the paramount title remains in the bridge company. The lease is subject to a defeasance, in event of any failure, on the part of the lessee, to meet all of its requirements, and its entire scope and effect exclude the notion of any attempt at a transfer of the title outright. This view of it results in the ruling that the property is yet 'owned' by the bridge company, within the meaning of the section for the taxation."

The cases of *Cass County v. Chicago B. & Q. R. Co.*, 41 N. W., 246, and *Chicago, B. & Q. R. Co. v. School District No. 1*, Id., 249, held that the Nebraska Statutes does not require the return to the State board of a bridge constructed across the Missouri River; that said river being a navigable stream, the right to bridge it can be obtained only by law of Congress and not by authority from the State. The opinions hold that such bridges, when constructed, are not parts of the roadbeds or superstructures. It is also held that such bridges are not assessable by the State Board of Equalization for the reason that section 40 of the Nebraska Statutes specifically declares that said board, in making their assessment and valuation, "shall not assess the value of any machine or repair shop, or general office buildings, storehouses, or any real or personal property, situated outside of the right of way or depot grounds of such company." The court held that this exception to the general law excluded the bridge property

from assessment by the State Board of Equalization and Assessment.

It will be seen, therefore, that these cases are different from the case under consideration in that the language defining the character of property assessable by the State board, as well as the statutory exceptions thereto, are not similar to ours.

By the decided weight of authority, we think the whole question depends upon the ownership of the bridge in question. If it be railroad property used in connection with the operation of a railroad, it is then assessable by the railroad commission. The fact that a portion of the bridge may be used for other than railroad purposes does not, we think, give the right to the local officers of the county to assess the same.

For the foregoing reasons the judgment is affirmed.

KENNEDY v. COMMONWEALTH.

(Filed April 15, 1908—Not to be reported.)

1. Jury—Statement by Member of—Effort to Discharge—A statement by a member of the jury during the trial of appellant to the court that he desired to hear the evidence, evidencing some impatience at a wrangle of the lawyers, while it may have been indiscreet, was not sufficient cause to warrant the court to discharge the jury.

2. Grand Jury—Member of May Disclose Evidence Before It—By the provisions of section 113 Criminal Code, a member of the grand jury may be required to disclose testimony given before it, and as the defendant had undertaken to impeach a witness by one member of the grand jury, the Commonwealth was properly permitted to sustain him by another. (Former appeal, 31 Ky. Law Rep., 546.)

M. C. Saufley, G. B. Saufley, C. C. Williams, T. H. Shanks and W. H. Shanks for appellant.

James Breathitt, Tom. B. McGregor and Chas. H. Morris for appellee.

Appeal from Lincoln Circuit Court.

Opinion of the court by Judge Hobson, affirming.

James Kennedy shot and killed Milton Estes. He was indicted on the charge of murder and being tried was found guilty and his punishment fixed at imprisonment in the penitentiary for life. He appealed to this court and the judgment was reversed. (Kennedy v. Commonwealth, 31 Ky. Law Rep., 546.) On a return of the case to the circuit court it was tried a second time. The jury again found him guilty as charged, and fixed his punishment at imprisonment in the penitentiary for life. The court refused to grant a new trial, and he appeals.

The court did not err in refusing to discharge the jury on the ground of misconduct on the part of the jury and of the Commonwealth attorney. The misconduct on the part of the jury consisted in this, that one of the jurors said at one point in the proceedings that a question had been asked a number of times before during the introduction of the Commonwealth's evidence, exhibiting impatience with the controversy that was going on between the lawyers; at another time during a similar discussion he said "Judge we want to hear the evidence" or words to that effect. The jurymen may have acted indiscreetly, but there was nothing in his conduct to warrant the court

in discharging the jury. The misconduct charged to the Commonwealth attorney was in his repeating to the jury a statement made by a witness and smiling at the time. What he meant by smiling we do not know, but as he only used the words of the witness, there was nothing in this to impair the defendant's having a fair trial.

The Commonwealth proved by a number of witnesses that Kennedy threatened to kill Estes. Kennedy proved by about the same number that Estes had threatened to kill him. He offered to prove by John Payne, that, about six weeks before the homicide he had a rifle which he proposed to sell Estes and while they were talking Kennedy rode by, and Estes then said, "I would like to have a rifle now to put one just where his suspenders cross his back." The court refused to allow the evidence to be given on the ground that it was not a threat but only a statement showing hatred. The evidence, if admitted, could not have affected the result; for there was abundant evidence of threats made by Estes against Kennedy on the day of the homicide and on other days previous to it, which was uncontradicted and this evidence, if admitted, would have added nothing to what was already shown in the case.

The court allowed the defendant to prove that the alley for ten or twelve years had been open and was not closed up. It also allowed him to state that he regarded it as a public alley and went into it for this reason. If the other evidence offered by him as to the use of the alley by the public, had been admitted, it would have thrown no light upon the merits of the homicide, and therefore the exclusion of the evidence was in no manner prejudicial to the defendant's substantial rights.

The defendant filed an affidavit for a continuance on the ground that P. E. Parrish, a witness for him, was sick and could not be present at the trial. The court allowed the statement of the affidavit to be read as the deposition of Parrish. In it Parrish stated that he was a member of the grand jury who found the indictment, that Bud Payne, Babe DeBorde and Harvey Foley testified before the grand jury, and in effect stated that they did not see the shooting or know how it occurred. Bud Payne, Babe DeBorde and Harvey Foley were introduced on the trial as witnesses for the Commonwealth. They testified that they did see the shooting and stated in effect that Kennedy began the difficulty by drawing his pistol and shooting first at Estes. After the Commonwealth had closed its case, the defendant read to the jury the deposition of Parrish to contradict these three witnesses. After the deposition of Parrish was read the Commonwealth was allowed to introduce another member of the grand jury who testified in substance that he had heard the testimony of Payne, DeBorde and Foley before the grand jury and that their testimony before the grand jury was the same as on the trial. The defendant objected to this evidence, but we do not see that he has any substantial grounds for complaint. By section 113 of the Criminal Code, a member of the grand jury may be required to disclose the testimony of a witness before the grand jury for the purpose of ascertaining the consistency of the testimony given by the witness on the trial. As the defendant had undertaken to impeach the Commonwealth's witnesses by one member of the grand jury the Commonwealth was properly permitted to sustain its witnesses by other members of the grand jury. It is true that the court should have admonished the jury as to the purpose for which the evidence was allowed, and that this he failed to do, but the examination did not bring out any fact which the witnesses had not stated on the trial. The whole of the inquiry was directed to ascertain whether the Commonwealth's witnesses referred to, had testified before the grand jury as they testified on the trial. The jury could not have misunderstood the purpose of the evidence, and as nothing new was

brought out, the defendant could not have been prejudiced by the failure of the court to admonish the jury as to the purpose for which the evidence was admitted. In the cases in which this court has held it error not to give such admonition, the witness stated facts which had not otherwise appeared, but in the case at bar the members of the grand jury stated that the witnesses had said nothing more than they had testified to on the trial. The court instructed the jury as follows:

"If you believe from the evidence that at the time James Kennedy shot at and killed the defendant, Milt Estes (if you shall believe from the evidence beyond a reasonable doubt that he did so), he believed and had reasonable grounds to believe, that he was then and there, in danger of death or the infliction of some other great bodily harm at the hands of the deceased, and that it was necessary or was believed by the defendant in the exercise of a reasonable judgment to be necessary to shoot at and kill the deceased in order to avert that danger, real or to the defendant apparent, then you will find the defendant not guilty on the ground of self defense and apparent necessity thereof; but if you shall believe from the evidence, beyond a reasonable doubt, that the defendant, when he was in no danger, or apparent danger of death or great bodily harm at the hands of Estes, began the difficulty by shooting at Estes or making demonstration to shoot at him, and so made the danger to himself excusable on the part of Estes in his necessary or apparently necessary self defense, or if the combat was voluntarily engaged in by both, then in each event the defendant can not be acquitted on the grounds of self-defense."

This instruction is verbatim the instruction which this court directed to be given on the former appeal. We can not see that it was in anywise erroneous. The jury were elsewhere told that if upon the whole case, they had a reasonable doubt that the defendant had been proven guilty, they should find him not guilty. They could not therefore find him guilty under this instruction unless they believed the facts herein set out beyond a reasonable doubt. (*Oday v. Commonwealth*, 30 Ky. Law Rep., 848.) The opinion delivered on the former appeal is the law of the case. The facts of the case appear in the opinion delivered on the former appeal.

Judgment affirmed.

BURTON v. MONTICELLO AND BURNSIDE TURNPIKE CO.

(Filed April 15, 1908—Not to be reported.)

1. Turnpikes—Action to Recover Tolls—The fact that a turnpike was insufficient can not be shown in an action to recover tolls paid. The remedy that the statute provides must be followed.

2. Transfer of Actions—This was simply an action to recover money had and received and the court below did not err in transferring it to the common law docket.

Virgil P. Smith for appellant.

Harrison & Harrison for appellee.

Appeal from Wayne Circuit Court.

Opinion of the court by Judge Hobson, affirming.

Chas. H. Burton runs two vehicles from Burnside to Monticello and paid the Monticello and Burnside Turnpike Co., the tolls de-

manded by it. He brought this suit against the turnpike company, charging that within five years before the filing of the petition he had so paid it in tolls \$4,824; that the charges were excessive and not warranted by law, and he prayed judgment for the excess which had been collected of him beyond that which the company was authorized to charge. The court transferred the action from the equity to the common law docket, and on final hearing dismissed the petition. From this judgment he appeals.

If the turnpike was not as wide as the law required or if it was not maintained in proper condition, the remedies provided by statute must be followed. The fact that the pike was insufficient can not be shown in an action like this to recover tolls paid. (*Kennedy v. Crum*, 16 Ky. Law Rep., 257; 26 S. W., 190; *Shewmaker v. Turnpike Co.*, 18 Ky. Law Rep., 221, 35 S. W., 1040.)

One of the appellant's vehicles left Monticello every morning, making the trip to Burnside and back that day. It had seats within for nine passengers. On this vehicle the turnpike company charged 55 cents toll at each toll gate. Appellant's other vehicle left Burnside every morning, for Monticello, returning the next morning; it had seats within for six passengers. The turnpike company charged 35 cents toll on this vehicle at each gate. Section 4724 Kentucky Statutes, regulating the rate of toll on turnpikes, contains, among other things, the following:

"For each pleasure carriage or hackney coach drawn by two horses or mules 25 cents."

"For each stage coach having seats within for six passengers, 35 cents. For same for nine passengers 55 cents."

The statute recognizes a distinction between pleasure coaches or hackney coaches on one hand and stage coaches on the other. A hackney coach is a coach which is hired out; a stage coach is one which is used by the owner to carry passengers from one point to another. A stage coach is not hired out. It remains in the possession of the owner. Under the agreed facts, appellant's vehicles were stage coaches and were properly charged toll as such.

They were used for the carrying of passengers, express matter, and the mails between Burnside and Monticello. The larger vehicle was drawn by four horses and the smaller one by two horses. The vehicles were not hackney coaches or pleasure carriages, but stage coaches in which the owner conducted his business as a common carrier.

The court did not err in transferring the action from the equity to the common law docket as it was simply an action to recover money had and received. There was no necessity for taking an account.

Under the agreed facts the plaintiff has no cause for action.
Judgment affirmed.

CLINGER'S ADM'X v. CHESAPEAKE & OHIO OF KENTUCKY, &c.

(Filed April 15, 1908—To be reported.)

1. Railroads—Removal of Causes—Petition—Allegations—Conclusions—Jurisdictional Facts—In a petition by a party to remove a case from the State court to the Federal court an allegation "that its co-defendants were not necessary, nor proper parties to the action, and that the sole purpose of the plaintiff in making other parties defendants was a fraudulent one to deprive the petition of its constitutional rights," amounts only to a conclusion of the pleader, and the allegation that "the negligence charged in the petition against its co-defendants

was untrue, and known by the plaintiff to be untrue," does not state any jurisdictional fact. The question of negligence or no negligence was an issue solely within the province of the jury to hear and determine.

2. Same—Negligent Injury—Joint Liability of Defendants—In an injury is inflicted by two or more wrongdoers, an action may be maintained against one or all of them. While several may be guilty of several distinct negligent acts, yet if their concurrent effect is to produce an actionable injury they are all liable therefor.

3. Same—Resident and Non-resident Defendants—Joint Action Against—Where, in an action for damages for an injury alleged to have been caused by the negligence of a non-resident railroad company, and its resident conductor who are jointly sued, this court can not assume that the conductor is not guilty, from its general knowledge of his powers and duties, but if on the trial it should appear from the evidence that the plaintiff had no reasonable grounds to believe that he was guilty when the petition was filed, the court should give a peremptory instruction to find for him, and the case should then be remanded to the Federal court.

4. Same—Acts of Incorporation—Legality—Effect of Lease—Section 769, Kentucky Statutes, providing among other things, that a railroad company "may make any agreement or arrangement, not inconsistent with law, with any other railroad company" is not in conflict with section 573, Kentucky Statutes, providing "that all provisions of charters and articles of incorporation which are inconsistent with the provisions of chapter 32, of the Kentucky Statutes, stand repealed to the extent of such conflict," and under the contract of lease by the C. & O. R'y Co. in Ky. to the C. & O. R'y Co. in Virginia, it did not relieve the Kentucky railroad from its responsibility existing before the enactment of section 573, Kentucky Statutes.

Allen D. Cole and Thomas R. Phister for appellant.

Worthington & Cochran and W. H. Wadsworth for appellees.

Appeal from Mason Circuit Court.

Opinion of the court by Judge Nunn, reversing.

This appeal is from an order of the circuit court transferring this case to the Federal court for trial.

The plaintiff (appellant) instituted this action for \$25,000 in damages against appellees for the alleged negligent killing of her husband, who, at the time he was killed, was crossing appellees' road on a street in the city of Maysville, Kentucky. She charged that it was by the joint gross negligence of the three appellees in the management and operation of its train of cars that resulted in the death of her husband; that appellee, the Chesapeake & Ohio Railway Co. of Kentucky, a Kentucky corporation, was the owner of the road and had leased it to appellee, Chesapeake & Ohio Railway Co. of Virginia, a foreign corporation, and that appellee, Shannon Hall, was the conductor on the train that killed Clinger.

The order of removal was made upon the petition of appellee, the Chesapeake & Ohio Railway Co. of Virginia, a foreign corporation. It was alleged in the petition, in substance, that it and the plaintiff were citizens of different States; that its co-defendants, the Chesapeake & Ohio Railway Co. of Kentucky and Shannon Hall, were not necessary nor proper parties to the action, and that they were made defendants for the sole purpose of preventing a removal of the cause to the Federal court, thereby unlawfully and fraudulently depriving the petitioner of a right conferred upon it by the Constitution and laws of the United States; and averred that the allegations of negli-

gence contained in plaintiff's petition, as to its co-defendants, were untrue and known to be so by her when this suit was brought. It was further alleged that the petition of plaintiff stated no cause of action at all against its co-defendants or either of them.

The charge that its co-defendants were not necessary nor proper parties to the action, and that her sole purpose in making them defendants was a fraudulent one to deprive it of its constitutional right, amounts only to a conclusion of the pleader. She could, possibly with the same propriety, have stated that they were necessary parties, and that the petition of appellee for removal was for the fraudulent purpose of depriving her of the right to a trial of the case at her residence; and this is also true of the allegation in the petition for removal that the negligence charged in her petition, against its co-defendants, was untrue and so known by plaintiff at the time she filed her petition. This allegation, and the others referred to, did not state any jurisdictional fact. The question of negligence or no negligence was an issue solely within the province of the jury to hear and determine. (*Chesapeake & Ohio Railway Co. v. Dixon*, 179 U. S., 131; *Cincinnati, New Orleans & Texas Pacific Railway Co. v. George Bohon*, 200 U. S., 221; *Rutherford v. Illinois Central R. R. Co., &c.*, 27 Ky. Law Rep., 397, 85 S. W., 199, and *Illinois Central R. Co. v. Sheegog's Adm'r*, 31 Ky. Law Rep., 691, 103 S. W., 323.)

This brings us to the last proposition made in the petition for removal, to-wit: That no cause at all was stated in plaintiff's petition against its co-defendants, or either of them. All the defendants were charged jointly with gross negligence, which she alleged produced the death of her husband; and it is a well established rule that if the injury inflicted is produced by two or more wrongdoers an action may be maintained by the person so injured, either against one or against all of them. The liability of the wrongdoers is joint and several. The injured person may elect whether he will proceed against one or all of them. While several may be guilty of several distinct negligent acts, yet if their concurrent effect is to produce an actionable injury, they are all liable therefor. The action, properly speaking, is not to recover for the negligent act or acts, but it is to recover damages for the injury which they produced. (*Pugh v. C. & O. Ry. Co.*, 101 Ky., 77, and the cases above cited.)

It was alleged in plaintiff's petition that the C. & O. R'y Co. in Kentucky was a Kentucky corporation, and owned the road, but had leased it to the C. & O. R'y. Co. in Virginia, which operated it as its agent or lessee, and that Shannon Hall was the conductor of the train which was so negligently managed and operated that it produced the death of her husband while he was passing along a street in the city of Maysville. It does not appear in the record why the lower court made the transfer, but, from the brief of counsel for appellees, we presume that the lower court determined that the C. & O. R'y. Co. in Kentucky, although admitted to be the owner of the road, was not operating it, and that Shannon Hall was only the conductor, and by reason of his position he could not and it was not his duty to keep a lookout for persons at street crossings. Although it is alleged in the petition that the conductor, by gross negligence, so managed and operated the train that it resulted in the death of Clinger, we were asked to assume that this is not true because of our general knowledge of the position of a conductor on a train. We also have some general knowledge of the powers of a conductor, although his regular place upon a train is in the caboose. It may be that a conductor has all the power and authority over the management and operation of a train that his title implies; that is the conductor and controller of it. On the trial it may be made to appear that the train was being run at an excessive and dangerous rate of speed through the city of Maysville at the time Clinger was killed, and which caused his death, and

that the conductor had some power or control over the matter of speed and could have, by due care, prevented such a rate of speed; or the evidence might show that he was guilty of actionable negligence in some other respect; but if upon the trial it should appear from the evidence that plaintiff had no reasonable grounds to believe, when she filed her petition, that the conductor was negligent in any manner which produced the death of Clinger, then, under the rule in the cases of *Illinois Central R. R. Co. v. Coley*, 28 Ky. Law Rep., 336; *Dudley v. Illinois Central R. R. Co.*, 29 Ky. Law Rep., 1029, and *Underwood v. Illinois Central R. R. Co.*, 31 Ky. Law Rep., 595, the court should give a peremptory instruction in behalf of Shannon Hall, and the case should be removed to the Federal court, unless the Kentucky corporation, C. & O. R'y Co. in Kentucky, the owner of the road, is jointly liable with the C. & O. R'y Co. in Virginia, for the negligent acts of any of the servants in charge of the train which produced the injury and death of Clinger.

The only question remaining to be determined is, whether the C. & O. R'y Co. in Kentucky is responsible in damages, with the C. & O. R'y Co. in Virginia, for the death of plaintiff's intestate. Appellees' counsel virtually concede that if the provisions of the charter of the Maysville & Big Sandy Railroad Co., which charter the C. & O. R'y Co. in Kentucky took when it was incorporated, with reference to its power to lease the road are in full force and effect under the authority of the case of *McCabe's Adm'x v. Maysville & Big Sandy R'y Co.*, 112 Ky., 861, the C. & O. R'y Co. in Kentucky would be responsible jointly with the lessee, the Virginia corporation. But contend that this provision of the charter of the Maysville & Big Sandy Railroad Co. stands repealed by section 573 of the Kentucky Statutes, which in effect, says: That all provisions of charters and articles of incorporation, which are inconsistent with the provisions of chapter 32 of the Kentucky Statutes, stand repealed to the extent of such conflict; and claims that the lease made by the C. & O. R'y Co. in Kentucky to the Virginia corporation was made under the provisions of section 769, of the Kentucky Statutes. The first part of this section deals with the construction of spurs, tracks or branches of roads by railroad companies organized in Kentucky; and also authorizes such corporations to purchase the property and franchise of any other railroad company not a competing or parallel line; then authorizes such corporations to sell its franchise and property to any other company not a competing or parallel line, or not otherwise prohibited by law to purchase; and after speaking of other matters, not germane to the matter under consideration, the section closes with these words: "And may make any agreement or arrangement, not inconsistent with law, with any other railroad company."

There is no claim that the C. & O. R'y Co. in Kentucky sold its property and franchises to the C. & O. R'y Co. in Virginia; but appellees claim that the lease was made under the clause of section 769 above quoted, and that it exempts the C. & O. R'y Co. in Kentucky from all responsibility while the C. & O. Ry. Co. in Virginia controls and operates the road. We deem it unnecessary to consider and determine whether the provision of the charter referred to in the McCabe case, *supra*, was repealed or not by the enactment of section 573 of the Kentucky Statutes; for the reason that, in our opinion, if the lease was made under the authority of section 769 of the Kentucky Statutes, it did not have the effect to relieve the C. & O. R'y Co. in Kentucky from the same responsibility as existed under the charter of the Maysville & Big Sandy Railroad before the enactment of section 573. There is nothing in the language of section 769 exempting it from liability in such a case. In the case of *Gilbert Logan v. N. C. R. R. Co.*, 116 N. C., 940, the court held that a railroad company could not escape responsibility for negligence by leasing its road to another

company, unless its charter or a subsequent act of the Legislature exempts it from such liability.

In the case of *The Central & Montgomery R. R. Co. v. Morris & Crawford*, 68 Texas, 49, the court said: "It is well established that a railroad company can not transfer or lease the right to operate its road, so as to absolve itself from its duties to the public, without legislative authority. Nor will a lease duly authorized by law release the company from a failure to discharge its charter obligations, unless the law giving the power contains a provision to that effect. (*Abbott v. Horse Co.*, 80 New York, 27; *Ohio & Mississippi Railroad Co. v. Dunbar*, 20 Illinois, 623; *Nelson v. Vermont & Canada Railroad Co.*, 26 Vermont, 717; *Macon & Augusta Railroad Co. v. Mayes*, 49 Georgia, 355; *Railroad Co. v. Brown*, 5 Wallace, 90; 1 *Rorer on Railroads*, 605, et seq.; 1 *Redfield on Railways*, chapter 22, page 616, star page 587; *Pierce on Railways*, 283, 496.)"

In the case of *Eliza Chollette v. Omaha & Republic Valley Railroad Co.*, 26 Neb., 159, the court in considering a question like the one we have before us, quoted with approval from the case of *Nelson v. R. R. Co.*, 26 Vt., 717, as follows: "The lessor must, at all events, be held responsible for just what they expected the lessee to do, and possibly for all which they do do, as their general agents. For the public can only look to that corporation to whom they have delegated this portion of public service. Certainly they are not bound to look beyond them, although they may doubtless do so."

In the case of *Pennsylvania Co. v. Ellett*, 132 Ill., 654, the court said: "The law has become settled in this State, by an unbroken line of decisions, that the grant of a franchise, giving the right to build, own and operate a railway, carries with it the duty to so use the property and manage and control the railroad as to do no unnecessary damage to the person or property of others; and where injury results from the negligent or unlawful operation of the railroad, whether by the corporation to which the franchise is granted, or by another corporation, or by individuals whom the owner authorizes or permits to use its tracks, the company owning the railway and franchise will be liable." (*Leshner v. Wabash Navigation Co.*, 14 Ill., 85; *Chicago, St. Paul & Fon du Lac R'y Co. v. McCarthy*, 20 Id., 385; *Ohio & Mississippi R'y Co. v. Dunbar*, Id., 623; *Illinois Central Railroad Co. v. Finnigan*, Id., 646; *Illinois Central Railroad Co. v. Kanouse*, 39 Id., 272; *Toledo, Peoria & Warsaw Ry. Co. v. Rumbolt*, 40 Id., 143; *Peoria & Rock Island Railroad Co. v. Lane*, Adm'x, 83 Id., 448; *Pittsburg, Chicago & St. Louis Ry. Co. v. Campbell*, 86 Id., 443; *Wabash, St. Louis & Pacific Railway Co. v. Shacklett*, 105 Id., 364; *Balsly v. Railroad Co.*, 119 Id., 68.)"

In the case of *Bower v. The B. & S. W. R. Co.*, 42 Iowa, 546, the court held that a railroad corporation can not escape liability for an accident occurring while its road is being operated, even though in fact it might have been leased, and was at the time controlled by another party.

In the McCabe case, supra, this court in discussing the charter of the Maysville & Big Sandy Railroad, under which the C. & O. R'y Co. in Kentucky is operating, said: "By its acceptance of the franchises conferred by the State the corporation assumed the corresponding burdens thereby imposed. These franchises it could not transfer to another without distinct legislative authority. The grant of power to lease its property is one thing; the grant of absolution from its responsibility is another, and is not to be inferred from a mere power to lease the road, where the corporation still retains its existence and the enjoyment of its franchises in the rents. For such grants are strictly construed, and, as against the public, are never extended by construction. There is nothing in the provision to show that the Legislature had in mind authorizing the company to divest

itself of its franchise, or permitting it, while enjoying them or their fruits, to be acquit of responsibility for their abuse, without regard to the financial ability of the lessee or his amenability to suit."

In the same case this court quoted, with approval, from the case of *Driscoll v. Railroad Co.*, 65 Conn., 254, as follows: "A grant to a corporation of a right to lay out, construct, and operate a railroad is the grant to the corporation of the capacity to exercise a portion of the powers of sovereignty for the purpose of making pecuniary profit to itself. This is its franchise. Such grants are never made except at the request of the corporation: In return, the corporation is held to have promised to pay just damages to any person injured by any want of care in using the right so granted. As the grant is of a public right, in which every one of the public is a sharer, so the promise is to each one of the public. A due regard for the public rights obviously requires that a corporation which has asked for and received such a grant shall not be absolved from its promise except by an act of the Legislature to that effect so distinct and unequivocal as not to be open to mistake. Nothing should be left to inference." (*York & M. R. R. Co. v. Winans*, 17 Howard, 39, and *Thomas v. R. R. Co.*, 101 U. S., 83.) This rule is established and adhered to by the courts of almost all the States, and is a just one. If the rule were otherwise, the inducement would be great for all domestic corporations to lease their roads to foreign corporations and avoid litigation in the State courts; and the probability would be, under such rule, that no citizen of a State could have his rights determined in a State court when the amount in controversy exceeded \$2,000. The rule, as above stated, was adhered to in the case of *Illinois Central R. R. Co. v. Sheegog's Adm'x*, 31 Ky. Law Rep., 691, 103 S. W., 323; but in that case the question considered and determined was as to the liability of the lessor to an employe of the lessee, who was killed by negligence, and the lessor was made responsible because of defective roadbed. That case is unlike this. Clinger was not an employe, but a member of the public traveling on one of the streets of the city of Maysville.

Appellees' counsel contends that the cases of *Harper v. N. N. & M. V. R'y Co.*, 90 Ky., 360, and *Sinkhorn v. Lexington, H. & P. Turnpike Co., &c.*, 112 Ky., 205, establish a different rule and have the effect to release the lessor from liability for the negligence of appellees' servants in the operation of trains. The Harper case was decided September, 1890, and it appears that the employes of the N. N. & M. V. R'y Co. (a lessee) caused the injuries to Harper; but it does not appear whether Harper was an employe of that company or a third party. The presumption is that he was an employe. If otherwise, the opinion would be against the trend of all the authorities. The Sinkhorn case was one wherein Sinkhorn received his injuries by reason of a defective bridge on a turnpike road after the county had become the owner of it under legislative authority, after a vote by the people of the county. When Sinkhorn was injured the turnpike company did not own the road or the franchise, the county owned both. The county was relieved from responsibility on the general principle that a county could not be made liable for such torts. Of course, the turnpike company was not liable, because it had no interest in the road at the time Sinkhorn was injured; and the court, in substance, said that when the turnpike company had surrendered all ownership and control to the county it was not responsible for the torts of the county.

In our opinion the court erred in removing the case to the Federal court, and the judgment is reversed and remanded, for further proceedings consistent herewith.

Whole court sitting.

COMMONWEALTH v. CHESAPEAKE & OHIO RAILWAY CO.

(Filed April 15, 1908—To be reported.)

1. Railroads—Indictment for Nuisance—Obstructing Street—Sufficient Allegations—An indictment for a nuisance against a railroad company which charges that "on the 12th day of September, 1907 in the county of Clark, and in the city of Winchester, within twelve months before the finding of the indictment, it unlawfully and willfully suffered and permitted its cars attached to passenger and freight trains, to be placed on and across Main street in said city of Winchester, said street being a public highway, and did suffer them to be and remain on and across said street for an unreasonable length of time, thereby obstructing travel on said street," is a good indictment under section 124, of the Criminal Code.

2. Same—Bill of Particulars—Requirement of Commonwealth—Response—Time Allowed—On the return of an indictment against a railroad company for obstructing a street in a city by permitting its cars to remain in and across said street for an unreasonable length of time, the court did not abuse its discretion, on motion of the defendant, to require the Commonwealth's attorney to file a bill of particulars, stating the time as near as he could, when the offense was committed, but the court should not require such response to be filed until the attorney had obtained the presence of the Commonwealth's witnesses from whom he could ascertain the particular facts to be relied on in sustaining the prosecution.

3. Same—Sufficiency of Response—The law does not require the prosecution to give facts which are within the knowledge of the defendant, nor to give the particular hour or day or even the week in which the offense was committed, nor the particular train or number of it, unless the witness can remember same. The law only requires an honest effort on the part of the prosecution to obtain and give to the defendant all the necessary information it reasonably can, to enable it to show as far as possible the particular act or acts relied on for a conviction.

James Breathitt, Theo. B. Blakey, T. B. McGregor, Chas. H. Morris and B. A. Crutcher for appellant.

D. L. Pendleton for appellee.

Appeal from Clark Circuit Court.

Opinion of the court by Judge Nunn, reversing.

This appeal is from a judgment sustaining a demurrer to and dismissing the following indictment (omitting the formal parts):

"The grand jury of Clark county, in the name and by the authority of the Commonwealth of Kentucky, accuse the Chesapeake & Ohio Railway Company of the offense of suffering a nuisance committed as follows, viz: That said the Chesapeake & Ohio Railway Company on the 12th day of September, 1907, in the county aforesaid, and at a time other than mentioned in indictment No. 1, and within twelve months before the finding of this indictment, it, the said Chesapeake & Ohio Railway Company being a corporation, incorporated under the laws of the State of Virginia and owning and operating a railroad in and through the county of Clark and the city of Winchester, in said county, did unlawfully and willfully suffer and permit its cars attached to passenger and freight trains belonging to said railway company, to be placed on and across Main street, in the city of Winchester, Kentucky, it, the said Main street, being then a public highway, and did suffer and permit said cars to be and remain on and across said Main street for an unreasonable length of time, thereby obstruct-

ing said street and rendering travel along said street dangerous and unsafe to the common nuisance of all the citizens of the Commonwealth of Kentucky, and especially to persons living on and in the neighborhood of said street and passing and re-passing along same, against the peace and dignity of the Commonwealth of Kentucky."

The defendant (appellee) moved the court to require the Commonwealth to make the indictment more definite so as to show the day and time of day, the character of train and the direction in which the train was headed which obstructed Main street, as alleged therein. The court sustained this motion.

The Commonwealth's attorney filed a statement as follows:

"The undersigned states that he is unable to give the time of the committing of the alleged nuisance, as mentioned in indictment No. 2, against the C. & O. R'y Co., more definite than it was only three or four days before the 12th day of September, 1907."

The defendant (appellee) filed a demurrer to the statement, which the court sustained and entered the following order:

"The attorney for the Commonwealth declines to make the statement more definite and the court being of the opinion that the defendant is entitled to a more definite statement in order to be able to defend this case, it is now ordered that the indictment herein be dismissed, to which ruling the Commonwealth objects and excepts, and prays an appeal to the Court of Appeals, which is granted."

The only questions involved on this appeal are: The sufficiency of the indictment and whether the court, in its discretion, should have granted appellee's motion for a bill of particulars.

Section 124, of the Criminal Code, provides:

"The indictment must be direct and certain as regards—

"1. The party charged.

"2. The offense charged.

"3. The county in which the offense was committed.

"4. The particular circumstances of the offense charged, if they be necessary to constitute a complete offense."

The indictment under consideration meets the requirement of this section. The party charged with committing the offense is specifically named; and it is charged that the defendant had suffered and permitted its cars to be and remain on and across Main street; and rendered the travel along the street dangerous, to the common nuisance, &c. The offense was alleged to have been committed in Clark county, and in the city of Winchester. There were no other circumstances necessary to be alleged to constitute a complete offense. The suffering and permitting cars to remain across Main street, which obstructed travel thereon, completed the offense. The Commonwealth was not required to state in the indictment the particular day or the time of day, or the character of the train, or the direction in which the train was headed which obstructed the street. To require the Commonwealth to allege and prove these particular facts and circumstances would, in most cases relieve defendants from conviction for such offenses.

The indictment in the case of the Louisville & Nashville R. R. Co v. Commonwealth, 25 Ky. Law Rep., 1452, was as follows:

"The said Louisville & Nashville R. R. Co., in the said county of Hopkins, on the 16th day of May, 1903, and on many other days before the finding of this indictment, did create, suffer and maintain a common nuisance in the city of Earlington, Hopkins county, Kentucky, by placing and running railroad cars, flats, box cars and steam engines, and making up trains and switching cars and changing cars unnecessarily and for unreasonable lengths of time in, on and across a public street and highway of said city of Earlington, where the track and side-track of said railroad company crosses said street or highway, near said railroad company's depot, in said city, thereby obstructing

said public street and highway for unreasonable lengths of time and causing the people who pass over and drive teams over said public street and highway great inconvenience and trouble and delays, and making and causing said street and highway at said crossing to be dangerous and unsafe to all people traveling along same, and to the common nuisance of all the people of the Commonwealth."

The defendant in that case was convicted, and on appeal the case was reversed because the indictment was defective, in that it failed to name the street of Earlington which was obstructed. The indictment in that case was equally as indefinite in the matters referred to as the indictment in this case; but the defect for which the case was reversed is not in the indictment before us, for it is charged that the obstruction was of Main street in the city of Winchester, Clark county, Kentucky.

In the case of C. & O. R'y Co. v. Commonwealth, 88 Ky., 370, two indictments were found against defendant on the same day, charging it with obstructing a certain road with its cars. Each charged that the offense was committed at the same time, substantially in the same language. The defendant was acquitted under one of the indictments, and being placed on trial under the other, pleaded the judgment in the former case in bar. It was held that the judgment under the first indictment was not a bar to a proceeding under the second, unless the same obstruction which was relied on in the second case was proven, or attempted to be proven, in the first case. The court said:

"It is true the indictments were found upon the same day; they were for the same character of offense; they covered the same period of time, because the statutory limitation under our law to such a prosecution is one year; but the time named in them as being that when the offense was committed was not material, and each obstruction was a distinct offense. The State was not confined to any particular time, but had the right to show that the appellant had so offended at any time within a year previous to the finding of the indictment. This being so, a conviction or acquittal would not, ipso facto, bar another indictment found at the same time and charging the same character and offense. Whether the same act was proven, or attempted to be proven, upon the trial of the other one would be a question of fact; and the first trial would only be a bar to a further prosecution for such offenses as were then proven, or attempted to be proven. This would, of course, have to be shown by extrinsic evidence."

In the same opinion, the court further said:

"In this character of case the State could, upon the trial of one indictment, select one particular act or offense and proceed for it; and, under the other indictment, although found at the same time, it could prove a different one."

This was quoted with approval in the case *supra*. (Illinois Central R. R. Co. v. Commonwealth, 104 Ky., 364.) The indictment therein was very similar to the indictment in the case at bar. The court held the indictment in that case sufficient, except that it was not alleged whether the obstruction was within the city limits or not. The indictment in the case at bar is not defective in this respect. These cases are conclusive of the first question under consideration.

The remaining question is: Did the court err in requiring the Commonwealth to file a bill of particulars? This practice has not been usually resorted to in this State; but it is authorized in certain cases by Bishop on Criminal Procedure, section 643, volume 1, which is as follows:

"An indictment which the court can not pronounce ill may still be deemed wanting in detail of which the defendant is justly entitled to be informed before trial. In such a case, the judge, if applied to,

orders a written specification of the things, called sometimes a bill of particulars, to be filed with the papers in the cause; and, on the trial, restricts the prosecuting officer in his evidence to the items therein set down. The application for it is addressed solely to the discretion of the court; hence its decision thereon is not generally subject to revision by a higher tribunal." (Bogard v. Illinois Central R. R. Co., 116 Ky., 429, wherein this court quoted, with approval, from the case of Tilton v. Beecher, 59 N. Y., 176, in part, as follows:

"A bill of particulars is appropriate in all descriptions of actions where the circumstances are such that justice demands that a party should be apprised of the matters for which he is to be put for trial with greater particularity than is required by the rule of pleading. They have been ordered in actions of libel, escape, trespass, trover and ejectment, and even in criminal cases, on an indictment for nuisance,' &c., and concludes as follows: 'A reference to a few of the authorities upon which these decisions were founded will show that in almost every kind of case in which the defendant can satisfy the court that it is necessary to a fair trial that he should be apprised beforehand of the particulars of the charge which he is expected to meet the court has authority to compel the adverse party to specify those particulars so far as in his power.'"

In 3 Edition of P. & Pr., 517, the author says:

"There is no inflexible rule as to the class of cases in which a bill of particulars will be granted, but it rests within the sound judicial discretion of the court, to be exercised only in furtherance of justice. But the rule is equally well established that a party will not be obliged to furnish facts already known to his adversary, nor when the means of ascertaining the facts are equally accessible to both parties."

In the case before us appellee was indicted for a nuisance, created by leaving its train of cars across a main street in a town. The affidavit filed by appellee with its motion for a bill of particulars stated that within a year before the finding of this indictment and the other referred to, appellee ran a number of trains each day over and across said Main street, and that unless the defendant is informed as to the day and time of day when the alleged obstruction occurred, and the train which obstructed the street is described, it can not properly make a defense. We realize, under the circumstances, the necessity for a bill of particulars in this case. Appellee had another indictment pending against it for a similar offense, and many trains had been run over and across this street within the year preceding the finding of the indictment. It was reasonably certain that appellee could not know in advance what particular offense or act would be relied upon by the Commonwealth in making out a case against it, as the Commonwealth had a right to prove any act of obstructing Main street within a year next preceding the finding of the indictment, and the court did not abuse its discretion in sustaining the motion for a bill of particulars. The court, however, should not have required the prosecuting attorney to respond to this motion until the Commonwealth had obtained the presence of its witnesses, from whom it could ascertain the particular facts to be relied upon by it in the prosecution. The law does not require the prosecution to give facts which are within the knowledge of the other party, nor to give the particular hour, or day, or even week, in which the offense was committed, nor the particular train, or number of it, unless the witnesses can remember same. The law only requires an honest effort, on the part of the prosecution, to obtain and give to the defendant all the necessary information that it reasonably can, to enable it to know, as far as possible, the particular act or acts relied upon by the prosecution for a conviction.

For these reasons the judgment of the lower court is reversed and remanded, for further proceedings consistent herewith.

GLOBE BANK AND TRUST CO. v. RIGGLESBERGER.

(Filed April 15, 1908—Not to be reported)

1. Actions—Pleadings—Liens—The judgment herein in favor of appellee was proper in view of the pleadings and proof. The bank sued to recover of appellee upon an account for lumber sold, the transaction was between appellee and her son, alone, and neither the trustee nor the bank knew anything about it. The facts proved were insufficient to establish a promise on the part of appellee to pay for the lumber.

2. Same—While appellee signed an agreement not to force or demand payment of her debt out of R.'s property in charge of the trustee, yet if they permitted a bill of lumber to be sold her as a credit on a debt, which R. owed her, there seems to be no reason why she should not accept it without incurring liability to the bank under the pleadings in this case, for nothing is set out in the petition upon which to base the debt claimed.

D. G. Park for appellant.

Wheeler, Hughes & Berry for appellee.

Appeal from McCracken Circuit Court.

Opinion of the court by Judge Settle, affirming.

In this action appellant sought to recover of appellee upon an open account \$856.73, which amount, it was alleged, appellant "advanced to her at her special instance and request, and which she agreed to pay plaintiff with interest from the date of such advancement until paid."

By an amended petition, filed before appellee's answer, appellant alleged that the sum sued for was due it from appellee for lumber it furnished her at her request, and for which she promised to pay. Appellee's answer traversed the affirmative matter of the petition as amended.

By agreement of the parties a trial by jury was waived and the cause submitted to a special judge of their selection, who, after hearing the evidence and considering the questions of law involved, rendered judgment, dismissing the action at appellant's cost, of which judgment, and the refusal of the court to grant it a new trial, it complains, hence this appeal.

On July 27th, 1904, the firm of Rigglesberger Brothers, composed of the two sons of appellee, being indebted to appellant in the sum of \$21,000.00, to their mother in the sum of \$9,400.00 and to other creditors in the sum of \$3,000.00 made a deed of trust to R. H. Noble, whereby he was nominally put in charge of the property and business of the firm; the property consisting of their mill plant, lumber, accounts, &c. The purpose of this conveyance was to provide for the payment of the indebtedness of the firm of Rigglesberger Brothers. By a separate writing appellee consented that appellant's debt might have priority of hers. The deed of trust provided, however, that the members of the firm were to be consulted by the trustee in the conduct of the business. In fact the firm was permitted by the trustee to retain the property conveyed and control of the business practically as they had done before the deed of trust was executed.

By May 25th, 1907, appellant's debt had been reduced from \$21,000.00 to \$10,000.00. On that day the firm of Rigglesberger Brothers, by Noble as trustee, executed to appellant their note for \$10,000. Shortly thereafter suit was brought by appellant upon this note and judgment was taken against the firm and each member thereof for the amount of the note, with interest. When a suit was filed appellant obtained an attachment against the firm property. What property the attachment

was levied upon, what was realized from its sale, or what disposition was made of the attachment does not appear from this record.

R. H. Noble was not a party to that action and appellant's petition as amended does not rely upon or mention that action or claim any right or lien under the attachment or judgment therein or by virtue of the deed of trust. Indeed, there is no claim in the petition that Rigglesberger Brothers are insolvent or that they are indebted to appellant.

Several months after the appellant obtained the judgment in question against the firm of Rigglesberger Brothers, the latter being still in charge of their mill and business, sold to their mother, the appellee, \$856.73 worth of lumber, which she used in repairing one house and erecting another on her lot. The sale was made with the understanding that the price of the lumber should be credited upon the indebtedness of the firm to appellee, and it was so credited.

If R. H. Noble had joined in this action as a plaintiff, and it were alleged in appellant's petition and shown by proof, that the lumber sold by the Rigglesberger Brothers to appellee was under a lien in appellant's favor by virtue of the deed of trust, or the attachment procured by the latter in the other action, and that the sale was without the consent of R. H. Noble, trustee, and resulted from fraud or collusion between the members of the firm and appellee to enable her to obtain a preference and payment on her debt, in violation of her written agreement to be postponed as a creditor until appellant's claim and those of the other creditors named in the deed of trust, should be paid, a state of case greatly differing from that before us would have been presented. But the case actually presented is that appellant sues to recover the price of lumber it claims to have sold appellee upon her agreement to pay therefor the price charged.

In order to sustain the cause of action relied on, it was necessary for appellant to allege and prove either its complete ownership of the lumber sold, or that it had a lien upon it, and that it made the sale in its corporate capacity, or through the trustee and with the approval of the firm of Rigglesberger Brothers, and further that there was a promise, express or implied, upon the part of appellee to pay it (appellant) for the lumber. These facts were neither alleged nor proved. On the contrary, the evidence showed that neither appellant nor Noble, the trustee, knew anything about the sale of the lumber when made, and it was not made to appear that the latter knew anything about it at the time of the trial. The transaction was between appellee and her son, J. W. Rigglesberger, alone.

The effort of appellant to prove an implied promise upon appellee's part to pay it for the lumber by the introduction in evidence of the deed of trust and the separate writing executed by appellee, was unavailing, in the absence of proper averments in its petition joining the trustee as a plaintiff, setting forth these instruments and charging fraud or collusion between appellee and Rigglesberger Brothers in the sale to the former of the lumber, and that it was for the purpose of giving her a preference as a creditor of which she had previously deprived herself by the writing executed at the time of the execution of the deed of trust.

As before stated, the petition fails to allege that the firm of Rigglesberger Brothers is insolvent. It was not alleged or proved that the firm did not have on hand at the time of the trial enough property to pay the balance due upon appellant's debt, or even alleged that its debt had not been fully paid. The facts proved by appellant were insufficient to establish a promise, express or implied, on the part of appellee, to pay it for the lumber.

As said in the written opinion of the special judge: "The trustee took no active part in the management of this trust property. He per-

mitted the Rigglesbergers to operate the business, buy and sell lumber from and to whom they desired and pay off their debts, not only the debt to the bank, but other debts as well, out of the profits. Rigglesberger Brothers owed this defendant (appellee) a large sum of money, and while it is true that in the contract which she signed she agreed not to force or demand the payment of her debt out of the trust property, yet if the trustee permitted the owners to use the discretion which he seems to have allowed them in the operation of the business, and they sold the defendant a bill of lumber and agreed to and did receive credit on the debt they owed her, there seems to be no reason why she could not accept it, without incurring any liability to the bank under the pleadings in this case. * * * It is not claimed that defendant owes the bank anything except by reason of a debt Rigglesberger Brothers owes it and this indebtedness is not alleged. Yet the petition sets up an entirely separate and distinct cause of action against defendant without setting forth any predicates upon which to base such indebtedness. How could the court render judgment against the defendant, with any degree of intelligence for the amount sued for or any part of it? The court would have no jurisdiction to apply any judgment rendered against the defendant here upon any indebtedness Rigglesberger Brothers might owe the bank. None is alleged. It is not shown by the proof or the pleadings whether the other debts referred to in the deed of trust have been paid, nor by what right or authority the Globe Bank and Trust Company claims to be the sole beneficiary of this property."

Counsel for appellant complains that the court erred in refusing to allow it to file, during the trial, a second amended petition making Noble, the trustee, a party to the action. This ruling of the court was not error. The mere making of the trustee a party, without setting forth the deed of trust, and other facts manifesting appellant's right to the proceeds of the lumber sold appellee by Rigglesberger Brothers, would not have entitled appellant to a judgment against appellee.

In view of the state of the pleadings and proof, the judgment complained of was proper. Wherefore, it is affirmed.

CALOR OIL & GAS CO. v. FRANZELL, &c.

KENTUCKY HEATING CO., &c. v. CALOR OIL & GAS CO.

(Filed March 26, 1908—To be reported.)

1. Eminent Domain—Action in County Court—Dismissal—Appeal to Circuit Court—Trial De Novo in a proceeding by a corporation in the county court against a land owner for a right of way to lay a pipe line for gas, which was dismissed on the ground that the corporation did not have the right of eminent domain, on appeal to the circuit court the case stood for trial de novo, and the whole controversy was to be tried in the circuit court.

2. Laying Pipe Line—Contract With Land Owner—Exclusive Privilege—Validity of Contract—A contract made by a corporation with a land owner for the "exclusive right and privilege of laying pipe and pipe lines for any and all purposes whatever, on, across, in or upon said land," is void as being in contravention of public policy.

3. Corporations—Organization—Validity Challenged—Collateral Attack—When a corporation is organized as provided in Kentucky Statutes, sections 540 and 542, neither its purpose nor its validity can be inquired into collaterally, and any proceeding which challenges its right to exist must be instituted and maintained by the government under whose laws it is organized.

4. Natural Gas—Waste—Legitimate Use—Effect on Adjacent District—While one who unlawfully wastes or destroys the gas of a district may be punished under the criminal statutes of the State, all parties owning gas wells in the district are free to make any legitimate use of the gas they choose, and the fact that this legitimate use tends to exhaust the supply, gives the other owners of gas wells in the district, no just grounds of complaint.

5. Same—Excessive Verdict—Where a railroad has the right of way through a farm, 1,450 feet long and 27 feet wide, in which strip a ten-inch pipe line, for carrying natural gas, is proposed to be buried, where the whole farm through which this strip is condemned is listed at \$2,000, a verdict of a jury awarding the owner \$4,000 in damages is flagrantly excessive and out of all proportion to the real damages sustained.

6. Right of Way—Additional Servitude—Measure of Damages Recoverable—Where a railroad company owns the exclusive right of way through a farm, there can be no resulting damages to the remainder of the farm by the laying of a pipe line by another party along this easement, and in such case the measure of damages recoverable by the owner of the land is such sum which the owner, who desired to sell, but was not compelled to do so, would take for it in its present condition, and what a purchaser, who desired to buy, but was not compelled to have it, would give for it under the circumstances.

L. A. Faurest, J. S. Wortham and Humphrey & Humphrey for Calor Oil & Gas Co.

Matt O'Doherty, McQuown & Brown, J. W. Lewis and J. M. Richardson for Kentucky Heating Co., &c., and Nicholas Franzell, &c.

Appeals from Meade Circuit Court.

Opinion of the court by Judge Barker, affirming in part and reversing in part.

These two appeals grow out of the same transactions; both the plaintiff and the defendants below appealed from the judgment of the circuit court, and filed copies of the record here. These, by order of this court, were heard together, and will be treated in this opinion as one case.

Nicholas Franzell and wife own a farm in Meade county, Kentucky, between the natural gas fields and the city of Louisville. The Kentucky Heating Company is a corporation owning and operating natural gas wells in Meade county, and is engaged in the business of piping the gas from the wells to the city of Louisville, and there selling it to its customers, under a franchise which it owns and holds to lay its pipes through the public streets. The Louisville Gas Company is a corporation engaged in the business of manufacturing gas in the city of Louisville and selling it, both for lighting and heating purposes, under a franchise which it owns of laying its pipes through public ways of the city of Louisville. This latter corporation is not a party to this record, but it is a rival, to some extent, at least, of the Kentucky Heating Company, and it is the theory of the heating company that the Calor Oil & Gas Company is but a branch of the Louisville Gas Company, and that the latter was incorporated, among other things, to enable the Louisville Gas Company, by indirection, to pipe natural gas from the gas fields of Meade county to the city of Louisville, and in this way unlawfully compete with the Kentucky Heating Company in its business. We shall not enter very deeply into this phase of the case, for reasons which will appear further on in the opinion.

The Calor Oil & Gas Company is a corporation having power and authority, under its charter, to buy and lease oil and gas lands, dig wells, construct pipe lines, and do any and all other things connected with such business. The questions which arise for adjudication upon the transcripts before us grow out of an attempt on the part of the gas company to condemn a strip of land across the farm of appellants, Franzell and wife, for the purpose of laying therein a pipe line, to convey natural gas from its wells in Meade county, Kentucky, to the city of Louisville. The proceeding is under section 3766a, Kentucky Statutes, and sections 835, 836, 837, 838 and 839 and 840, Kentucky Statutes. The statement which was filed in the clerk's office of the county court of Meade county, fully described the strip to be condemned, and, thereupon, the judge of the Meade County Court appointed three commissioners, who, after having duly qualified as required by law, viewed the land and made report, assessing the damages which would accrue to the owners by reason of the condemnation thereof. Upon the trial of the case before the county court, on the exceptions of the owners of the land to the report of the commissioners, the court held that the corporation did not have the power of eminent domain, and dismissed the proceedings. From this judgment the corporation appealed to the circuit court of Meade county, where, upon a trial de novo, as provided by statute, the circuit court held that the corporation did possess the right of eminent domain, and submitted the question of damages to the jury, with the result that they returned a verdict of \$4,000.00 in favor of Franzell and wife; and from this judgment all the parties, as said before, have prosecuted appeals for its reversal.

The first question which is raised by the defendants below on this appeal is, that, after the judgment in the circuit court, that the Calor Oil & Gas Company possessed the right of eminent domain under its charter, the case should have been sent back to the county court, and there tried out before a jury on the question of the amount of damages. We can not agree to this proposition. When the county court decided that the corporation did not possess the right of eminent domain, it was forced to appeal to the circuit court to get from under the ban of that adverse adjudication; and, having appealed to the circuit court, under the statute (section 839, Kentucky Statutes), the case came on for trial de novo, and the whole controversy was to be tried out there. This is what a trial de novo means; and there is nothing in the statute which indicates that the Legislature intended to impose upon the parties the burden of the case's being sent back to the county court for a retrial, after an appeal to the circuit court. On the contrary, all the language of the section (839) indicates an intention that, upon appeal to the circuit court, the whole case is to be there tried and settled, subject, of course, to a right of appeal to this court.

The Kentucky Heating Company was made a party defendant to the condemnation proceedings because it claimed, under a written contract with Franzell and wife, the owners of the land, the "exclusive right and privilege of laying pipe and pipe lines for any and all purposes whatsoever, on, across, in, or upon said land;" the consideration of which was an annual rental of two hundred and sixty-two dollars, so long as the Kentucky Heating Company "shall continue to occupy and use any part of the above described land under this agreement." In addition to this exclusive privilege, it had, under this contract, certain mineral rights in the land, which need not be set forth here, as the proposed right of way sought by the Calor Oil & Gas Company in nowise infringed upon or involved them. So far, then, as the Kentucky Heating Company is concerned, the only question in this case in which it is interested is the validity of its

claim to an exclusive right to construct or operate a pipe line across the Franzell farm.

Obviously, this contract is void, as being in contravention of public policy. This position needs little elucidation or argument. Undoubtedly the public welfare requires the freest competition in all things pertaining to the common interest; and it has always been contrary to law to establish a monopoly such as is involved in the contract between the Franzells and the Kentucky Heating Company. What would be thought, for instance, of the proposition that a railroad corporation could lease from the owners a belt of land surrounding a municipality, and provide in the lease that it should have the exclusive right to operate a railroad across the land in question? And yet, the supposed proposition differs in principle in nowise from the contract between the Kentucky Heating Company and the Franzells.

In 1 Lewis on Eminent Domain, section 137, it is said:

"An exclusive franchise or privilege in a matter of public concern can be created only by the sovereign power. It can not be secured by contract with individuals or corporations. Thus, the grant by a railroad company of the exclusive right of maintaining a telegraph line along its right of way, or the grant by an individual of the exclusive right of constructing pipe lines over his lands for the transportation of oil, is void, as against public policy."

And again, in volume 2, section 289a, it is said:

"It is held that the grant of an exclusive right of way for a use of a public nature, such as a railroad, or pipe line, or telegraph, is against public policy and void, so far, at least, as the exclusive feature is concerned."

To the same effect is *West Virginia Transportation Co. v. Ohio River Pipe Line Co.*, 22 W. Va., 626, 46 Am. Rep., 527; *Kettle River R. Co. v. Eastern R. Co.*, 6 L. R. A., 111; 41 Minn., 461; *W. U. T. Co. v. A. U. T. Co.*, 38 Am. Rep., 781; 65 Ga., 160; *Western Union Telegraph Co. v. B. & S. W. Ry. Co.*, 11 Fed. Rep., 1; *W. U. T. Co. v. B. & O. Tel. Co.*, 23 Fed. Rep., 12.

From the foregoing authorities, and upon principle, it is manifest that the lease from the Franzells to the heating company is void, so far as it undertakes to grant an exclusive right to lay pipe lines in or across the land involved here. Being void, it can constitute the basis for no claim for compensation, either upon the part of the Franzells or the heating company, as a void contract can give rise to no legal right. In 2 Lewis on Eminent Domain, section 484, it is said: "Nothing can be allowed on account of the loss or impairment of a gratuitous privilege, which the owner has been enjoying by the sufferance of another, or contrary to law or public right." (*Kingsland v. New York*, 110 N. Y., 569; 18 N. E. Rep., 435; *Ranlet v. R. R. Co.*, 62 N. H., 561.)

It follows that the Kentucky Heating Company had no interest whatever in this condemnation proceeding; it being patent that the rights which the Calor Oil & Gas Company were seeking did not, in anywise militate against, or infringe upon, the mineral rights of the heating company in the Franzell farm; and, as we have already said, it had no right whatever to the exclusive privilege of laying pipe lines across the farm. The commissioners and the jury correctly refused to award it any damages by reason of the condemnation of the right of way, and the court erred in permitting any evidence as to the damages that would accrue to the Franzells by reason of the loss of rental under their contract with the Kentucky Heating Company, based upon the abandonment by the heating company of the lease.

The appellee, both by traverse and affirmative allegation, placed in issue the existence of the Calor Oil & Gas Company. When the

corporation introduced in evidence a properly certified copy of its charter, which was regular on its face, and showed a compliance on its part with the statutory requirements, this evidence established its existence. Section 540, of the Kentucky Statutes, provides: "Said articles, or a certified copy thereof, may be used as evidence in any action for or against such corporation." And, in section 542, it is provided: "When the articles are filed and recorded, as provided, * * * the corporation shall be deemed to be organized for the purpose of transacting, promoting or carrying on the business or purpose for which it was created; and shall, thereupon, become a body corporate." When the corporation is organized as the statute requires, neither its purpose nor its validity can be inquired into collaterally, and any proceeding which challenges its right to exist must be instituted and maintained by the government, under whose laws it is organized. It would produce confusion and hardship if the right of a corporation to exist could be called in question by every litigant with whom it came in contact during its business career, and, therefore, the principle is wisely established, that, after a corporation is organized as by law required, no adverse litigant can, in a collateral proceeding, challenge its right to exist. In the case of *Cumberland Telephone & Telegraph Co. v. Louisville Home Telephone Co.*, 114 Ky., 892, on this very question, we said:

"Appellee has not only been incorporated in the State of Delaware, but it has been recognized by the authorities of the city of Louisville as a corporation, and has been granted by it an important and valuable franchise. It is, at least, a *de facto* corporation, and the rule seems to be that, when an association of persons is exercising corporate franchises under color of legal organization, the existence of the corporation can not be inquired into collaterally, but only in a direct proceeding by the government. The reason of the rule is that it would produce endless confusion, and destroy the corporation if the legality of its existence could be drawn in question in every suit in which it was a party, for then no judgment could be rendered which would finally settle the question."

The same principle is enunciated in *Turnpike Co. v. Bobb*, 88 Ky., 226; *Lawson on Rights, Remedies and Practice*, volume 1, section 370; *Wright v. Shelby R. R. Co.*, 16 B. Mon., 5, *Lafin & Rand Power Co. v. Sinsheimer*, 46 Md., 315; *Central of Georgia R. Co. v. U. S. & N. R. Co.* (Ala.), 39 Southern, 473; 144 Ala., 639; *Postal Tel. Cable Co. v. O. S. L. R. Co.*, 23 Utah, 474; *Parker v. Bethel Hotel Co.*, 96 Tenn., 252.

It follows, from what we have said above and from the foregoing authorities, that the trial court should not have permitted any inquiry into the motives or bona fides of the gas company in this proceeding, and a fortiori should have excluded all attempt to bring into question whether the venture of the Gas Company, in piping natural gas from Meade county to Louisville, would or not be profitable. With that the Franzells had nothing to do, nor did the Kentucky Heating Company, because, as above shown, the latter had no legal interest in the property that was involved in the condemnation proceedings. The right of the gas company to pipe the natural gas from its own wells in Meade county, and transport it to Louisville for sale, was a legitimate exercise of its property right, and this the Kentucky Heating Company could not successfully challenge, although it may be detrimental to its interest. If it be true, as said in the briefs, that the natural gas in the district of Meade county is contained in a common reservoir, underlying the whole area, of necessity it follows that the gas company's use of its wells tends to exhaust the wells of the heating company; and it is equally true, that the piping of gas by the heating company from its wells tends to exhaust the gas company's wells; and, undoubtedly, the operation

of two gas companies in the same field (assuming that the quantity of gas is limited) will exhaust it sooner than one of them would. But each has the legal right to the legitimate use of the gas underlying its own property, and neither can complain of such use by the other. We have already held, in the cases of *Commonwealth v. Trent, &c.*, 117 Ky., 34, and *Calor Oil & Gas Co. v. McGehee*, 117 Ky., 71, that one who illegitimately wastes or destroys the gas of a district may be punished under the criminal statutes of the State, and may also be enjoined from committing such wrongful acts; but all parties owning gas wells in the district are free to make any legitimate use of the gas they choose; and the fact that this legitimate use tends to exhaust the supply, gives the other owners of gas wells in the district no just ground of complaint. The court knows, as a part of the history of the country, that natural gas districts, after flourishing for a while, are frequently entirely exhausted, and that manufacturing and power plants established in the district, and dependent upon the use of the gas for fuel, are forced to move elsewhere. This may happen to the district under consideration; but, as said before, if this results from legitimate sales by the various owners to their customers, no one of them has a just ground of complaint. They have all enjoyed the property while it existed, and, when it is exhausted, they, of course, can no longer enjoy it. The right of the Calor Oil & Gas Company to transport its gas to Louisville and sell it, is as high as the right of the Kentucky Heating Company, and neither has a monopoly of the field.

The real issue in this case was much obscured by a consideration of the effect upon the heating company of the gas company's piping its gas to Louisville—a question which had no valid place in the procedure. If the gas company makes an illegitimate use of its wells or pipe line, and unlawfully attempts to destroy the gas fields by unnecessarily or fraudulently wasting the gas, the Kentucky Heating Company, as a joint owner in the common field, will have a remedy, both by injunction and by an action for damages, and undoubtedly the doers of the wrong will be subject to the penalty provided in the criminal statutes forbidding the wrong. But these are considerations which should not have been superimposed upon the simple issues as to (1) whether or not the Calor Oil & Gas Company had, under its charter, the right of eminent domain, and (2) what damage accrued to Franzell and wife by reason of its exercise in the manner sought in this case.

The question of the constitutionality of section 3766a, of the Kentucky Statutes, which gives the right of eminent domain to the owners of gas and oil wells for the purpose of piping their products to market, is not now an open one. The constitutionality of the act was recognized in the case of *Paine's Guardian, &c. v. Calor Oil & Gas Co.*, 31 Ky. Law Rep., 754, and is clearly established by the reasoning of the opinions in *Chesapeake Stone Co. v. Moreland*, 104 S. W., 762, and *Kirk-Christy Co. v. American Association, Incorporated*, decided March 4, 1908.

The fact that the Louisville Gas Company owns a majority, or, even all, of the stock of the Calor Oil & Gas Company does not vacate or destroy the charter or corporate rights of the latter corporation. The Calor Oil & Gas Company retains its separate corporate entity, and has all the powers and rights which it would otherwise have if its stock was in the hands of a number of individual holders. (*Louisville Gas. Co. v. Kaufman & Straus*, 105 Ky., 158; *City of Louisville v. Louisville Water Co.*, 26 Ky. Law Rep., 425; *Bell, Sheriff v. City of Louisville, &c.*, decided January 21, 1908; *Parker v. Bethel Hotel Co.*, 96 Tenn., 252; *McTighe v. Macon Construction Co.*, 94 Ga., 306.)

It follows, from what we have said, that the purpose of the Louisville Gas Company in purchasing the stock of the Calor Oil & Gas

Company, can not be inquired into in this collateral proceeding, and that it is immaterial here whether or not it is seeking to evade the provisions of section 190 of the Constitution, which requires pre-existing corporations to accept the provisions of the Constitution before they shall enjoy the benefits of future legislation. If either the Louisville Gas Company or the Calor Oil & Gas Company is violating its charter, that question may not be inquired into in a collateral proceeding, but, as said before, can only be challenged in a direct proceeding, instituted by the Commonwealth, through its proper officers. It is also immaterial, in this proceeding, whether or not the Calor Oil & Gas Company has obtained from the city of Louisville a franchise to distribute its gas to the public through its streets. It can not obtain its whole right of way at once. Some part of the proceeding must have priority in point of time. It is possible, of course, that the city may not grant the franchise at all, or the price for it may be so high that the venture will have to be abandoned. But this does not affect the Franzells, who, if this happens, will have their money for the right of way over their land, without the burden of a pipe line upon it. Nor is it material that appellant proposes to sell all of its gas to the Louisville Gas Company, and in this way distribute it to the citizens of Louisville. The statute gives the appellant the right to condemn a pipe line from its wells to the market for its produce. It contains no restrictions upon the manner of sale; it evidently being the belief of the Legislature that the public interest will be best subserved by affording the owner of the gas an opportunity to sell it upon the market.

This brings us to the question of the excessiveness of the verdict. The laying of the pipe line on the strip of land in question will be an additional servitude upon the right of way of the Louisville, Henderson & St. Louis Railroad Company, which runs through the Franzell farm. The railroad owns a perpetual and exclusive right of way through the farm, and the strip of ground in question here is within this easement, and is one thousand, four hundred and fifty feet long and twenty-seven feet wide. In this strip a pipe line ten inches in diameter is to be buried, and for this privilege the jury returned a verdict of four thousand dollars in damages. It can not be claimed that the laying of the pipe line injures in any way, or damages, the remainder of the farm. The railroad, as said before, has a perpetual and exclusive franchise of the whole strip for railroad purposes. The pipe is to be sunk along the railroad track. The commissioners appointed to assess the damages, in their report, fixed the damages at twenty-one dollars and seventy-five cents. The whole farm, it is said, is assessed for taxation at two thousand dollars; and yet, a jury assessed the damages for taking the strip, of which the owner of the fee—leaving out of view the bare possibility of a reverter—can never make any use, at four thousand dollars. This verdict is flagrantly excessive and out of all proportion to the real damages sustained. The question was not what the property was worth to the Calor Oil & Gas Company as a pipe line, and no consideration of its availability for this purpose should have been allowed to enter into the problem.

In the case of *West Virginia, &c. R. Co. v. Gibson, &c.*, 94 Ky., 234, which was a condemnation proceeding on the part of the railroad, in establishing the measure of damage, the court said:

"The issue in such a case is not what the land is worth to the appellant, nor how profitably it may use it in its business; nor the cost and expense that it would be compelled to incur in obtaining other property or fitting it for its business, if it failed to obtain that particular property. (See *Lewis on Eminent Domain*, section 479, and authorities there cited.) The law should be given to the jury without including the evidential matters indicated; they are evidence

only. But, in such cases, the jury should be admonished not to let those matters indicated as not evidence influence them."

In the case of *Texas & N. O. R. Co. v. Postal Tel. Cable Co.*, 52 S. W., 108, the Supreme Court of Texas, in speaking of the condemnation of the right to put telegraph poles on the railroad right of way, said:

"Under no conceivable state of facts could the value of the use of the right of way to appellee (the telegraph company) be made the measure by which to determine the damages sustained by appellant."

To the same effect is *V. & T. R. Co. v. Elliott*, 5 Nev., 358; *Sullivan v. LaFayette County*, 61 Miss., 271; *Union Depot, &c. Co. v. Brunswick*, 31 Minn., 297.

The case of *Madisonville, Hartford & Eastern Railroad Co. v. Ross*, 31 Ky. Law Rep., 584, involved the condemnation of appellee's home for railroad purposes, and we there held that his measure of damages was the market value of the property taken, and that the inconvenience to the owner of moving or finding another home could not be allowed as an element of damages. On the subject of the measure of damages, we said:

"Lewis, in his work on *Eminent Domain*, 2 edition, section 463, the proper measure of damages. A fair equivalent for any entire tract is taken: 'This case presents but little difficulty, and, so far as we have observed, there is no difference in the authorities as to the proper measure of damages. A fair equivalent for any entire piece of property is its market value in money.'

"In section 478, it is said: 'In estimating the value of property taken for public use, it is the market value of the property which is to be considered. The market value of property is the price which it will bring when it is offered for sale by one who desires, but is not obliged to sell it, and is bought by one who is under no necessity of having it.'

"In the *Cyclopedia of Law and Procedure*, volume 15, page 685, the rule is thus stated: 'The measure of damages, when the whole of any particular piece of property is taken for a public use under the power of eminent domain, is the market value of it. Market value means the fair value as between one who wants to purchase and one who wants to sell, not what could be obtained for it under peculiar circumstances, when a greater than its fair price could be obtained, nor its speculative value, nor a value obtained from the necessity of another; its present value at a sale which a prudent owner would make if he had the power of election as to the time and terms.' * * *

"The *Am. & Eng. Ency. of Law*, 2 edition, volume 10, page 1151, on the subject in hand, says: 'In determining the compensation to be paid to the land owner for land taken under the power of eminent domain, there are many elements that must be considered. The principal rule, which is to be applied, as far as possible, is that, whenever property is taken, the fair market value of the property at the time of the taking should be paid for it. The market value of land is usually declared to be, not what the land would bring at a forced sale, but what it would bring in the hands of a prudent seller, at liberty to fix the time and conditions of sale. What property would bring at a fair public sale, where one party wanted to sell and another wanted to buy, may be taken as a criterion of its market value.' "

In the above case, it is true, the whole of appellee's property was taken, and, in the case at bar, only a strip of ground running across the farm is sought to be condemned. Ordinarily, in the case of an easement, such as a railroad right of way, or the easement involved here, the incidental question arises as to the damages accruing to

the remainder of the property. In the case at bar, however, that question is eliminated by the peculiar situation. As the railroad owns the exclusive right of way across the farm, and the appellant is seeking to lay its pipe line along this easement, there can be no resulting damage to the remainder of the property of the Franzells. This being true, what we said in the case last cited above is pertinent to the establishment of the proper measure of damages here. We think the court should have told the jury, substantially, that the measure of damages for the taking of the strip of land in question was its fair market value; being that sum which the owner who desired to sell, but was not compelled to do so, would take for it in its present condition, and what a purchaser who desired to buy, but was not compelled to have it, would give for it under the circumstances.

What we have said in regard to the measure of damages in this case does not conflict with the principle enunciated in *Boom Company v. Patterson*, 98 U. S., 403. In that case, it was held that where the property sought to be condemned had a peculiar adaptability and an increased market value because of its suitability as sites for log booms, that this adaptability was to be considered in ascertaining the market value of the property. There is nothing in the case before us which affords grounds for the application of this principle. The land sought to be condemned is on the direct route from the Meade county gas wells to Louisville; but there was no special reason for desiring it more than any other direct route between the wells and the city.

For the reasons indicated, the judgment is affirmed, on the appeal of the Kentucky Heating Company, Nicholas Franzell and wife, and reversed on the appeal of the Calor Oil & Gas Company, for a new trial, under principles consistent with this opinion.

LOUISVILLE VENEER MILLS CO. v. CLEMONTs.

(Filed April 16, 1908—Not to be reported.)

1. Master and Servant—Injury to Servant—Contract of Settlement—Avoidance—Consideration—The mere fact that a person is in such financial distress or so hard pressed about money matters as that he would be willing to sell his property at a sacrifice or surrender a claim for an inadequate consideration, is not in itself sufficient to avoid a contract that its free from fraud, overreaching or misrepresentation.

2. Same—Appliances—Duty of Master to Furnish—A master is not required to furnish his employes the latest or the best appliances or those that are in general use. He is only charged with the duty of furnishing the servant with reasonably safe appliances, and where the servant is injured by the use of such appliances, the question as to whether they were reasonably safe is one for the jury.

Bennett H. Young and Marion W. Ripy for appellant.

Robert L. Page and Harry Robinson for appellee.

Appeal from Jefferson Circuit Court, Common Pleas Branch, Second Division.

Opinion of the court by Judge Carroll, reversing.

Appellee, who was injured by a rip saw he was operating in the mill owned by appellant, brought this suit to recover damages. We are asked to reverse the judgment rendered in his behalf because of

the assigned errors of the trial court in failing to give a peremptory instruction to find for appellant and in misinstructing the jury. The request for a peremptory instruction was rested upon two grounds, first, that appellee, in consideration of thirty-six dollars paid him, agreed to and did release it from liability for the injury sustained, and, second, because he failed to tender the money received before instituting the action to recover damages.

Appellee was injured on April 25, 1905, when four of his fingers were cut off by the rapidly revolving saw which came in contact with his hand. He was taken to the Deaconess Hospital, where he remained until May 1, 1905. On this date the physician in attendance discharged him from his care. On the day he was dismissed by the physician, but before he left the hospital, he was visited by Harry Kline, manager of appellant's mill, and Sherley Crawford, an attorney and agent of an indemnity company in which appellant was insured against loss on account of injury to its employees. These gentlemen went to see appellee for the purpose of settling with him any claim for damages he might have against the company. There is sharp conflict between the statements of appellee and those made by Kline and Crawford as to what took place at the interview between them that resulted in appellee signing the following paper: "For the sole consideration of the sum of thirty-six dollars this 1st day of May, 1905, received from Louisville Veneer Mills, I do hereby acknowledge full satisfaction in discharge of all claims accrued, or to accrue, in respect to all injuries or injurious results, direct or indirect, arising, or to arise, from an accident sustained by me on or about the 25th of April, 1905, while in the employment of the above."

Appellee testified that Crawford and Kline told him that he was entitled to twenty-five dollars accident insurance. That Mr. Kline, the manager of the company, had kept up his insurance. That the paper they wished him to sign was a receipt showing that he had received from the insurance company that amount of money. That he did not read the receipt, nor was it read to him, and he signed it upon their representations as to what it contained; and did not know that it purported to be a compromise or settlement of any claim he might have for damages against the company. That he relied entirely upon the statements made by them as to the contents of the paper, and would not have signed it had he known that it was a settlement of his claim.

Kline and Crawford say that the paper was read to appellee, and its contents fully explained to him. That he signed it with full knowledge of its purport and meaning. That it was understood eleven dollars was to be paid to the hospital for medical attention received by appellee, and twenty-five dollars was to be paid to him. That the amount due the hospital was paid, and twenty-five dollars given to appellee.

There was evidence conducing to show that appellee at the time he signed the paper was an intelligent, sensible man, although not well educated, and that he was not suffering from any mental or physical disorder that would render him incompetent to form an opinion about a matter of business, although he was somewhat distressed and disturbed about the condition of his financial affairs.

It will thus be seen that the issue upon the question as to what occurred when appellee signed the paper was purely one of fact. Upon this point the court instructed the jury as follows: "You will find for the defendant, Florence C. Kline (who was the owner of the appellant company), unless you believe from the evidence that the paper shown you as of the 1st day of May, 1905, was signed by plaintiff, William Clemonts, under the belief that the paper was a release or receipt for insurance allowed to him, and that such representations were made by the defendant's agent or an agent of the Aetna Insurance Co., that such was the fact, and Clemonts relying upon them,

believing such representations, so signed the paper; or, unless you shall believe from the evidence that at the time Clemonts signed the paper he was in such distress of mind, or in such great financial distress as that he would make undue sacrifice of his rights under and by reason of such condition and surrender the same for an inadequate consideration, and such condition, if it existed, was known to the defendant or her agent, or the agent of the Aetna Insurance Co., and such agent, one or both of them, took advantage of such condition and under those circumstances and by reason thereof procured from Clemonts the paper which has been shown you; if you do believe these things that I have submitted to you under this instruction, under the evidence, then you will disregard such paper in your deliberations, and consider Clemonts not bound thereby."

If appellee's version of the manner in which the receipt was procured, and the representations made to him at the time by Kline and Crawford to induce him to sign it, were true, the paper was not binding upon him, and it was proper to submit this issue to the jury. Upon the question as to the validity of this receipt there was only one substantial issue, made by the evidence, and that one is fairly stated in the first paragraph of the instruction. So much of the instruction as reads: "Or unless you shall believe from the evidence that at the time Clemonts signed the paper he was in such distress of mind or in such great financial distress as that he would make undue sacrifice of his rights under and by reason of such condition and surrender the same for an inadequate consideration, and such condition, if it existed, was known to the defendant or her agent or the agent of the Aetna Insurance Co., and such agent, one or both of them, took advantage of such condition and under those circumstances and by reason thereof procured from Clemonts the paper which has been shown you," should be omitted from it on another trial of the case, if the evidence is the same as on this trial. There was not sufficient evidence to authorize the submission of the question as to whether appellee's distress of mind growing out of his financial condition or for other causes was taken advantage of. Aside from this, the mere fact that a person is in such financial distress, or so hard pressed about money matters, as that he would be willing to sell his property at a sacrifice or surrender a claim for an inadequate consideration, is not in, and of itself sufficient to avoid a contract that is free from fraud, overreaching or misrepresentation. It often happens that persons are obliged by their necessities to dispose of their property at a grossly inadequate price, and generally, when persons are so unfortunate as to be placed in this position, there is a purchaser waiting for just such an opportunity, ready and willing to take advantage of it. But, a purchase, under circumstances like these, will not be cancelled at the suit of the seller, merely because his poverty obliged him to sell and the purchaser took advantage of his situation to buy.

Crawford was the attorney and agent of the insurance company that had obligated itself to indemnify appellant against any loss it might sustain on account of injuries to its employees, including appellee. The money paid to appellee was the money of the insurance company. Appellee, before the institution of the action tendered to the general agent of the company the amount received by him, which the general agent refused to accept. A tender should, of course, be made to the person paying the money, to the person making the tender or to some person representing him. And as the insurance company had obligated itself to protect the appellant company from loss on account of injury sustained by Clemonts, and its agent on account of this obligation had paid the money to Clemonts, it was proper that the tender should have been made to the general agent of the company. When the general agent of the company refused to accept the amount ten-

dered, it was paid into court by appellee. It was necessary to enable appellee to maintain an action that he should pay, or offer to pay, the money he had received, and in this respect he did all under the circumstances he could do.

There was evidence conducing to show that the rip saw plaintiff was working with should have been protected by a guard and provided with what is called a "spreader," and that these implements were generally used in operating similar machinery. On the other hand, there was testimony to the effect that neither a guard nor a spreader was necessary, and that it was not usual to have them attached to saws like the one plaintiff was injured by. With the evidence in this condition, the court gave to the jury instruction No. 3, reading as follows: "The court instructs the jury that it was the duty of the defendant company to have and maintain the rip saw in the evidence referred to in a condition reasonably safe for use, and to adopt and provide such appliances as would make it reasonably safe for use by the operator; and if you believe from the evidence that there were any such appliances in general use at the time the injury to plaintiff occurred, if it did occur, and that such appliances were known to the defendant, or its agents in charge of its factory, and charged by defendant with the duty of supervising its machinery, or could have been known by the exercise of ordinary care, and by reason of such failure upon their part, if there was any, the plaintiff sustained the injuries alleged, in that event the law is for the plaintiff, and the jury should so find; unless, as in the other case stated in the second instruction, the jury should be of the opinion and believe from the evidence that the plaintiff failed to exercise ordinary care for his own safety, and such failure on his part so far contributed to his injury but that for such failure he would not have been injured, in which latter event the law is for the defendant, and you should so find."

Appellant objects to so much of the instruction as reads: "And if you shall believe from the evidence that there were any such appliances in general use at the time that the injury to plaintiff occurred, if it did so occur, and that such appliances were known to the defendant or its agent in charge of its factory, and charged by defendant with the duty of supervising this machinery, or could have been known by the exercise of ordinary care."

In our opinion this objection is well taken. In cases of this character the master is not required to furnish the latest appliances, or the best appliances, or appliances that are in general use. He is only charged with the duty of furnishing the servant with reasonably safe appliances. Whether the appliances furnished are reasonably safe or not is a question of fact to be determined by the jury from the evidence. And to the end that the jury may intelligibly consider and dispose of this question, it is competent for the parties to show, by evidence, the character of appliances furnished, as well as the character of appliances in general use in similar employments, so that the jury may determine whether or not the appliances furnished are reasonably safe. This identical question was before this court in the case of *Dow Wire Works Co. v. Morgan*, 29 Ky. Law Rep., 854, in which an instruction similar to the one being considered was condemned; and it was said that: "The court should have told the jury that it was the duty of appellant to have and maintain the rip saw in a reasonably safe condition to work with, and to provide it with such appliances as would make it reasonably safe for use by the operator."

The same rule was announced in *Louisville & Atlantic R. Co. v. Wilson*, 30 Ky. Law Rep., 734, in which it was said: "The rule in this State, and the one generally prevailing, is that while the master is not required to furnish the servant with absolutely safe or faultless machinery, or provide the latest or most modern appliances, he is re-

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quired to furnish reasonably safe appliances and reasonably safe places for the use of the servant." (New Galt House Co. v. Chapman, 30 Ky. Law Rep., 692.)

The rule laid down in these cases has been approved in many others, and it is prejudicial error to go outside of it in instructions in cases like this.

For the errors mentioned in the instructions, the case must be reversed, with directions for a new trial, and it is so ordered.

MOSELEY'S ADM'R v. BLACK DIAMOND COAL & MINING CO.

(Filed April 16, 1908—Not to be reported.)

1. Master and Servant—Dangerous Premises—Mining Shafts—Statutory Provisions—Gates Required—Under Kentucky Statutes, section 2731, providing that "at every mine operated by a shaft there shall be provided an approved safety catch, and a sufficient cover overhead, on all cages used for lowering and hoisting persons, and at the top of every shaft a safety gate shall be provided, and an adequate brake attached to every drum or machine used in raising or lowering persons in all shafts and slopes," the statutory duty is not complied with by furnishing gates that can not be closed. The gates contemplated are such as will either automatically close, or can easily be closed by persons using them.

2. Same—Death of Servant—Negligence of Master—Liability—In an action against a mining company for causing the death of an employe by falling into a shaft which the statute requires should be provided with safety gates the company was guilty of negligence in permitting coal and other material to be placed and accumulate around the gates in such manner as to prevent them from being closed, and a failure to provide such gates for the safety of employes and other persons rightfully using the premises can not be neglected without subjecting the owner to liability for damages thereby caused.

3. Same—Evidence—Statement of Mining Boss—Competency—In an action against a mining company for damages for negligently causing the death of an employe, evidence of a statement made by the mine boss some time after the accident, that he had told the deceased to go to the shaft for instructions, was incompetent, not being a part of the *res gestae*.

4. Defective Premises—Knowledge of Servant—Where an injury results in death and the action is brought by the personal representative of the servant, it is not necessary to a recovery to show that the deceased knew, or might by ordinary care have discovered, the dangerous or defective condition of the premises.

S. R. Crewdson for appellant.

Gordon, Gordon & Cox and Forcht & Field for appellee.

Appeal from Muhlenberg Circuit Court.

Opinion of the court by Judge Carroll, reversing.

James Moseley was employed as night fireman and engineer by the appellee company. The engine was situated some sixty feet from the mouth of a shaft sunk from the top of the ground to the coal stratum, about one hundred feet below the surface. The opening of

this shaft on the surface of the ground was sixteen by sixteen feet. It was divided into two compartments, in each of which was a cage or elevator used for hoisting and lowering the employes and material from and into the mines. When a person in the bottom of the shaft desired the elevator to be lowered or hoisted, he could notify the engineer by blowing a whistle which could be heard by the engineer. Moseley was not the regular engineer or fireman, and was only temporarily in charge of the engine on the night he met his death. On that night, a party of young people had gone down into the mine, in company with Tilden Bridges, who was one of the bosses. After the party went down in the shaft, the regular engineer went off duty, leaving Moseley alone in charge of the engine. A short time after this, Bridges, who was at the bottom of the shaft, blew the whistle to notify the engineer to hoist the elevator, and at this moment, or immediately afterwards, Moseley fell into the shaft from the top, landing in the bottom, fatally injured. He never recovered consciousness, nor made any statement as to how the accident happened.

In this action by his personal representative to recover damages for his death, the trial judge, at the conclusion of the evidence for appellant, who was plaintiff below, directed the jury to return a verdict for appellee. The correctness of this ruling depends upon the question whether or not there was any evidence conducing to show that Moseley's death was caused by the negligence or carelessness of the appellee company.

Section 2731, of the Kentucky Statutes, provides in part: "And at every mine operated by a shaft there shall be provided an approved safety catch, and a sufficient cover overhead, on all cages used for lowering and hoisting persons, and at the top of every shaft a safety gate shall be provided, and an adequate brake shall be attached to every drum or machine used in lowering or raising persons in all shafts and slopes."

The appellee company partially complied with this statute by enclosing the opening or mouth of the shaft with a fence, provided with gates, through which persons desiring to go in or come out of the shaft might enter, but there was evidence tending to show that the gates were constantly left open, and could not be closed on account of coal and other material that had accumulated and was allowed to remain about the gates. The statutory duty imposed upon mine owners is not complied with by furnishing gates that can not be closed. The company was guilty of negligence in permitting coal and other material to be placed and accumulate around these gates in such a manner as to prevent them from being closed. The safety gates contemplated by the statute are gates so arranged that they will either automatically close themselves when opened, or can easily be closed by persons using them. To provide a gate and then permit it to be and remain in such a condition, for any cause, that it can not be closed, is the same as if no gate had been provided or maintained. The Legislature deemed the establishment and maintenance of safety gates of sufficient importance to make it the mandatory duty of mine owners to provide them for the safety of the employes, and to prevent persons rightfully using the premises from falling into the mine shaft, and this statutory duty can not be neglected or disobeyed without subjecting the owner to liability for damages suffered by persons rightfully using the premises. (*Andricus v. The Pineville Coal Co.*, 28 Ky. Law Rep., 704.) We may, therefore, properly treat this case as if the appellee company had not provided any safety gates at all. Accepting this view as correct, the question remains—was the failure of the company to perform this statutory duty such negligence as would authorize a recovery in this case? Upon this point, the argument is made in behalf of the company

that, although it may have been negligent in failing to provide safety gates, yet its negligence in this respect does not render it liable in damages for the death of Moseley, because his duties as engineer and fireman did not require him to leave the engine room, or go to the shaft. It is said that, in going to the shaft, he was not in the performance of any duty owing to the company, or acting within the scope of his employment. That if he had remained at the place where his duties required him to be, he would not have fallen into the shaft or have been injured by its negligence in failing to properly protect the opening. Why Moseley went to the shaft does not appear in the record. Appellee offered to prove that Bridges, the mine boss, said, sometime after the accident, that he told Moseley when the whistle was sounded, he should go to the shaft to receive instructions. This offered evidence was properly excluded by the court. Direct evidence by any person who heard Bridges so instruct or direct Moseley would be competent, but the statements made by Bridges after the accident were not a part of the *res gestae*, and could not be used as evidence against the company. But, aside from the failure of proof upon this point, Moseley's duties as engineer and fireman placed him in charge of all the machinery connected with the lowering and hoisting of the elevators by the engine. It was as much a part of his duties to see that the pulleys and cables attached to the elevators and by which they were raised and lowered, were in working order and good condition, as it was to see that the fires in the boilers were kept up, or that a sufficient supply of water was on hand, or that the machinery directly attached to the engine was in proper condition. It can not be said that his duties were confined exclusively to the engine house, or that he had no right to go about the shaft where the elevators operated by the engine were located. He was not a trespasser, but was rightfully on the premises. Nor was he outside the fair line of his duties in going to the shaft. The rule laid down in the line of cases holding that a servant can not recover for injuries sustained by him acting outside of the line of his duties and going in or about places where his employment does not require him to be or go, is not applicable to the facts of this case. It has been often held that the duty imposed upon the master of furnishing for the use of the servant reasonably safe premises is limited to those premises where the servant, in the performance of the duties for which he is engaged requires him to labor, and does not extend to other parts of the establishment, where the servant is not obliged to be or go. Thus, in *Mitchell & Tranter Co. v. Ehmett*, 23 Ky. Law Rep., 1788, it was held that the helper of a brick-layer could not recover for injuries sustained by falling through a roof that was unsafe, and this upon the ground that, in getting upon the roof, the servant was a volunteer and the master owed him no duty to keep the roof in safe condition, and its failure to do so was not, as to him, actionable negligence. And, in *L. & N. R. Co. v. Hocker*, 23 Ky. Law Rep., 982, it was held that Hocker, an employe of the company, who was injured by a train of cars, could not recover because he was at a place where his duties did not require him to be, and the company did not owe him any duty, except to avoid injuring him after his perilous condition was discovered.

Whether or not the company, in failing to maintain sufficient gates, would be guilty of actionable negligence as to any other of its employes who had the right to be upon and about its premises in the night time, although his specific duties may not have called him to the shaft, if he had fallen into it, we express no opinion. It is not necessary, under the facts of this case, in order to fix liability on the appellee, that the doctrine of responsibility for a failure to perform a statutory duty intended for the protection of human life,

should be extended to embrace employes whose duties did not require them to go about the shaft.

The night was very dark, and there was evidence showing that the premises about the shaft were not lighted. To fall into the shaft, it was necessary that Moseley should have walked through the open gate or have climbed the fence that surrounded the shaft at other places than where an opening was left for the gates. Although there is no evidence to show whether Moseley walked through the opening or climbed over the fence, it is fair to assume that he did not do the latter, and that, when he went to the shaft, he walked through the open gate. We are aware of the rule laid down by this court in *Hughes v. C. N. O. & T. P. Ry. Co.*, 91 Ky., 526, and *Wintuska's Admr. v. L. & N. R. Co.*, 14 Ky. Law Rep., 579, and *Visman v. Southern Ry. Co.*, 28 Ky. Law Rep., 429, to the effect that, in order to recover damages against the master, the servant must produce some evidence conducing to show that it was caused by the negligence of the master or some one having authority to represent him. That negligence will not be presumed. And where an injury or accident may have happened in two or more ways, in one of which the master would be liable, and the other not, and the presumptions as to how the injury or accident happened are equal, a recovery will be denied. But here, with the exception of the gates, the opening in the shaft was enclosed by a fence, and it is not probable or reasonable that the deceased, who was in his right mind and a sensible man, would have climbed a fence and deliberately precipitated himself into a hole one hundred feet deep. There is no suspicion in the record that Moseley desired to commit suicide, or that he was laboring under any mental disease; and the only reasonable explanation of the manner in which he came to his death is that he walked through the open gate and fell into the open shaft. (*L. & N. R. Co. v. Mulfinger*, 26 Ky. Law Rep., 3.)

In this connection it is also well to keep in mind that the rule that the servant before he can recover for injuries sustained by defective appliances or premises must show that he did not know, or could not have known of the dangerous or defective condition of the place or appliances where he is at work, has no application to a case like this. When the injury results in death, and the action is brought by the personal representative of the servant, it is not necessary to a recovery to show that the deceased knew, or might by the exercise of ordinary care have discovered, the dangerous or defective condition of the premises. (*Brown v. C. N. O. & T. P. R. Co.*, 29 Ky. Law Rep., 146; *Willie v. East Tennessee Coal Co.*, 27 Ky. Law Rep., 335; *Lexington & Carter County Mining Co. v. Stephens*, 104 Ky., 502; *Tanner v. W. A. Wickliffe Coal Co.*, 32 Ky. Law Rep., ante.)

Nor, in view of the darkness of the night and the failure to have the premises lighted, can it be said that the shaft into which Moseley fell was so obviously dangerous, or the hazard in going about it so apparent, that a person of ordinary prudence would not incur the risk. Hence, the line of cases like *Wilson v. Chess & Wymond Co.*, 117 Ky., 567; *McCormack Harvester Co. v. Liter*, 23 Ky. Law Rep., 2154; *Duncan v. Gernert Bros. Lumber Co.*, 27 Ky. Law Rep., 1039; *Shemwell v. Owensboro & Nashville Ry. Co.*, 25 Ky. Law Rep., 1671; are not pertinent.

We are of the opinion that there was evidence sufficient to authorize a submission of the case to the jury, and the judgment is reversed, with directions to grant a new trial, in conformity with this opinion.

SEBREE, &c. v. SEBREE.

(Filed April 17, 1908—Not to be reported.)

Judgments—Correction of After Becoming Final—(30 Ky. Law Rep., 670, for authority to maintain this action.) It appearing that appellee did not agree to the disposition of the attached tobacco, or authorize her attorney to act for her, its disposition being the result of a mistake on the part of her attorney, as appellant had parted with nothing to get the tobacco, he must be required to restore the proceeds of it to appellee.

W. A. Lee for appellants.

Charles Strother for appellee.

Appeal from Owen Circuit Court.

Opinion of the court by Chief Justice O'Rear, affirming.

Appellee sued her husband, J. L. Sebree for divorce and alimony. She procured an attachment against his property which was levied upon his half interest in a crop of tobacco. Subsequently appellant Taylor caused an execution against J. L. Sebree to be levied upon the same interest, but subject to the attachment. Before judgment in the action for divorce appellee and J. L. Sebree effected a compromise of their property rights, in which it was agreed that the tobacco levied upon was to be applied first to the payment of certain costs of the action, and the remainder to be applied upon such debts as both the parties were bound upon. But instead of this being done, by mistake of appellee's counsel probably, it was recited in an agreement, signed by him, that the proceeds of the tobacco, after paying the costs alluded to, were to be applied to the debt owing to appellant Taylor by J. L. Sebree, but without the knowledge of appellee. When she learned of it, after the judgment of the court confirming it had become final, she brought this suit to correct that part of the judgment. On a former appeal, it was held that her action could be maintained. (30 Ky. Law Rep., 670.) The facts are, so the chancellor found, and we concur, that appellee did not authorize the disposition made of the tobacco proceeds by the agreement signed by her attorney. Nor was there consideration for it. The whole thing was a mishap, to say the least of it, which she was ignorant of at the time, and which she disavowed as soon as she learned of it. Appellant Taylor, through his representative in the transaction, had full notice of the error, and as he has parted with nothing, he should restore what he got. The circuit court so adjudged, which is affirmed.

N. C. & ST. L. RY. CO., &c. v. BEAN'S EX'OR.

(Filed April 17, 1908—To be reported.)

Appeals—Replevied—Right of Appeal—A defendant in a judgment may prosecute an appeal from it, although he may have replevied it or paid it.

Wheeler, Hughes & Berry for appellants.

Hendrick & Miller for appellee.

Appeal from Marshall Circuit Court.

Opinion of the court by Chief Justice O'Rear, overruling motion.

Appellee recovered a judgment for money against appellants. Without superseding the judgment, appellants have prosecuted this appeal.

Appellee having caused an execution to issue upon the judgment and to be levied upon certain of appellants' property, the latter replevied the judgment by executing bond as authorized by sections 1667-1669, Kentucky Statutes. The judgment was replevied after the appeal was granted and transcript filed in this court.

Appellee has filed an answer in bar of the appeal, based upon section 757 of the Civil Code, which provides that the appeal shall be dismissed if the appellants' right to further prosecute it had ceased. He contends that, as the Code provides for a stay of proceedings upon a judgment appealed from by supersedeas only (section 747, Civil Code), and as the effect of the replevy is to merge the judgment, it is a voluntary waiver by appellant of its right to appeal, as holding otherwise would be a stay of a judgment on appeal by replevy in addition to supersedeas. A defendant in a judgment may prosecute an appeal from it, although he may have paid it. (*Elbridge v. Wilson*, 4 Ky. Law Rep., 982; *Figg v. Richardson*, 5 Ky. Law Rep., 510; *Shannon v. Paget*, 24 Ky. Law Rep., 1281; *Pike-Morgan v. Wathen*, 25 Ky. Law Rep., 1264; *Kellar v. Williams*, 10 Bush, 216.)

The appeal does not affect the judgment until it is reversed. Hence, if the appellant were unable to give the supersedeas bond required by the Code in order to obtain a stay of the execution, pending the appeal, he would be under the necessity of suffering his property to be seized and sold by the sheriff, with added costs and possible sacrifices. Yet, in that event, his right of appeal would not be affected, as otherwise the right of appeal would be valuable only to the rich, who could make the supersedeas bond, and to the very poor who were execution proof. What one may be compelled to do, he may do without compulsion, without impairing his legal rights. So it is held, if he pays off the judgment, he may, nevertheless, prosecute an appeal from it, and, if it is reversed, may have restitution of what he has paid, with interest.

The statute allows any judgment for money (except in certain instances, not here involved) to be stayed for three months by replevy. This is not only a privilege, but it is a legal right of the defendant, as much as it is the right of the plaintiff, to have an execution against the defendant's property issue upon the judgment. The judgment is subject to that right of the defendant. The latter may appeal from it if the amount gives the Appellate Court jurisdiction. That is also an incident of the law which gives the judgment. There is no prohibition upon the right of appeal, either because the defendant pays off the judgment, or replevies it. Nor is there perceived any sound reason why there should be a distinction in favor of those who pay as against those who replevy. It is said, for appellee, that the execution of the replevin bond merges the judgment. And so it does. Likewise, the payment satisfies it. A judgment merged into a replevin bond is no more beyond the corrective process of the Appellate Court than one discharged by payment. It is argued, by way of illustration that the execution of a replevin bond by one of the judgment debtors would operate to discharge a surety upon the debt not signing the bond, or to discharge a lien securing the debt. So would the payment of the judgment. We think the analogy is clear and the principle just that the replevy and payment alike do not affect the defendant's right of appeal. (*Kellar v. Williams*, 10 Bush, 216.)

The demurrer to the answer of appellee is sustained, and his motion to dismiss the appeal is overruled.

CITY OF LEXINGTON v. WALBY, &c.

(Filed April 17, 1908—Not to be reported.)

Street Improvements—Liability of Property Owner—Law in Force at Time the Work Was Done—The liability of a land owner for a street improvement must be determined by the law in force at the time the work was done. The Legislature may change the rule as to how the liability of the property owner may be created, but the new rule can only operate as to work after the legislation is had.

Allen & Duncan for appellant.

Forman & Forman, Don Forman and James H. Mulligan for appellees.

Appeal from Fayette Circuit Court.

Opinion of the court by Judge Hobson, affirming.

By the act April 13, 1890, the general council of the City of Lexington was authorized to provide by ordinance for the construction and reconstruction of the streets of the city, the cost to be paid in either of two ways: (1) The council might levy a special tax on the abutting property sufficient to pay two thirds of it; or, (2) "at the request of parties liable for special taxes," a tax might be levied for the entire cost of construction, divided into ten annual payments, bonds of the city to be issued for the amount, the property owners to pay the entire cost in ten annual payments, and the city to pay the interest on the bonds. (Lexington v. Bowman, 119 Ky., 840.) Under this act, the general council of the city passed an ordinance No. 196 approved February 24, 1892, directing that South Broadway street from the line of Main street to the city limits be constructed with brick; the street to be improved by blocks. One of these blocks ran from the center line of Water street to the center line of High street. A part of this block was a steep ascent. The original plans and specifications for that portion of the street provided that a strip ten feet wide on each side of the street railway tracks should be constructed of crushed granite, six inches in depth after being rolled. The excavating and other work to be done under the surface was the same on these strips as on other parts of the street, the only difference being that instead of putting on brick on top they were to put on six inches of crushed granite after it was rolled. The reason for using the crushed granite at this point was to furnish a better foot way for horses as the ascent was steep. After the contract had been let for the work, opposition developed among the property owners against the use of the granite on these strips, on the ground that it would be washed away by rains and would not be durable. Finally the Mayor, the city engineer and the improvement committee of the general council took up the matter, and, the contractor agreeing, it was ordered that the entire street should be paved with brick. No property owner objected to the brick being used, and the contractor then went on and did the work according to the contract as thus modified. When the work was completed no action had been taken by the council in regard to the substitution of brick for granite on these two strips ten feet wide; and the council with a view of ratifying what its committee had done, adopted the following ordinance No. 288 approved December 15, 1892:

"That section one of ordinance No. 196, approved February 24, 1892, and entitled 'An ordinance to cause the roadway of South Broadway from the center line of its intersection with Main street to the line of its

Intersection with the city limits to be reconstructed with brick', be, and the same is hereby, amended by inserting after the words 'in accordance with the profiles, plans, specifications and estimates of cost of the city surveyor for the reconstruction of said street,' the following, to-wit: 'except that the portion of the said street ten feet in width on each side of the electric railway between the south side of Vine street and station 15 shall be constructed and paved with brick in all respects as is provided with regard to the other portions of said railway, instead of with crushed granite, as provided in said specifications.'

"Section 2. That the mayor and Joint Improvement Committee are hereby authorized to enter into a contract with the Standard Construction Company, modifying the terms of the contract made with said company under joint resolution No. 83, so as to provide for the construction of said portion of said street as herein required: Provided, That the same shall be done at not exceeding the sum of \$2.25 per square yard: And, provided further, That said Standard Construction Company shall agree to indemnify the city against any inability to collect from the abutting property holders the special tax levied for the reconstruction of said street so far as such inability may result from this amendment."

After this, by an ordinance approved January 31, 1893, the council accepted the work.

By an ordinance approved March 20, 1893, the cost of the improvement was apportioned among the property owners. This ordinance, as a basis for its action, contains the following recital:

"Whereas, the owners of the property fronting on said street liable for the cost and expense of said improvement, did petition the general council of the city of Lexington to have said improvements of said street with brick made on the ten-year plan, as provided for in the amendment to the city charter, as aforesaid, and having obligated themselves to pay their respective assessments for said improvements, and requested the general council to lend them the credit of the city for a period not exceeding ten years for an amount sufficient to pay the entire cost of the improvement, and said request being granted, therefore be it ordained, &c."

The third section of the ordinance is in these words:

"Section 3. The entire cost and expense of reconstructing said street shall be paid for on the ten-year plan by the property holders on said street, who have requested and been granted the credit of the city in ten equal annual payments, payable one-tenth each year, and which is so levied on the assessed value of the property made liable for said improvement. The first payment of one-tenth shall be due and payable on the first day of July, 1893, and the other payments of one-tenth shall be due and payable respectively on the same day of each year thereafter until said tax shall be paid in full."

By another ordinance, approved March 20, 1893, the general council directed the bonds of the city to be issued for the cost of the improvement, this ordinance containing also a preamble as to the request of the property owners similar to that quoted above. William Walby owned a lot fronting on the block referred to. On October 31, 1898, he filed a petition in the Fayette Circuit Court against the city of Lexington and the delinquent tax collector, in which he alleged that the change had been made in the construction of the street, as above stated, in that the two strips ten feet wide had been surfaced with brick and not with crushed granite; that the change had been made without authority, and that the work of construction had not been done as provided by the contract. He also alleged that the tax collector was about to sell the tax bills for an installment of the tax. He prayed and obtained an injunction restraining further proceedings. The city filed an answer, and after this Walby died. The action was revived

in the name of his representatives. To the answer and counterclaim of the city, in which it prayed the court to enforce its taxes, they filed a reply pleading limitation, on the ground that Walby had not requested that the taxes be paid on the ten-year plan. The city pleaded that he had so requested in writing, but that the writing was lost. The city was unable to produce the writing, or to produce any proof that Walby had signed such writing, and the case being submitted, the court perpetuated the injunction. The city appeals.

An agreement as to the facts was filed in the action which sets out the facts above stated and conclusions as follows:

"It is further agreed that the contract with the Standard Construction Company was fully and fairly performed in every particular according to the original specifications except as to the two ten-foot strips above mentioned. The excavation, grading, curbing, concrete foundation from curb to curb, sewer, catch basin, surfacing with the specified brick, &c., were constructed in accordance with the terms of the company's contract.

"The cost of the work from Water street to High street was \$6,150. The cost of the work, as required by the contract under the original specifications, excluding the two ten-foot strips to be surfaced with crushed granite was \$5,352; the cost of surfacing these ten-foot strips with brick was \$798, and the cost of surfacing these strips with crushed granite would have been \$565.25. The difference between the cost of completing the street with brick instead of with crushed granite was \$232.75.

"No protest or complaint was made to the general council or officers of the city by petition or by legal proceedings, or otherwise, by any of the property owners affected by the change against the use of brick instead of crushed granite, nor was any protest or complaint made at the time or during the progress of the work by any one as to the power of the Mayor, City Surveyor and Joint Improvement Committee of the General Council who authorized the change in the specifications to order such change, nor as to the authority of the General Council to pass ordinance 288, nor as to the validity of that ordinance or the validity of the tax levied to pay for the cost of the work until after the work had been completed, and after the tax was levied, the bonds issued and the contractors were paid."

In *Henderson v. Lambert*, 14 Bush, 24, the contractor had not constructed the space occupied by the railroad tracks as required by the contract. In this condition of things the council accepted the work as done according to the contract. It was held that there is no common law liability upon lot owners to pay for the improvement of an adjacent street; that their liability is created by statute, and that there is no liability where the statute is not complied with. The rule laid down in this case was in effect laid down in *Hydes v. Joyes*, 4 Bush, 466; *Murphy v. Louisville*, 9 Bush, 189; *Murray v. Tucker*, 10 Bush, 241. It has been followed by the court in a number of subsequent cases. Appellant relies on *Gleason v. Barnett*, 106 Ky., 125; *Richardson v. Mehler*, 111 Ky., 408; *Barbour Asphalt Co. v. Gaar*, 115 Ky., 334; *Orth v. Park*, 117 Ky., 779; *Lindsay v. Brawner*, 97 S. W., 1. But these cases all rest upon provisions of the Kentucky Statutes enacted by the Legislature for the purpose of changing the rule declared in the former cases. The court has not departed from the former cases in any manner except as the Legislature has, by statute, changed the rule. The work in the case at bar was done in the year 1892, and before the passage of the statute referred to. The liability of the land owner must be determined by the law in force at the time the work was done; for if there was then no liability on the part of the land owner the Legislature could not, by a subsequent statute, make his property liable for the cost of the work which had already been done. The Legislature may change the rule as to how the liability

of the property owner may be created, but the new rule can only operate as to work done after the legislation is had. For the same reason the council could not, by an ordinance enacted after the work had been done, impose a liability upon the property owner for the work which had thus been done. No work was done under the ordinance of the council passed for the purpose of curing the irregularity. When the council passed this ordinance and then, at a subsequent meeting, accepted the work, the legal effect of the transaction was the same as it would have been if the work had been accepted without any new ordinance having been passed. What the council could not do directly, it could not do indirectly under the form of a new ordinance.

We, therefore, conclude that as the contract was not complied with, and the street was not made as required by the contract, the property owner was not liable for the cost of the improvement, and that the circuit court properly dismissed the petition under the well-settled rule obtaining in this State before the recent legislation on the subject, which has been had since this work was done. This conclusion makes it unnecessary for us to consider other questions raised on the appeal. As no lien had been created on Walby's property by the proceedings, a lien upon it could not be created by what subsequently occurred.

Judgment affirmed.

OCHSNER v. COMMONWEALTH.

(Filed April 17, 1908—Not to be reported.)

1. Witnesses—Impeachment—Party Defendant—Previous Conviction of Felony—Defendant Required to Testify—Under section 597, Criminal Code, providing that a witness may be impeached "by the examination of a witness, or record of a judgment that he had been convicted of a felony," where a party to a felony offers himself as a witness he is subject to the same rules as any other witness, and for the purpose of impeaching his testimony he may be required to testify that he had previously been convicted of a felony.

2. Evidence—Incompetency—Failure to Save Exception—Waiver—The failure of the accused, or his counsel, to save an exception, where one is necessary, in order to present the question for review on appeal, is deemed in law, as it is in fact, a waiver of the question.

3. Joint Indictment—Dismissal as to Same—Competency as Witness—Accomplices—On the trial of one indicted with two others for a felony, where before the beginning of the trial the indictment was dismissed as to the other two, they are not accomplices of the defendant on trial, in the meaning of section 241, of the Criminal Code.

H. D. Gregory for appellant.

James Breathitt and Theo. B. Blakey for appellee.

Appeal from Kenton Circuit Court.

Opinion of the court by Chief Justice O'Rear, affirming.

Appellant was convicted of the crime of robbery. His punishment was fixed at confinement in the penitentiary for the term of ten years. On his appeal he relies on three principal alleged errors: One because the court permitted the Commonwealth to require the appellant, while on the witness stand, to testify in detail as to the facts of a former conviction of a felony over the objection of the defendant.

The other, because the court erred in failing to instruct the jury that they should only consider the fact of his former conviction as affecting his credibility as a witness, and, third, "because the court erred in failing to instruct the jury that the evidence of the Commonwealth's witnesses, Gausepohl and Bush, should not be considered unless corroborated by other testimony connecting defendant with the crime." As to the first assignment: Appellant offered himself as a witness in his own behalf. On cross-examination he was asked if he had not previously been convicted of a felony. He admitted that he had been. He was then asked if he had not been charged in that matter with holding up Joe Rehling, in Austinburg, and taking from him \$80.50. The proceedings from this point were as follows:

"Counsel for defendant: I now move that what Mr. Galvin has stated before the jury be excluded."

"The court: He has not said anything except to ask a question."

"Witness: Judge, your Honor, I don't like to answer anything that is done past or any thing like that. I was guilty of that one, yes, sir."

The complaint is that by requiring the defendant to answer the questions concerning the particular transactions as to his former conviction of a felony the court allowed the prosecution to go too far in that matter. Section 151, Criminal Code, adopts the provisions of the Civil Code of Practice in criminal cases touching the production of evidence except as limited in the former. By section 597, Civil Code, a witness may be impeached in four ways: (1) By contradictory evidence; (2) by showing that he had made statements different from his present testimony; (3) by evidence that his general reputation for untruthfulness or immorality renders him unworthy of belief, and (4) by showing "by the examination of a witness, or record of a judgment, that he had been convicted of felony." The last ground is in itself an exception to the general rule that evidence of particular wrongful acts is inadmissible to impeach a witness. The party desiring to impeach an adversary witness may resort to two methods under the last ground: One, by proving the fact of a former conviction of felony by any witness (which of course includes the witness to be impeached) or the other by the production of the record containing the judgment of conviction. If the latter had been resorted to the indictment, verdict and judgment of conviction would have been admissible. In that event, the record would have disclosed the identical facts detailed in the foregoing quotation from appellant's testimony. That which could have been shown by the record it was equally competent to show by parol, under section 597, Civil Code. That a party is himself the witness to be impeached makes no difference, as when he offers himself as a witness he is subject to the same rules as any other witness.

The trial court did not admonish the jury that the sole effect they could give the impeaching evidence was such bearing as it might have upon the credibility of the witness. That the defendant was entitled to, as otherwise it might have been received by the jury as substantive evidence of his guilt of the principal charge. (*Fueston v. Commonwealth*, 91 Ky., 230.) It is never permissible to prove that one on trial charged with a particular offense has committed some other offense, except to show motive, or where it is part of the *res gestae*, unless the defendant has offered himself as a witness, when he may be impeached by evidence of his having been convicted of another crime that is a felony. (Section 954, *Roberson's Crim. Law*; *Welsch v. Commonwealth*, 111 Ky., 530; *Powers v. Commonwealth*, 110 Ky., 386; *Howard v. Commonwealth*, 110 Ky., 356; *Pennington v. Commonwealth*, 21 Ky. Law Rep., 406.) But in this case the defendant did not request the court to admonish the jury as to the proper effect to be given the evidence objected to, nor did he except to the ruling of the

court on the subject. His objection to the evidence, as we have indicated, was not well taken; it was admissible for a particular purpose. When received, the court should have admonished the jury as to its legal effect. Either party may except to any decision of the court by which his substantial rights are prejudiced except challenges to the penal and for cause, upon motion to set aside an indictment, and upon motions for new trial. (Sections 280-281; Criminal Code.) All exceptions at the trial must be shown upon the record by bill of exceptions. (Section 282, Criminal Code.) A party can not rely for reversal upon an erroneous decision or ruling unless there was an exception to it at the time. (*Branson v. Commonwealth*, 92 Ky., 330.) While it is true that a distinction has been recognized between other rulings and the giving of instructions to the jury, as to the latter it being held that it is the duty of the court to give the whole law of the case whether requested to do so or not, and that an exception is not necessary to save the question of erroneous instructions. (*Buckles v. Commonwealth*, 113 Ky., 795; *Thompson v. Commonwealth*, 28 Ky. Law Rep., 1137; *Cook v. Commonwealth*, 10 Ky. Law Rep., 222; *Trimble v. Commonwealth*, 78 Ky., 176; *Heilman v. Commonwealth*, 84 Ky., 157), and while it is also true that all instructions to the jury must be in writing (section 225, Criminal Code), an admonition or instruction limiting the effect of testimony is not within the definition of instruction as used in that section of the Code, and in the cases cited. There may arise frequent occasions during the trial when the court should admonish the jury concerning their duty, as for example, when evidence tentatively or erroneously admitted was finally withdrawn from the jury by the court. In that event a simple admonition to disregard the evidence would be sufficient, though of course there could be no objection if it was in writing. Or, if in the course of argument, counsel transcended his privilege and went out of the record, a parol admonition to the jury by the court would be as effective as if in writing, although it in one sense would be an instruction to the jury concerning the law of the case. But it is not necessary to multiply examples. The purpose of this opinion is to define the practice on this subject. It has been held a number of times that such admonition or instruction limiting the effect of evidence was necessary, and that its omission was prejudicial error. (*Fueston v. Commonwealth*, 91 Ky., 230; *Collins v. Commonwealth*, 15 Ky. Law Rep., 691; *Jones v. Commonwealth*, 22 Ky. Law Rep., 355; *Ashcroft v. Commonwealth*, 24 Ky. Law Rep., 488.) Yet the question here decided does not seem to have been presented before. It arises now upon a proper application of the authorities above, namely that instructions to the jury must be in writing, and that evidence of the character just discussed is admissible for a limited purpose only which should be explained to the jury. As in this case such evidence unexplained was admitted, it is urged that the error was prejudicial, and the judgment of conviction should, on that account, be reversed. But there are other provisions equally binding upon the court and parties, which should have been observed, in order to legally present the error for consideration on appeal. For it is not every error that will justify the reversal of a judgment of conviction in a criminal case; for the Code of Practice, by which the rights of litigants and the duty of the courts are regulated, expressly requires certain steps to be taken in order to preserve and present alleged errors for review on appeal; among them, is the necessity for excepting to the rulings complained of, to be shown by a properly prepared bill. Nor is this an idle requirement. If the trial court's attention were called at the time to what is frequently a mere omission, it would have been corrected. To allow reversals for such lapses is to put a premium upon sharpness rather than tend to the just and fair administration of the law. The failure of the accused,

or his counsel, to have an exception where one is necessary in order to present the question for review on appeal, is deemed in law, as it evidently is in fact, a waiver of the question.

The witnesses, Gausepohl and Bush, were jointly indicted with the defendant. The evidence failed to connect them with the commission of the offense. Before the beginning of the trial the indictment was dismissed as to them. As was held in *Sizemore v. Commonwealth*, 10 Ky. Law Rep., 1: "It is not the mere fact that a person is charged with a crime in connection with another that makes him an accomplice, within the meaning of section 241, of the Criminal Code. In order to make him an accomplice it is necessary that his criminal participation in the crime charged should be shown by the evidence."

The instructions fairly submitted the questions of fact constituting appellant's guilt to the jury.

We do not see any prejudicial error in the record, and the judgment is affirmed.

DEVON v. CINCINNATI, COVINGTON & ERLANGER R'Y CO.

(Filed April 17, 1908—Not to be reported.)

1. Railway—Synonymous with Railroad—While the term "railroad," as used in section 835, Kentucky Statutes, has not been construed by this court, we are clearly of the opinion that the word "railway" has the same meaning.

2. Electric Interurban Railway—Right to Condemn Land—An electric interurban railway authorized by its charter to construct and operate its line for a distance of ten miles from a city, has the same right and powers, under Kentucky Statutes, sections 842a and 835, to condemn land for a right of way, that may be exercised by steam railroads, and the fact that the entire ten miles has not been completed, does not affect the question.

3. Same—Condemnation Within City—The articles of incorporation of an interurban railway company, authorizing it to run a railway from the city of C. to E., and points beyond, includes the right to condemn land within the city of C. for the construction of its road.

Herbert Jackson for appellant.

Ernst, Cassatt & McDougall for appellee.

Appeal from Kenton Circuit Court.

Opinion of the court by Judge Settle, affirming.

Appellee is a railroad corporation, organized under the laws of Kentucky, for the purpose of constructing and operating an electric railway from Covington to Erlanger, and other points beyond, not exceeding ten miles in distance, from Covington.

Appellee's articles of incorporation provide: * * * "The undersigned have and do hereby associate themselves together to form an incorporated company, under the statutes of Kentucky, for the purpose of constructing a line of railway, as hereinafter stated. * * *

Third. The business of said company shall be the construction maintenance and operation of a line of railway not exceeding ten miles long, with a single or double track, and with all the usual and convenient appendages and appurtenances thereunto belonging, including the right to erect, maintain and operate electric poles and wires over and along said railway and with the privilege of operating a line of telegraph or telephone on and over the line of said railway. Said

railway is to be constructed and operated from the city of Covington, Kenton county, Kentucky, to the town of Erlanger, in Kenton county, Kentucky, and to such further points beyond said town of Erlanger as may hereafter be determined upon, and over, along and upon such bridges, streets, roads, highways, and such private property, as said company may, by due process of law, acquire the right to lay its tracks and other appliances and appendages upon. Fourth. Said railway shall be operated by electricity or other improved methods of rapid transit."

In constructing its line of railway appellee found it necessary to cross upon and over a parcel of real estate owned by the appellant, and which is situated partly within and partly without the corporate limits of the city of Covington. The land in question was unoccupied by buildings and consisted mainly of a steep hillside which rendered it partially, if not wholly, unfit for cultivation.

Being unable to contract with appellant for a right of way for its railway line over this land, appellee, in March, 1901, filed in the county court its petition, asking the condemnation of such right of way as provided by section 835, Kentucky Statutes; following which, commissioners were appointed by the court to view the premises and make and report the necessary assessment of damages to which appellant would be entitled by reason of the construction and operation of the railway upon her land. This duty was performed by the commissioners whose report fixed her damages at \$454.50. Appellant filed exceptions to the report, making objection to its confirmation on certain legal grounds, as well as on account of the smallness of the damages; and on the trial of the exceptions in the county court they were overruled, except as to the question of damages, the amount of which was increased from \$454.50 to \$575, and appellee adjudged entitled to occupy the ground condemned for the right of way, upon the payment by it to appellant or into court, of the damages awarded. Appellee thereupon tendered the \$575 damages to appellant, which she refused to accept; it was then paid into court after which appellee began the construction of its railway bed and track over appellant's land upon the right of way adjudged it, and in a short time commenced to operate, and is operating electric cars thereon as far as the cemeteries, which lie about three miles out of Covington and on the way to Erlanger.

Appellant being dissatisfied with the judgment of the county court prosecuted an appeal to the circuit court, and on the trial in that court, the jury returned a verdict fixing her damages at \$450; the court thereupon overruled appellant's objections to the proceedings, and by the judgment rendered, required her to accept the damages awarded, and confirmed appellee's right to the land condemned for the use and operation of its railway line. The circuit court refused appellant a new trial, and from the judgment of that court she prosecutes this appeal.

It was contended by appellant, both in the county and circuit courts, and she yet contends, first, that no right or authority is conferred by the statute upon electric railroads, street railways, or trolley lines, to condemn land for the purposes of constructing roadbeds, laying tracks, or operating cars; that only steam railroads possess such right, therefore, the county and circuit courts were without jurisdiction to entertain the proceeding whereby appellee obtained the right of way over her land; and that the judgment appealed from is in violation of that provision of the fourteenth amendment to the Federal Constitution, which declares that the citizen can not be deprived of his property without due process of law. Second, that appellee can not in any event, by condemnation, obtain a right of way for its road over land lying within the corporate limits of the city of Covington. Third, that the circuit court admitted incompetent evidence on the trial.

As it is not denied that appellee was unable to contract with appellant for the right of way over her land, or that the land in question is necessary for the construction and operation of its railway, and no complaint is made that the proceedings in the circuit court did not conform to the statute or that the damages allowed appellant are inadequate, it only remains to be determined whether appellee is a railroad that may condemn land as provided by section 835, Kentucky Statutes. It will hardly be questioned that appellee's articles of incorporation authorize it to construct and operate a railroad and to that end to run over, along and upon "such bridges, streets, roads, highways, and such private property as said company may, by due process of law, acquire the right to lay its tracks and other appliances and appendages upon." While the term "railroad," as used in section 835, Kentucky Statutes, has not been construed by this court, we are clearly of opinion that the word "railway" has the same meaning.

The words, "railway, transfer, belt line," and "railway bridge companies," are used in sections 213, 214, 215 and 216, of the Constitution, and this court has held that the provisions of section 216, of the Constitution, embrace street railroads as well as steam railroads. The language of that section is as follows: "All railway, transfer, belt lines, and railway bridge companies, shall allow the tracks of each other to unite, intersect and cross at any point where such union intersection, and crossing is reasonable or feasible."

In passing upon the question of whether a street railway in process of construction between Ashland and Catlettsburg, a distance of four miles, should be allowed to cross a steam railroad at grade in Ashland, as provided by section 216, Constitution, this court said: "It is urged, however, that the appellee (street railway) is not a railway company in the meaning of the section of the Constitution quoted. We think, whatever may be said of street railways in general, that the charter of this company puts it in the class indicated by that section. The railway was to connect two cities. It might use steam, horse, or other propelling power on said car route in the transportation of freight and passengers." (Elizabethtown, &c., R. R. Co. v. Ashland, &c., Street R'y Co., 96 Ky., 347; Johnson's Adm'r v. Louisville City R'y Co., 10 Bush, 231; L. & N. R. R. Co. v. Bowling Green R'y Co., 23 Ky. Law Rep., 274.)

The appellee railway, like the Ashland railway company, mentioned in the case supra, is of the class indicated by section 216, of the Constitution, as it is to connect two cities, may carry freight as well as passengers, and use steam instead of electricity, steam being one of the "improved methods of rapid transit."

While appellee's cars pass through Covington to Cincinnati and return, its railway is not, strictly speaking, a street railway, but rather an interurban electric railway, which is, or may be, operated a distance of ten miles from Covington, and beyond Erlanger.

As said in Johnson v. Milwaukee Electric R'y Co., 99 Wis., 83: "A street railway in its inception is a purely urban institution. It is intended to facilitate travel in and about the city from one part of the municipality to another and thus relieve the sidewalk of foot passengers and the roadway of vehicles. It is thus an aid to the exercise of the easement of passage. Strictly a city convenience for the use of the city by people living or stopping thereon, and fully under the control of the municipal authorities who have been endowed with ample power for that purpose. * * * The urban railway has developed into the interurban railway and threatens soon to develop (as in the case at bar) into the interstate railway. The small car which took up passengers at one corner and dropped them at another, has become a large coach in size and has become a part, perhaps, of a train, which sweeps across the country from one city to another, bearing

its load of passengers ticketed through, with an occasional passenger picked up on the highways. The purely city purposes which the urban railway embraces, have developed into and are being supplanted by an entirely different purpose, namely, the transportation of passengers from city to city, over long distances and stretches of intervening country." * * *

Kentucky Statutes, section 842a (Act of March 11, 1902), provides: "All interurban electric railroad companies authorized to construct a railroad ten or more miles in length, heretofore or hereafter incorporated under the general railroad laws of this Commonwealth, shall be under the same duties and responsibilities, so far as practicable, and shall have the same rights, powers and privileges as is now granted to or conferred upon railroad companies existing, operated or incorporated under existing laws of this Commonwealth, or under laws that may hereafter be enacted."

Appellee being an electric interurban railroad and authorized by its charter to construct and operate its line for a distance of ten miles from the city of Covington, has the same right and powers under the section, supra, and section 835, Kentucky Statutes, to condemn land for a right of way, that may be exercised by steam railroads; and has not yet been completed by appellee, does not affect the question; there being nothing in the record to show that it is not its purpose, in good faith, to complete the line as authorized.

In *Diebold v. Kentucky Traction Co.*, 25 Ky. Law Rep., 1275, section 842a, Kentucky Statutes, was given the same construction we now place upon it.

It is contended by counsel for appellant that as appellee's articles of incorporation authorize it to run a railroad from Covington to Erlanger and points beyond, this means that land for the use of its railway lying within the corporate limits of the city of Covington, can not be condemned by it. We see no force in this contention, and no authority is cited in support of it. Manifestly, a railroad charter which authorizes the railroad to connect two towns, will authorize it to run from a point within either town, and not limit it to the corporation line, or boundary. The strained construction contended for by appellant would tend to defeat the purpose of such a grant by making it inconvenient for the citizens of the town to use the road, and would be inconsistent with the provisions of the articles of incorporation which permit the road to run "over, along and upon bridges, streets, roads, highways, &c." Clearly the meaning of the articles of incorporation is, that appellee's railroad may, and was intended to, operate from a point within the city of Covington, to a point within and beyond the city of Erlanger.

Only a small portion of the land condemned in this case lies within the city of Covington, and such as there is seems to have been used for nothing but an entrance to a quarry long since abandoned.

The Supreme Court of the United States in *Union Pac. R. R. Co. v. Hall*, 91 U. S., 343, in passing upon this question declared, that "authority to construct a railroad, or turnpike from A. to B., or beginning at A. and running to B., is held to confer authority to commence the road at some point within A. and to end it at some point within B., the words 'from,' 'to' and 'at,' are taken inclusively, according to the subject-matter."

Objection is also made by appellant that in questioning witnesses as to the value of the land condemned for the use of appellee's railway, the court did not require that they be asked as to its market value, the word "value" in that connection being mainly used. We find no merit in this contention. Of course the market value of the land was the thing to be ascertained, and while the word "value" was principally used by both counsel and witnesses with respect to the land, the term "market value" was also sometimes used. We do

not think the witnesss or jury were misled by the manner in which these questions were framed.

There seems to have been no incompetent evidence presented to the jury, and the record as a whole discloses no error upon the part of the circuit court that can be said to have been prejudicial to appellant's substantial rights.

Wherefore, the judgment is affirmed.

While court sitting.

TERRY v. TERRY.

(Filed April 21, 1908—Not to be reported.)

Boundary Line—Failure of Court to Make Statement of Conclusions—This action relates to a disputed boundary line, trial by jury was waived and the court failed to make a statement of its conclusions of the law and facts, there having been no motion to that effect. But, waiving this error, the judgment of the lower court in a case like this is entitled to the same weight as the verdict of a properly instructed jury, and it not appearing that the finding was flagrantly against the evidence, the judgment will not be disturbed.

Hazelrigg, Chenault & Hazelrigg, Pollard & Redwine and T. T. Cope for appellant.

J. J. C. Bach for appellee.

Appeal from Breathitt Circuit Court.

Opinion of the court by Judge Nunn, affirming.

The parties to this action are brothers, and each owns a survey of land lying between Bowman Fork and Roberts Fork of Turkey creek. Appellee's land is covered by the Tabitha Caudill patent, and appellant's by the R. M. Rose patent, which is the elder. Each of these patents extends over a dividing ridge between the two forks, thereby conflicting with each other. About fifteen acres of the Rose patent extends over the ridge onto the Bowman Fork side, and a greater number of acres covered by the Caudill patent extend over this ridge onto the Roberts Fork side. But appellee concedes, as the Rose patent is the elder, he is barred from recovering it.

Appellee, about twenty-five years ago, extended his farm and fence so as to include about five acres of land covered by the Rose patent; that is, he cleared and fenced about five acres of the fifteen acres covered by the Rose patent which extends over the dividing ridge referred to, and has had it under fence ever since, using and cultivating it, claiming it as his own and adversely to every one, as he alleges and proves.

Appellant's contention is that appellee enclosed this land by the consent of his father, Isaac Terry, and with the understanding that he should pay his father rent therefor until the year 1898, when appellant purchased the land covered by the Rose patent from his father, Isaac Terry, but appellee never claimed this land as his own until after this conveyance.

It appears from the record that appellant's only claim of title to the land for which he sues, is a deed from his father, Isaac Terry, and it is apparent that this deed does not include the land in controversy; but, on the contrary, it calls for a line along the dividing ridge referred to and leaves the fifteen acres on the Bowman Fork side of the ridge not included in the deed; but, for some reason not explained, appellee failed to deny that the deed covered the land in

controversy, but admitted that the deed by his father included the land in controversy.

This is a common law action, and the parties had a right to a trial by jury; however, this right was waived by the parties and by agreement the case was tried by the court, and the court failed to make a statement of its conclusions of law and of the facts, there having been no motion made to that effect. But, waiving this error, the judgment of the lower court, in a case like this, is entitled to the same consideration as a verdict of a properly instructed jury; that is, it should be permitted to stand, unless flagrantly against the evidence, and we are unwilling to say this with reference to the judgment of the court in this case.

For these reasons the judgment of the lower court is affirmed.

CITY OF COVINGTON v. REGENTHAL.

(Filed April 21, 1908—Not to be reported.)

1. Streets—Action as to Ownership—Pleading—This is an action as to the ownership of a certain street, and appellant complains that the court erred in admitting oral and written evidence to contradict and explain a plat of an addition to appellant city. The plat, however, formed no part of the pleadings, and was not referred to in them, it was only introduced to sustain the allegations of the petition and the rule of pleading referred to does not apply.

2. As to the Issue—The issue was as to the location of the road at the time of appellee's purchase of the land, and the evidence considered and held that the jury was authorized to find for the appellee.

F. J. Hanlon for appellant.

Robert C. Simmons for appellee.

Appeal from Kenton Circuit Court.

Opinion of the court by Judge Nunn, affirming.

Appellant city instituted this action in ejectment against appellee to recover a portion of a street known as the "Old Lexington State Road." The city alleged that the street was dedicated to it, and that appellee was in possession of a portion of it without its permission or consent. Appellee answered, denying all the affirmative allegations of the petition. A trial was had, which resulted in behalf of appellee.

Appellant does not complain of the instructions of the court to the jury, but says that the court erred to its prejudice in permitting incompetent evidence to be introduced. That is, it allowed oral and written evidence to be introduced to contradict and explain a plat of Morten's addition to the city of Covington, which had been filed and recorded in the county court clerk's office in 1870, without alleging in the pleading that there were any mistakes therein. This plat formed no part of the pleadings in this action, and was not referred to therein; it was only introduced by appellant as evidence to sustain the allegations of its petition, and the rule of pleading referred to does not apply.

It was developed by the evidence that appellee's husband had purchased this property abutting on the "Old Lexington State Road," from Morten, in January, 1871; that an old slaughter-house on same had been turned around, enlarged and made into a residence,

and the property then enclosed by a fence which had been maintained on the same line to the time of trial. The ground in controversy forms the front of appellee's property; the city claiming that the alleged street included enough to take off ten or twelve feet of her house. Appellee contends that the road was not established at that place, and that it was only thirty feet wide, and there was evidence authorizing the jury to find for appellee on this point.

The Morten plat, referred to, on its face, shows that it was not made by an expert. It appears that Morten had a boundary of land surveyed and laid off into streets and lots, giving the dimensions of each, and dedicated the streets and alleys to the public, other than the "Old Lexington State Road," which was one of the boundaries of the survey, and in which he stated it was forty feet wide. He did not attempt to dedicate this road and the proof shows that it had been established seventy-five or a hundred years. The plat represents this road as running, in part, from west to east, and then turning in a northeastern direction, as shown by the proof, ascending a hill. It appears that appellee owns several lots of the Morten addition abutting this road on the hill side. Taking the lines of this road, as represented on the plat, they are straight; but, taking the calls of the lines of the lots, as they appear on the plat, evidently the road was not straight at the time the plat was made. The lots abutting upon this road, owned by appellee, are represented on the plat as of the same width, each being extensions of twenty-five foot lots from Linden avenue to the road. There is an obvious contradiction between the straight line, as represented on the plat, forming the boundary of the "Old Lexington State Road," abutting these lots, and the figures representing the length of the side lines of these lots. Because, if the street line were straight, the dividing lines between the lots would increase uniformly in length as the depth of the lots increased. This will be readily understood, for the lines of the lots running from Linden avenue to the road run in a north and south course, and the "Old State Road," at that point, runs in a northeastern course; but, instead of such uniformity, it appears from the plat that while the line between lots ninety-one and ninety-two is fourteen feet longer than the line between lots ninety and ninety-one, the dividing line between lots ninety-two and ninety-three is twenty-six feet longer than the dividing line between lots ninety-one and ninety-two. Then we find that between the next lots, ninety-three and ninety-four, the increase in length again is fourteen feet, and that between the next two, the increase is thirteen, which is the same as the increase in the line between lots ninety-five and ninety-six. According to the recorded length of the side lines of these lots, which were evidently measured with great care, and which doubtless conformed to the road as it existed when the plat was made, a curve appears which is exactly identical with that shown on the Kennedy plat, filed as evidence in the action.

Witness Kennedy was, at the time of trial, seventy-two years of age, was a civil engineer, and had repeatedly surveyed this land, and had made a plat for the party owning the land on the opposite side of the State Road from Morten's. He knew the location of the "Old Lexington State Road" at the time Morten's plat was made, and stated that the line of the road was not straight, but curved, as represented by appellee's line abutting thereon. Appellee purchased to the "Old Lexington State Road." The issue was as to the location of this road at the time appellee purchased. If the location of the road was as indicated by the straight line in the plat, then appellee has a portion of the "Old Lexington State Road;" but if its location is governed by the description of the lots as represented in the plat, and other evidence, then the jury was authorized to find in behalf of appellee.

For these reasons, the judgment of the lower court is affirmed.

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- 1. Newly Discovered Evidence—Probable Effect on Another trial—To entitle one to a new trial on the ground of newly discovered evidence, such evidence should be of such a controlling and decisive character as to convince the court that it will probably have a preponderating influence upon another trial. Nium v. Commonwealth..... 62

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2. Same—Foreigner—Trial for Felony—Appointment of Interpreter—Authority of Court—A foreigner on trial for maliciously cutting another, who does not understand the English language, and had to have an interpreter to translate his testimony to the jury, is not entitled to a new trial after conviction, on the ground that there is no statute in this State authorizing the appointment of an interpreter except in bastardy cases (sec. 181) and courts of continuous session (sec. 1034). Courts, in the absence of statutory authority, have the inherent power to appoint an interpreter when the ends of justice require it. *Idem.* 62
3. Same—Failure to Swear Interpreter—Absence of Objection—Consideration on Appeal—Where an interpreter was permitted by the court to be used on the trial of one for felony, who was introduced and used by the defendant to translate his testimony to the jury, the fact that he was not sworn, to which no objection or exception was made by defendant until the filing of his grounds for a new trial, such error or oversight can not be considered on appeal. *Idem.* 62
4. Same—Qualification of Interpreter—Where an interpreter was introduced by a defendant on trial for a felony and used by him to interpret his testimony before the jury, to which no objection was made by the Commonwealth, the court had a right to assume that he was qualified to act, and it was not error in the court to fail to examine into his competency as an interpreter. *Idem.* 63
5. Arraignment of Defendant—Showing of Record—Grounds for New Trial—On the trial of one for a felony, the fact that the record fails to show that the defendant was arraigned, or that a formal arraignment was waived, or that his plea was entered, is not cause for reversal, unless such failure is made a ground for a new trial. *Idem.* 63
6. Grounds for New Trial not in Record—Sufficiency of Petition—As appellant's motion and grounds for a new trial are not in the record, the court can not know what errors were complained of in the lower court. Such being the condition of the record, and the petition being sufficient to support the judgment, it will not be disturbed. *Falls City Woolen Mills v. Pike, by, &c.* 67

NUISANCE—See Railroads, 13, 14.

OBSTRUCTING STREETS—See Railroads, 13, 14, 15.

PARTNERSHIPS—

1. Acts Constituting—Where three men mutually agree to go in together and buy a large tract of mineral and timbered land and hold it for a profit, each to furnish some of the money and expense, and to do certain work, and, after the sale of the land, each shall have the money he advanced, with 7 per cent. interest thereon and his expenses refunded, and to share equally in the balance of the sale money, they are partners in contemplation of law. *Boreing, &c. v. Wilson & Moss.* 14
2. Settlement of a Partnership—Sharing of Profits—Where in the settlement of a partnership formed for the purchase and sale of land, it is shown that one of the partners sold 500 acres of the partnership land and 500 acres of his individual land in a body at an agreed consideration for the whole 1,000 acres such partner is bound to account to his co-partners in the 500 acres for one-half of the price he

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received for the whole tract, and the fact that the partner, in making such sale, received a part of the consideration in corporation stock, did not require his co-partners to accept such stock in payment for their interest in the 500 acres of partnership land sold. <i>Idem</i>	15
3. Same—Interest Paid on Advancements—Like Interest on Settlement—Where, in the formation of a partnership, it is agreed that each partner shall be allowed eight per cent. interest on advancements made, which was enforced in the settlement of such advancements, it would be equitable and proper in the distribution of the proceeds of the partnership to require each of the partners, on final settlement, to account for eight per cent. interest on the amount due from each from the time the same was received. <i>Idem</i>	15
PARTNERS—See Contracts, 6.	
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PERSONAL INJURIES—	
1. Actions—Owner of Property—Liability of for Accidents—In this action by B. for damages for injuries sustained by falling through an elevator shaft, Dunn was not liable because it is shown by the record that his purchase of the property was not complete at the time of the accident. <i>Baker v. Best</i>	1
2. Same—The verdict against Mrs. B., the owner, seems to be supported by the evidence, and it must be upheld. The evidence complained of could not have prejudiced appellant's rights. <i>Idem</i>	1
PLEADINGS—See Detinue, 1; Injury to Property, 2—	
1. Filing Amendments During Trial—Discretion of Court—Trial on Merits—The trial court has a large discretion in allowing amended pleadings to be filed during the progress of the trial, and this discretion should be exercised with great liberality when the purpose of enabling the party offering it is to obtain a fair trial of the case on its merits. <i>Schuke v. L. & N. R. R. Co., &c.</i>	31
2. Actions—Pleadings—Liens—The judgment herein in favor of appellee was proper, in view of the pleadings and proof. The bank sued to recover of appellee upon an account for lumber sold, the transaction was between appellee and her son, alone, and neither the trustee nor the bank knew anything about it. The facts proved were insufficient to establish a promise on the part of appellee to pay for the lumber. <i>Globe B. & T. Co. v. Rigglesberger</i>	96
3. Same—While appellee signed an agreement not to force or demand payment of her debt out of R.'s property in charge of the trustee, yet, if they permitted a bill of lumber to be sold her as a credit on a debt, which R. owed her, there seems to be no reason why she should not accept it without incurring liability to the bank under the pleadings in this case, for nothing is set out in the petition upon which to base the debt claimed. <i>Idem</i>	96
4. Streets—Action as to Ownership—Pleading—This is an action as to the ownership of a certain street, and appellant complains that the court erred in admitting oral and written evidence to contradict and explain a plat of an addition to appellant city. The plat, however, formed no part of the pleadings, and was not referred to in them,	

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it was only introduced to sustain the allegations of the petition and the rule of pleading referred to does not apply. <i>City of Covington v. Regenthal</i>	127
5. As to the Issue —The issue was as to the location of the road at the time of appellee's purchase of the land, and the evidence considered and held that the jury was authorized to find for the appellee. <i>Idem</i>	127
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1. Gates Across Highway—Protection to Public—Joint Use by Different Railroads—Liability for Injury —Where a gate is necessary across a street in a city for the protection of the traveling public across a railroad track, it is the duty of every railroad company using the track to protect the public from injury from its trains, and each company, and the owner of the track, is jointly and severally liable to the public for injuries committed by its trains due to failure to perform this duty, and the duty of protecting such crossing can not be delegated to one of the companies using the track, or to the owner, so as to absolve the company whose trains commit the injury from liability to the person injured. <i>Schulte v. L. & N. R. R. Co., &c.</i> .. .	31
2. Gates Raised—Invitation to Cross—Presumption—Care Required —When gates are maintained at a crossing, and are closed when trains are approaching and kept open for traffic when they are not, the fact that they are up and open is an invitation to the public to cross, and persons have a right to assume they can do so without danger by using ordinary care for their safety. <i>Idem</i>	31
3. Contract for Constructing Roadbed—Conclusiveness of Contract —The fact that a contract by a railroad company with a contractor employed to construct its road bed only called for one track, is not conclusive that the railroad company did not intend to build another track thereon. <i>Warden v. M. H. & E. R. R. Co.</i>	38
4. Eminent Domain—Necessity to be Shown—Circumstances to be Considered —There must always exist necessity for the appropriation of land sought to be condemned for railroad purposes, and in determining this necessity, the court should take into consideration all the facts and circumstances in the case. The right to condemn is not confined to the land that may be absolutely required at the time of the taking, but extends to so much as the present plans and purposes of the railroad company show will be reasonably necessary to construct and operate the road in accordance with such plans. <i>Idem</i>	38
5. Lookout—Negligence —At the time of appellee's intestate's death, the bell was being rung, the train was making a loud noise, it was about 5 o'clock in the afternoon, in July, and the slightest care, as the evidence shows, on the part of the deceased, would have enabled her to escape. The fireman had been keeping a lookout, but at the time had withdrawn to coal the engine. And it can not be said that because he withdrew to perform this duty that appellant was guilty of negligence. <i>L. & N. R. R. Co. v. Gilmore's Adm'r.</i> .. .	74

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6. Same—Whether it was because of intestate's deafness, or that her mind was so intent upon something else, it was her misfortune that she failed to hear it. She walked in front of an approaching train at such time as that no diligence on the part of those in charge of the train could have prevented or discovered her peril *Idem*..... 74
7. Taxation—Assessment of Bridge Property—The question involved upon this appeal is as to the mode of assessment of appellee's bridge, whether it should be assessed by the railroad commission, or the local authorities in Campbell county. After the consideration of authorities cited, it is held that the power of the Legislature to vest in a State board the assessment of property for local taxation is no longer an open question, and further that the fact that the bridge in question is used for purposes other than the railroad's use of it, does not render it any less "railroad property." *B'd Equalization Campbell Co. v. L. & N. R. R. Co.*, 78
8. Same—Question One of Ownership—The question here is one of ownership. If it is railroad property used in connection with the operation of a railroad, it is assessable by the railroad commission, and the fact that a portion of the bridge is used for other purposes does not give the local officers the right to assess it. *Idem*..... 78
9. Removal of Causes—Petition—Allegations—Conclusions—Jurisdictional Facts—In a petition by a party to remove a case from the State court to the Federal court an allegation "that its co-defendants were not necessary, nor proper parties to the action, and that the sole purpose of the plaintiff in making other parties defendants was a fraudulent one to deprive the petitioner of its constitutional rights." amounts only to a conclusion of the pleader, and the allegation that "the negligence charged in the petition against its co-defendants was untrue, and known by the plaintiff to be untrue," does not state any jurisdictional fact. The question of negligence or no negligence was an issue solely within the province of the jury to hear and determine. *Clinger's Adm'r v. C. & O. Ry. in Ky.*..... 86
10. Same—Negligent Injury—Joint Liability of Defendants—If an injury is inflicted by two or more wrongdoers, an action may be maintained against one or all of them. While several may be guilty of several distinct negligent acts, yet, if their concurrent effect is to produce an actionable injury, they are all liable therefor. *Idem*..... 87
11. Same—Resident and Non-resident Defendants—Joint Action Against—Where, in an action for damages for an injury alleged to have been caused by the negligence of a non-resident railroad company, and its resident conductor, who are jointly sued, this court can not assume that the conductor is not guilty, from its general knowledge of his powers and duties, but if, on the trial, it should appear from the evidence that the plaintiff had no reasonable grounds to believe that he was guilty when the petition was filed, the court should give a peremptory instruction to find for him, and the case should then be remanded to the Federal court. *Idem*..... 87
12. Same—Acts of Incorporation—Legality—Effect of Lease—Section 769, Kentucky Statutes, providing among other things, that a railroad company "may make any agreement or arrangement, not inconsistent with law, with any other railroad company," is not in conflict with section 573, Ken-

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tucky Statutes, providing "that all provisions of charters and articles of incorporation which are inconsistent with the provisions of chapter 32, of the Kentucky Statutes, stand repealed to the extent of such conflict," and under the contract of lease by the C. & O. R'y Co. in Ky., to the C. & O. R'y. Co. in Virginia, it did not relieve the Kentucky railroad from its responsibility existing before the enactment of section 573, Kentucky Statutes. <i>Idem</i>	87
13. Indictment for Nuisance—Obstructing Street—Sufficient Allegations—An indictment for a nuisance against a railroad company which charges that "on the 12th day of September, 1907, in the county of Clark, and in the city of Winchester, within twelve months before the finding of the indictment, it unlawfully and willfully suffered and permitted its cars attached to passenger and freight trains, to be placed on and across Main street in said city of Winchester, said street being a public highway, and did suffer them to be and remain on and across said street for an unreasonable length of time, thereby obstructing travel on said street," is a good indictment, under section 124, of the Criminal Code. <i>Commonwealth v. C. & O. R'y Co.</i>	92
14. Same—Bill of Particulars—Requirement of Commonwealth—Response—Time Allowed—On the return of an indictment against a railroad company for obstructing a street in a city by permitting its cars to remain in and across said street for an unreasonable length of time, the court did not abuse its discretion, on motion of the defendant, to require the Commonwealth's attorney to file a bill of particulars, stating the time as near as he could, when the offense was committed, but the court should not require such response to be filed until the attorney had obtained the presence of the Commonwealth's witnesses, from whom he could ascertain the particular facts to be relied on in sustaining the prosecution. <i>Idem</i>	92
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RAILWAY—	
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2. Electric Interurban Railway—Right to Condemn Land—An electric interurban railway authorized by its charter to construct and operate its line for a distance of ten miles from a city, has the same right and powers, under Kentucky Statutes, sections 842a and 835, to condemn land for a right of way, that may be exercised by steam railroads, and the fact that the entire ten miles has not been completed does not affect the question. <i>Idem</i>	122

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3. Same—Condemnation Within City—The articles of incorporation of an interurban railway company, authorizing it to run a railway from the city of C. to E., and points beyond, includes the right to condemn land within the city of C. for the construction of its road. *Idem*..... 122

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1. Judges—Affidavit of Disqualification—Sufficiency—An attorney appointed by the Governor as a special judge of a court, may properly refuse to vacate the bench upon an affidavit by a litigant that he and the opposing counsel of the litigant happen to be attorneys for the same railroad, though in different parts of the State. *Boreing, &c. v. Wilson & Moss* 14
2. Same—Likewise a judge is not disqualified to sit in a case because he may be socially entertained by the opposing counsel of one of the litigants, or because he expressed an opinion upon a preliminary motion in the case after hearing the argument thereon and congratulated the opposing counsel on his argument on the motion. Or because of his supposed intention to appoint a receiver in the case, who was not friendly to a deceased party whose estate is involved in the action. *Idem*..... 14

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2. Ordinances—All the members of the council voted for the ordinance attacked here, and, upon the authority of *Hedger v. Roebke*, 30 Ky. Law Rep., 1092, it is valid. *Idem*. 77
3. Liability of Property Owner—Law in Force at Time the Work Was Done—The liability of a land owner for a street improvement must be determined by the law in force at the time the work was done. The Legislature may change the rule as to how the liability of the property owner may be created, but the new rule can only operate as to work after the legislation is had. *City of Lexington v. Walby, &c.* 116

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2. Same—Estate by Implication—Presumption—The weight of authority is to the effect that an estate by implication will not be presumed or created by strained construction, but must grow out of the fair intendment of the instrument under consideration, looking at all its parts. *Idem.*..... 41
3. Construction of—A will providing that “all my estate, both real and personal,” shall descend to my wife “her life time, to manage and dispose of as she may see cause” invested her with an absolute estate. To limit it to a life estate, it would be necessary to take from the other parts of the will their fair and legitimate meaning. The will does not stop with the words “her life time,” but, in investing her with the power “to manage and dispose of it as she may see cause,” she is clothed with the power to convey the fee. *Alsip, &c. v. Morgan.*..... 72

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2. Same—Motive—Evidence of—On the trial of one for malicious shooting, the motive, being a material element of the shooting, may be shown by facts proven, though they involve the commission of another offense by the defendant, but such proof must be established by other witnesses than the defendant. *Idem.*..... 51
3. Impeachment—Party Defendant—Previous Conviction of Felony—Defendant Required to Testify—Under section 597, Criminal Code, providing that a witness may be impeached “by the examination of a witness, or record of a judgment that he had been convicted of a felony,” where a party to a felony offers himself as a witness, he is subject to the same rules as any other witness, and for the purpose of impeaching his testimony he may be required to testify that he had previously been convicted of a felony. *Ochsner v. Commonwealth.* 119
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July 15, 1908

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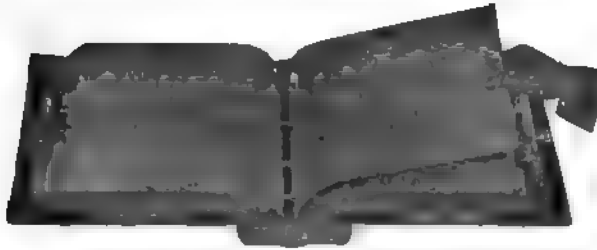
Arrangements have been made whereby the Judges of the Court of Appeals will edit their several opinions, thus securing a degree of accuracy that can not be obtained in any other manner.

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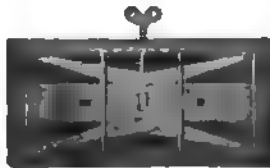


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No. 2

COURT OF APPEALS OF KENTUCKY.

POTTER, &c. v. PORTER, &c.

(Filed April 21, 1908.—Not to be reported.)

Trustees—Judgment Against Cestui Que Trust—Duty of Trustee—It is incumbent upon a trustee to keep an accurate account of his doings and no judgment will be entered by the chancellor against his cestui que trusts, where, upon the showing made by the trustee, the mind is left in doubt as to how the account really stands. To keep an accurate account is a primary duty, and the chancellor will afford him no relief against his trust estate when there is doubt as to the standing of the account.

Sims & Grider for appellants.

Thomas W. Thomas and Samuel D. Hines for appellees.

Appeal from Warren Circuit Court.

Opinion of the Court by Judge Hobson, reversing.

On October 25, 1890, E. H. Porter was appointed trustee of the estate of James Hilton by the Warren Circuit Court, Hilton being dissipated and unfit to manage his estate. Porter qualified and gave bond and collected from the administrator of Hilton's father \$16,683. After this, on Jan. 11, 1892, he collected from the administrator \$11,351.74, the two sums so collected amounting in all to \$28,034.74. On Dec. 22, 1896, Hilton and wife filed this suit against Porter, as trustee, and his surety, alleging that he had never settled his accounts and praying that he be required to settle his accounts, disclosing what property he had in his hands, and that judgment be entered for balance due them. At the February term, 1897, Porter resigned as trustee, and J. Whit Potter was appointed as trustee in his stead. Potter as trustee, was joined as party-plaintiff in the action; and the case was referred to a commissioner to make a settlement of the accounts of Porter, as trustee. The commissioner filed his report on May 25, 1897. In this report he showed that Porter, as trustee, had received in money \$28,595.61; that \$6,700 of this was invested in real estate; that he had otherwise expended \$20,794.68, leaving a balance in his hands of \$1,100.92. The plaintiffs and the present trustee filed exceptions to this report at that term, but these exceptions

seem to have been lost and are not in the record. They also filed an amended petition and the case was referred back to the commissioner to take evidence and report further. At the December term, 1898, the papers in the case having been lost it was referred to the commissioner to supply the lost record, and at this term the commissioner filed supplemental report in which he showed what part of the estate had been turned over by Porter as trustee to his successor. The estate received by Porter as trustee consisted of certain Louisville city bonds and certain railroad bonds. The papers had been burned more or less and were in bad condition. The only thing that Porter turned over to his successor was the real estate and certain of the bonds which for one reason or another he had been unable to collect. At the February term 1904, nothing further having been done in the meantime, the case was reinstated upon the docket and the defendant Porter filed exceptions to the master's report. By these exceptions he showed that the estate was indebted to him in the sum of \$4,872.91. At the May term, 1905, Porter filed amended exceptions, which he accompanied with a statement of his accounts from the beginning which showed that the estate was indebted to him in the sum of \$1,662.76. On Nov. 20, 1906, the commissioner under an order of the court, revised his report of settlement in which he corrected some minor errors but brought out Porter to be in debt to the estate on practically the same amount as before. Exceptions were filed to this report by Porter and the case being heard by the court the exceptions were sustained, and it was adjudged that the estate was indebted to Porter in the sum of \$1,362.76 with interest from May 25, 1897. From this judgment the plaintiffs appeal.

It is manifest from the proof that the appellee Porter has no adequate idea how he in fact stands with this estate. In one of his exceptions, as shown, he claimed that the estate owed him \$4,872.91. In his statement of the account which he afterward filed he made the balance due him \$1,662.76. The court entered a judgment in his favor for \$1,362.76. He kept no proper account of his doings as trustee. He kept only a cash account and this cash account was so kept as to be of little value in the settlement for the reason that he frequently paid debts with stocks and bonds and credited himself for paying in cash. He has furnished us with no list of the stocks and bonds which he received and he furnished no adequate statement of what he did with the stocks and bonds, so that no intelligent statement can be made of his accounts from the data furnished by the record. In addition to this we are satisfied from the evidence that when Porter turned over the estate to his successor, in 1897, he did not conceive that the estate owed him \$4,800 or \$1,600 or \$1,300 or any other sum. He may not have known then accurately how he stood but there is nothing in the record to indicate that he at any time understood that he was advancing money to Hilton outside of what was in his hands. It is incumbent on a trustee to keep an accurate account of his doings as such and no judgment will be entered by the chancellor against his cestui qui trusts, where, upon the showing made by the trustee, the mind is left in doubt as to how the account really stands; for to keep an accurate account is one of the primary duties of a trustee and if he has not kept an accurate account as trustee, the chancellor will give him no relief against his trust estate, when there is doubt as to how the account in truth stands. The evidence in the case at bar is not sufficient to warrant us in giving a judgment against the trustee; but the credits which he asks are involved in so much doubt that no judgment should be entered in his favor against the trust estate.

The judgment of the circuit court is reversed and the cause remanded, with directions to that court to enter a judgment offsetting the claims of the plaintiffs against the defendant and adjudging each party to pay one-half the cost in the circuit court.

UNITED STATES FIDELITY & GUARANTY COMPANY v. HOWES,
&c.

(Filed April 21, 1908—Not to be reported.)

1. Attachments—Wrongfully Sued Out—Where an attachment is wrongfully sued out, attorneys' fees may be recovered by the defendant on the bond. It is common in such cases to offer proof as to what is a reasonable fee, but the jury are not concluded by the evidence and may fix the fee at a different sum.

2. Clerical Error—It is manifest from the record that the use of the word "mineral" was a clerical error, and the case was properly taken from the jury and continued so as to have the order of the United States Circuit Court corrected in which suit was brought upon the attachment bond.

D. W. Steele, Jr., J. J. Montague and L. T. Everett for appellant.

C. B. Wheeler for appellees.

Appeal from Boyd Circuit Court.

Oponion of the court by Judge Hobson, affirming.

On February 27, 1902, the Kentucky Coal, Timber, Oil and Land Company brought an action in the United States Circuit Court for the eastern district of Kentucky against appellees to recover the sum of \$2,800, and took out an attachment which was levied upon their property. To obtain the attachment it executed an attachment bond with the United States Fidelity & Guaranty Company as its surety. During the progress of the action the court discharged the attachment, after which this action was brought by appellees against the United States Fidelity & Guaranty Company upon the attachment bond to recover the damages which they had sustained by reason of the wrongful attachment which they alleged amounted to \$1,175. The defendant filed answer controverting the allegations of the petition. The case was put on trial before a jury, and on the trial the plaintiffs, to sustain their allegation that the attachment had been discharged, offered in evidence an order of the United States Circuit Court in the caption of which the plaintiff was stated to be "The Kentucky Coal, Timber, Oil, Mineral & Land Co." It was insisted for the defendant that this order did not show that the attachment sued for had been discharged as the word, "Mineral," did not occur in the corporate name of the Kentucky Coal, Timber, Oil & Land Company, the plaintiff in that action. Upon a hearing of the motion to exclude the testimony, the court rejected the evidence, and thereupon, on the motion of the plaintiffs, withdrew the case from the jury and continued it for the purpose of giving the plaintiff an opportunity to have the order corrected in the court in which it was entered. The plaintiff filed an amended petition alleging that the word "Mineral" was a clerical error and that the order was in fact entered in the action referred to. At the next term of the court, the case came up for trial again and the plaintiff introduced evidence showing that the order was made in the action referred to and that the word "Mineral" in the corporate name of the plaintiff was an error of the clerk in entering it. On this evidence, which was uncontradicted, the jury found for the plaintiff in the sum of \$550. The court entered judgment on the verdict and the defendant appeals.

It is manifest from the record that the order was entered in the case referred to and that the use of the word "Mineral" in the order was simply a clerical error. The circuit court erred, on the original trial, in excluding the evidence and, on the second trial, he properly admitted the evidence and submitted the case to the jury. The order of the

court in connection with the opinion of the judge, which was a part of the record, and the other proceedings in the case, made out for the plaintiff a prima facie case without any other evidence. The copy of the attachment with the return made upon it showed that the plaintiff's property was levied upon, and sustained the allegations of the petition as to these matters. The deposition of the officer was properly admitted, however, to show more fully what he did and the nature of the loss sustained by the plaintiffs from the locking up of the store. As the plaintiffs made out their case on the first trial and the court erred in excluding the evidence, the defendant can not complain that the court set the case over for trial at another term.

Where an attachment is wrongfully sued out and is discharged, the defendant in the attachment may recover, on the attachment bond, his reasonable counsel fees in procuring the discharge of the attachment. While the evidence does not show that it would be a reasonable fee it does not show what the attorneys did and the amount of the fee which was paid them; and from this the jury were warranted in fixing a reasonable fee. It is common to offer proof in such cases by attorneys as to what is a reasonable fee, but when the lawyers have given their opinion the jury are not concluded by them and may fix the fee at a different sum. And so where there is no testimony by lawyers as to what is a reasonable fee, but it is shown what the lawyers did and how much they were paid, there is enough to warrant the submitting of the case to the jury; for, in the end, the jury must decide what is a reasonable fee.

The jury only allowed \$550 for damages. The store was locked up from the time the attachment was levied until it was discharged, a period of 43 days. The defendants had to go to Covington, and were at considerable expense there in making their defense to the attachment issue. Their lawyers' fee was \$350. In view of the expense the plaintiffs were at, the length of time the store was locked up, and their business was suspended, we can not say that the verdict for \$550 is excessive.

Judgment affirmed.

RUSSELLVILLE HOME TELEPHONE CO. v. COMMONWEALTH.

(Filed April 21, 1908—Not to be reported.)

1. Telephones—Indictment for Cutting Down Shade Trees—Order Changing Name of Defendant—It was not error to permit the name of appellant to be changed from the one under which it was indicted to its true corporate name. (Section 125, Criminal Code.)

2. Shade Trees—Consent of Supervisor of Roads—Evidence—As the supervisor of roads did not know the boundary of the highway where the trees were cut, little importance is attached to his consent that they might be cut.

B. R. Crewdson for appellant.

James Breathitt and Theo. B. Blakey for appellee.

Appeal from Logan Circuit Court.

Opinion of the court by Judge Settle, affirming.

Appellant was indicted, convicted and fined \$60.00 in the court below, for cutting down three shade trees on the land of H. E. Orndorf without his consent. It is insisted by its able counsel that the conviction of ap-

pellant was illegal, and several grounds are urged for a reversal of the judgment of conviction.

First, it is contended that the indictment having been returned against the Home Telephone Company, it was error for the trial court to allow an order to be entered of record changing the name of the defendant to the Russellville Home Telephone Company, which is admitted to be the true corporate name of appellant. The change of name was properly made because expressly authorized by section 125, Criminal Code, which provides:

"An error as to the name of the defendant shall not vitiate the indictment, nor proceedings thereon, and if his true name be discovered at any time before execution, an entry shall be made on the record of the court of his true name, referring to the fact of his being indicted by the name mentioned in the indictment, and the subsequent proceedings shall be in the true name."

In *Jenkins v. Commonwealth*, 115 Ky., 62, it was held: "Jeff Jenkins, having been indicted under the name of Albert Jenkins, the style of the prosecution may be changed to Jeff Jenkins on the record, though a person by the name of Albert Jenkins lived in the county, and by mistake was first arrested."

(*International Harvester Company v. Commonwealth*, 30 Ky. Law Rep., 716; 99 S. W., 627.)

It is further contended by appellant that the trees cut were not shade trees. Section 1257, Kentucky Statutes, under which appellant was indicted, reads as follows:

"If any person shall willfully and unlawfully cut down or destroy, by belting, topping, or otherwise, any fruit or shade trees of another * * * destroy or injure the vegetables, trees, or shrubbery of another person, he shall be fined not less than \$5.00 nor more than \$500.00."

Manifestly, the two oaks and hickory tree appellant was charged with cutting were shade trees within the meaning of the section, *supra*. They stood upon Orndorff's land on the border of the public highway, and trees upon the highway are valuable for the shade they make for the benefit of those who travel the highway; and the owner's right to protect them from the axe was not lessened by the fact that other persons using the highway in common with him got the same enjoyment he received from the shade afforded by the trees when standing.

It is further contended by appellant that the trees in question were cut by the permission of the owner, Orndorf. This contention is not sustained by the record. It is true the telephone poles and attached lines had previously been erected at that point and from there through other parts of Orndorf's land, under an agreement that he should be paid for the damages resulting to the land; but the trees were cut sometime after the construction of the telephone line, in removing the telephone poles from where they were first planted and again putting them on his land. It is also true that Orndorf had theretofore recovered judgment against the telephone company for the damages resulting to his land by the construction of the telephone line, but this fact did not authorize the changing of the line upon his land after its erection, without his consent. In other words, Orndorf's consent that the telephone line might be constructed on one part of his land did not authorize the telephone company to thereafter change it to another part of the land over his objection.

The only serious objection made by appellant to its conviction is that the cutting of the trees in question was done by the employes of the Central Telephone Construction Company and not by appellant. On this question the proof is scant. S. J. Rose and those acting under his orders, in cutting the trees in question, claim to have represented and been in the employ of the Central Telephone Construction Company, and to have had permission of the supervisor of county roads to

do the cutting. The testimony shows, however, that at that time Rose was also the manager of the appellant company, and further that the latter then had its wires upon and attached to the telephone poles which had previously been erected by the other company, including those changed when the trees were cut. It is true Rose also stated that the appellant company had not then commenced operating its line, though it was making arrangements to do so, and shortly thereafter did begin its operation. From this testimony it would appear that it was as much to the interest of the appellant company to change the poles and cut the trees, as that of the Central Telephone Construction Company. In other words, appellant's lines being then upon the poles, gave it an interest in them, and made it as necessary for the cutting of the trees to be done in its behalf as if its line were actually in operation at the time. It does not appear from the evidence whether appellant became the successor of the Central Telephone Construction Company in the ownership of the poles and lines in question, or whether the poles were thereafter used by both companies. In any event it had, at the time of cutting the trees, the same right to use the poles that was possessed by the other company. It can not be said, in view of the foregoing facts, that there was not some evidence authorizing the belief upon the part of the jury that appellant was responsible for the destruction of the three trees on Orndorf's land. This testimony, though slight, seemed to justify the submission of the case to the jury, and they, having found appellant guilty, we are not disposed to interfere with the verdict.

We attach little importance to the consent given by the supervisor of roads to the cutting of the trees in question, as his testimony conclusively shows that he did not know the boundary of the highway at the point of the cutting and could not say whether the trees were in the highway, or outside of it. He did express the opinion that they stood a few feet within the highway, which, if true, would have given him authority to have them cut and removed; but to show such authority it should have been made to appear, either from the records of the county court establishing the road, or other sufficient evidence, that the trees were upon the highway, and no such evidence was introduced.

The instructions are not objected to. They express with exceptional clearness and brevity the entire law of the case.

Wherefore, the judgment is affirmed.

SAGAMORE COAL COMPANY v. CLARK, &c.

(Filed April 21, 1908—Not to be reported.)

1. Contracts—Pleadings and Proof—Profits—In this action by appellee for damages occasioned by the alleged breach of a contract to remove stumps and pillars from a coal mine, the pleadings and proof show it to be a case where profits are recoverable.

2. Instructions—Measure of Damages—The instructions advised the jury that if they found for appellees they should allow them such a sum in damages as they would have earned under the contract by way of profits over and above the expense incurred in the work, and this instruction is approved. Appellant can not complain of an instruction given which was asked by it.

3. Pleading—The demurrer to the petition should have been overruled as the petition stated a good cause of action for the breach of the contract.

Rhorer, Ainsworth & Dawson and Chas. J. Dawson for appellant.

O. V. Riley for appellees.

Appeal from Bell Circuit Court.

Opinion of the court by Judge Settle, affirming.

This is an appeal from a judgment entered upon a verdict for \$500.00 damages awarded appellees against appellant in the court below for a breach of contract.

The contract in question and breach thereof constituting appellees' cause of action are set forth in the petition as follows:

"Plaintiffs state that in the early part of the year, they and the defendant entered into a contract which had for its subject matter the removal of the stumps, pillars and all the coal in place, remaining in two parts of defendant's coal mine in Bell county, where entries, cross-entries, rooms and other mining openings had been previously made in obtaining that body of the coal therefrom; that the first of said parts from which said coal was to be removed, or in the language of coal mining operations, "robbed," consisted of the stumps, pillars and the coal in place in that part of defendant's mine which was between rooms numbers 1 to 12 inclusive, on the first right entry, and that the second of said parts, where said remaining coal was to be gotten out, according to said contract, consisted of the coal in stumps, pillars and walls in that part of defendant's mine which was on both sides of the main straight entry for the distance of 990 feet, and included the coal in the stumps and pillars between the rooms opening from said entries and that in the walls of the air course running parallel therewith.

Plaintiffs say that by the terms of said contract the said coal from the said first part of defendant's mine was to be first removed, and then the coal from the said second part was to be taken out; that the coal in said second part was near the side track, cleaner, more easily mined and hauled out and could have been gotten out by plaintiffs at much less cost than the coal in said first part, and that in said second part there was coal enough, which was to be removed, to have made or yielded 20,000 mining cars.

Plaintiffs say that in consideration of both said parts of defendant's mine being included in said contract, and in consideration of their getting to pull all of the coal from both of said parts, they agreed to mine, load, and haul out the coal in the said first part before commencing on the second part, at the price of 75 cents per car, for all of said coal; that the defendant agreed to allow the plaintiff to get out all of the coal in the said two parts; first removing the coal from the first part of its mine and then the coal from the second part, and it agreed to pay them the aforesaid price per mining car for all the coal, in both parts. That the "robbing" of the first part of defendant's mine was to begin and be completed as soon as plaintiff could reasonably do it, and the second part "robbed" as expeditiously as was reasonable.

Plaintiffs say that they employed a sufficient force of laborers, provided the necessary tools and other equipments and began the work of removing the coal in the stump, pillars and walls in the first part of defendant's mine in the month of February of said year and completed same on the 26th of June following; that they were then ready, willing and able to mine and haul out all the coal in the stumps, pillars and walls in the second part of the mine and offered to do so, and to begin same immediately upon the completion of the removal of the coal from the first part, but the defendant refused at the time to permit them to do so, or perform their part of said contract as to said second part of its mine, and has ever since refused to allow them to remove the coal therefrom."

"Plaintiffs further say that the actual cost of mining, loading and hauling out of the coal from said second part was and would have been only 65 cents per mining car, and had the defendant permitted them to have removed said coal from said second part of its mine, they would

have realized as certain and net profit on the work, above the actual cost and necessary expense in performing their contract, the sum of \$2,000, and by the defendant's refusal to perform the contract, it has damaged them in the sum of \$2,000."

Appellant's answer admitted the contract as to part No. 1, of the mine, but denied that it extended to or included any agreement as to part No. 2. During the hearing of the evidence on the trial appellant tendered and was permitted to file an amended answer containing a denial of the averments of the petition as to the quantity of coal in part No. 2 of the mine, and charging an abandonment by appellees of the work as to part No. 2. The affirmative matter of the answer as amended was controverted by reply.

Appellant asked a new trial, and now asks a reversal of the judgment, upon the grounds, first, that the court erred in overruling its demurrer to the petition; second, in instructing the jury; third, in refusing the peremptory instruction asked by appellant.

Manifestly, the demurrer should have been overruled as the petition stated a good cause of action for a breach of the contract therein set forth.

The instructions given by the trial court, with one exception, to which attention will later be called, conformed to the issues made by the pleadings and were, therefore, proper, if there was any evidence upon which to base them, and there undoubtedly was such evidence. According to the testimony of appellees and their witnesses, appellees were employed by appellant's mine manager to remove from the mine the coal in the stumps, pillars and walls of parts numbered 1 and 2; number 1 to be worked first, and number 2 next, and that for the work they were to be paid at the rate of 75 cents per mining car for all the coal gotten out. Some of appellees' testimony was to the effect that as an inducement to appellees to undertake the contract, appellant's mine manager assured them they would make a profit of \$2,000.00, on the work in part number 2. According to the evidence "robbing" a mine is more dangerous than ordinary mining, as the work of removing stumps and pillars constituting supports to the mine roof, to get the coal they contain often leaves the roof or upper walls of the mine without sufficient support and causes them to fall, to the great peril of the miners, hence, better compensation is allowed for such work, than in ordinary mining.

It is true that appellant's testimony differed from that of appellees, as it tended to prove that the contract between them and appellant did not include the removing of stumps, pillars, &c., from part number 2 of the mine, but this conflicting testimony was properly allowed to go to the jury and it will not do to say that appellees' version of the contract was unsupported by evidence. If the jury believed appellees and their witnesses, as they evidently did and had the right to do, there was ample testimony to authorize the verdict.

There was also a contrariety of evidence as to the quantity of coal in part number 2 of the mine, but it conduced to prove that little, if any, profit was made by appellees in mining part one and was sufficient to show that if appellees had been permitted to work part number 2 as provided by the contract, their profits therefrom, allowing 75 cents per car for getting out and removing the coal and deducting 65 cents per car as the cost of the work, would have amounted to a much larger sum than the verdict allowed them.

Appellant's testimony also tended to show that its mine manager had not authority to contract with appellees as to the coal in part 2 of the mine. On the other hand that of appellees' conduced to prove that he had such authority and that his act in including part number 2, was within the apparent scope of his powers as agent. So as to this feature of the case there was evidence to authorize the verdict. There

was no evidence that conduced to prove an abandonment of the contract by appellees.

After the foregoing outline of the evidence it is hardly necessary to add that the peremptory instruction asked by appellant was properly refused by the trial court.

It is insisted for appellant that the jury should have been advised by the first instruction given, that in order to find for appellees they must not only believe from the evidence that the contract in question entitled them to remove the stumps and pillars of coal from part number 2, of the mine, but also that they were able, and ready and offered to do so, but were refused permission by appellant to do the work.

There is no ground for such a contention. The petition averred the ability and readiness of appellees to do the work in part number 2, and their offer to do so, and that appellant refused the offer and would not permit them to do the work. We do not find that any of these averments were denied by the answer, hence, there was no issue of fact on these points to submit to the jury. Appellant further complains that the instructions were wrong as to the measure of damages; that instead of advising the jury as was in substance done, that if they found for appellees, they should allow them damages in such sum as the evidence might show they would have earned under the contract by way of profits, if any, in working part number 2 of the appellant's mine, over and above the labor and other expense they would have incurred in such work, they should have been told that appellees could only recover the actual loss sustained by being deprived of working part 2 by the act of appellant, and that if during the time they would have been engaged in working part number 2 but for appellant's violation of the contract, they obtained and performed other mining work which paid them as much as they would have made by way of profits in working part number 2 of appellant's mine, they should find for appellant.

We can not sustain this contention, as it does not meet our view of the law. However, instruction number 4, given by the trial court, to which reference was earlier made in the opinion, practically conforms to the theory of appellant's counsel as to the measure of damages, of which instruction appellant cannot complain as it was highly prejudicial to appellees.

In our opinion the pleadings and proof in this case show it to be one in which profits are recoverable.

In *Blood, &c. v. Herring, &c.*, 22 Ky. Law Rep., 1725, one of the questions involved was as to the measure of damages; the case being one in which the appellees, for a stipulated price, agreed to saw for appellants 400,000 feet of lumber and put it on barges; after appellees had sawed and placed in barges 186,000 feet of lumber appellants refused to permit them to saw any more under the contract. Appellees then sued to recover of appellants the damages resulting from their violation of the contract. With respect to the criterion of damages the court held (quoting from the syllabus): "That the profits are recoverable as the direct and immediate fruits of the contract and must have been in the contemplation of the parties when the agreement was entered into, but the court should have instructed the jury that the true test was the difference between the actual cost to appellees of putting the lumber on the barges and the contract price. The court properly directed the jury to disregard the appellees' claim for loss of time as they can not recover both the estimated profits and for the loss of time." (*Elizabethtown and Paducah R. R. Co. v. Pottinger*, 10 Bush, 188.)

The two cases cited above are decisive of the case at bar in so far as the measure of damage is concerned.

The record disclosing no error by which appellant's rights have been prejudiced, the judgment is affirmed.

have realized as certain and net profit on the work, above the actual cost and necessary expense in performing their contract, the sum of \$2,000, and by the defendant's refusal to perform the contract, it has damaged them in the sum of \$2,000."

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Appellant asked a new trial, and now asks a reversal of the judgment, upon the grounds, first, that the court erred in overruling its demurrer to the petition; second, in instructing the jury; third, in refusing the peremptory instruction asked by appellant.

Manifestly, the demurrer should have been overruled as the petition stated a good cause of action for a breach of the contract therein set forth.

The instructions given by the trial court, with one exception, to which attention will later be called, conformed to the issues made by the pleadings and were, therefore, proper, if there was any evidence upon which to base them, and there undoubtedly was such evidence. According to the testimony of appellees and their witnesses, appellees were employed by appellant's mine manager to remove from the mine the coal in the stumps, pillars and walls of parts numbered 1 and 2; number 1 to be worked first, and number 2 next, and that for the work they were to be paid at the rate of 75 cents per mining car for all the coal gotten out. Some of appellees' testimony was to the effect that as an inducement to appellees to undertake the contract, appellant's mine manager assured them they would make a profit of \$2,000.00, on the work in part number 2. According to the evidence "robbing" a mine is more dangerous than ordinary mining, as the work of removing stumps and pillars constituting supports to the mine roof, to get the coal they contain often leaves the roof or upper walls of the mine without sufficient support and causes them to fall, to the great peril of the miners, hence, better compensation is allowed for such work, than in ordinary mining.

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We can not sustain this contention, as it does not meet our view of the law. However, instruction number 4, given by the trial court, to which reference was earlier made in the opinion, practically conforms to the theory of appellant's counsel as to the measure of damages, of which instruction appellant cannot complain as it was highly prejudicial to appellees.

In our opinion the pleadings and proof in this case show it to be one in which profits are recoverable.

In *Blood, &c. v. Herring, &c.*, 22 Ky. Law Rep., 1725, one of the questions involved was as to the measure of damages; the case being one in which the appellees, for a stipulated price, agreed to saw for appellants 400,000 feet of lumber and put it on barges; after appellees had sawed and placed in barges 186,000 feet of lumber appellants refused to permit them to saw any more under the contract. Appellees then sued to recover of appellants the damages resulting from their violation of the contract. With respect to the criterion of damages the court held (quoting from the syllabus): "That the profits are recoverable as the direct and immediate fruits of the contract and must have been in the contemplation of the parties when the agreement was entered into, but the court should have instructed the jury that the true test was the difference between the actual cost to appellees of putting the lumber on the barges and the contract price. The court properly directed the jury to disregard the appellees' claim for loss of time as they can not recover both the estimated profits and for the loss of time." (*Elizabethtown and Paducah R. R. Co. v. Pottinger*, 10 Bush, 188.)

The two cases cited above are decisive of the case at bar in so far as the measure of damage is concerned.

The record disclosing no error by which appellant's rights have been prejudiced, the judgment is affirmed.

CITY OF LATONIA, &c. v. LATONIA AGRICULTURAL ASSOCIATION.

(Filed April 22, 1908—Not to be reported.)

1. **Municipalities—Streets—Adverse Holding—Notice—Limitation—Statutory Provision—Construction—Section 2546, Kentucky Statutes,** provides, "that limitation shall not begin to run in respect to action by any town or city for the recovery of any street or other public easement until the trustees or council have been notified by the party in possession to the effect that such possession is adverse to the right of such city or town, and until such notice is given all such possession shall be deemed amicable," Held—That to meet the requirements of the statute the easements must exist as public highways and must be in the city during the period of adverse holding in order to prevent the statute from running.

2. **Same—Dedication of Streets—Acceptance—Presumption—Continued Possession—Record of Plat—**The dedication of a street or alley to the use of the public to be effectual must be accepted by the corporation, and the presumption of acceptance is rebutted by the fact of the continued possession thereof by the original proprietor and his vendees although such dedication be evidenced by the recording of a plat of the town and the sale of lots.

3. **Enclosure of Street or Alley—Possession—Limitation—**After the enclosure and use of an alley for 15 years it is too late for the trustees of a town to urge an acceptance of its dedication to the public or to assert a right to the land.

Hazelrigg, Chenault & Hazelrigg, O. P. Schmidt and J. L. Elliston for appellants.

Harvey Meyers for appellee.

Appeal from Kenton Circuit Court.

Opinion of the court by Judge Barker, affirming.

The question involved in this record is the authority of the city of Latonia (sixth class) to open certain named streets which it is claimed run through the property of the Latonia Agricultural Association.

The litigation arose as follows: The authorities of Latonia, under ordinance, were about to, or were threatening to tear down the fences and other improvements of the appellee for the purpose of opening and extending the streets through its grounds. To prevent this, appellee filed a bill in equity to obtain an injunction restraining these alleged wrongful acts. The city answered, among other things, alleging that the streets in question were public streets or highways; that the appellee was wrongfully in possession of them, and was wrongfully withholding their use from the public.

The claim of the city to the streets in question is deduced as follows: In 1869 one George W. Jones (his wife being the owner in fee), made a plat of her farm, which was situated in Kenton county, outside of the limits of the city of Covington, laying off the land into what were called town lots and dividing them by named streets and alleys. This plat was called Jones' sub-division of South Covington, and was recorded in the county court of Kenton county. Mrs. Jones (the wife) did not join in this attempted dedication of her land to public use, but afterwards she joined her husband in conveying some of the lots to purchasers, and in the deeds the plat was recognized by describing the lots. And this, it is said, fully ratified the original act of the husband, if that was necessary.

In 1894 the town of Latonia was organized as a city of the sixth class, and afterwards, in 1900, its boundaries were so extended as to

annex a part of the property of the appellee corporation, and thereupon the city claims arose its right, theretofore in abeyance, to open the streets in question.

The appellee, on the other hand, alleges the following claim to the streets and alleys involved in this litigation: It was chartered, and fully authorized to do the various things it afterwards did, in 1882. It bought from Jones and wife something less than two hundred acres of land, being all of the former town site except a few lots which had been sold to various people prior to appellee's purchase. It bought all of the lots owned by outside purchasers, so as to solidify its boundary, and then it enclosed the whole of its property with a close plank fence about eight feet high, and upon the enclosure laid off a regulation mile track, built a grandstand, betting sheds, stables, &c., and has there operated and maintained a race track, called by the public "The Latonia Race Track," ever since.

As we see it, the main question in this case will readily turn upon the plea of limitation, and we will proceed to examine that issue.

The plaintiff pleads and relies upon adverse possession for more than fifteen years in bar of the city's right to open the streets through its grounds, and there can be no sort of doubt that the evidence shows, without attempt at contradiction, that it has had the whole property enclosed with a high plank fence since 1882, and during all of the time, without intermission, it has occupied it as a race track under a claim of adverse right to all the world. It only remains, therefore, to see whether there is anything in the statute of limitations which prohibits its running against the claim of the city to open the streets. The provisions of the statute bearing on the subject are as follows:

"Section 2546. The limitations mentioned in the first article of this chapter shall not begin to run in respect to actions by any town or city for the recovery of any street, alley, or other public easement, or any part of either, or the use thereof in such town or city, until the trustees, or the council or the corporation, by whatever name known or called, have been notified, in writing, by the party in possession, or about to take possession, to the effect that such possession will be adverse to the right or title of such town or city. Until such notice is given, all possession of streets, alleys and public easements, or any part of either, in any town or city, shall be deemed amicable, and the person in possession the tenant at will of such town or city.

"Section 2547. Limitation shall not begin to run in favor of any person in the possession of any public road, or of any part thereof, until written notice shall be given to the county court of the county in which the road is situated, that such possession is adverse to the right of the public to the use of such road."

It will be observed that the operation of the first of the foregoing sections is limited to the right of a municipality to bring an action to recover the use of a street, alley, or other public easement in the city. To meet the requirements of the statute, the easements must exist as public highways, and must be in the city during the period of adverse holding in order to prevent the statute from running; and, under the provisions of the second section above quoted, the road must exist as a public highway of the county, while being adversely held, to stop the statute from running against the county. The object of both sections is clearly to prevent the secret appropriation of public highways by adverse possession. The important question, then, is: Were the streets involved here ever public highways, either of the city or the county?

Assuming, for the purposes of the case, that Jones and wife, by what they jointly and severally did in the premises, dedicated the streets and alleys shown on the plat of the Jones sub-division to public use as far as they had the power so to do, did they thereby

become public highways within the meaning of the sections of the statute above quoted? There is no pretense that the county of Kenton, or the city of Latonia, or any other public authority, ever expressly accepted the streets in question, or ever did such work on, or exercise such supervision over, them as would imply an acceptance. The question of law, then, arises: Can a public highway be established by dedication except by an acceptance, either express or implied, by the public?

In the case of *Trustees of Lagrange v. Bain, &c.*, 4 Ky. Law Rep., 256, the very question we have here arose, and it was there held by this court that the dedication of streets and alleys to the use of the public, to be effectual, must be accepted by the corporation; and that the presumption of acceptance by the corporation is rebutted by the fact of the continued possession by the original proprietor, and particularly his vendees, although the dedication be evidenced by the recording of a plat of the town and sale of lots. After the inclosure and use of an alley for fifteen years, it is too late for the trustees of the corporation to urge an acceptance of its dedication to the public or to assert a right to the land.

In the case of *Wilkins v. Barnes, &c.*, 79 Ky., 323, it is said: "And, therefore, where a dedication is claimed to have been made to the public, reason and authority require, as a protection to the land owners, the acceptance of the dedication to be made by the constituted representative of the public in its organic capacity, upon its records, or by such acts of control or recognition as will furnish a presumption of their existence."

The foregoing excerpt was cited, and the principle it contains approved in *Louisville & Nashville Railroad Co. v. Survant*, 96 Ky., 197; and in addition it was said: "A public road can only be established in two ways. One is in the manner prescribed by the statute, the other by dedication; and in the latter case it must be accepted by the county court."

In the case of *Gedge, &c. v. Commonwealth*, 9 Bush, 61, the court said: "The right in Wall to make the dedication of the ground to be used as a street or highway is unquestioned, but such a dedication does not compel the town of Cynthiana to improve the street or keep it in repair. If the act dedicating the land makes it a street or highway, then it is within the power of any person to compel a town or county to improve or keep in repair a highway, whether desired or not. There must be some acceptance of the dedication, by the town if a street, or by the county court if a public road, before an indictment can be maintained against those whose duty it is to keep the street or road in repair, or against one or more for a nuisance in obstructing the travel, &c." (*Cochran v. Town of Shepherdsville*, 19 Ky. Law Rep., 1192.) It follows from this authority, that the so-called streets in question were not technically highways, and the adverse possession of appellee for the statutory period, barred appellant's right to accept and open them after the land was annexed.

The case of *City of Covington v. Hall*, 30 Ky. Law Rep., 356, does not militate against the principle herein established. It is true there is some general resemblance in the facts of that case and the case at bar. It was held in the case cited, that Mrs. Hall was estopped by the recitation in the deed under which she held her property, that St. Louis street was a public highway of the city of Covington, there having been conveyed to her only so much of the property "as is not dedicated for streets and alleys by the plat of land of said Patch."

The principle established there has no application here. The property in question was outside of the city of Latonia at the time of the attempted dedication by the Jones plat. The attempt to establish a town on the Jones farm had been abandoned. The appellee pur-

chased all the property platted except a few lots, buying out all adverse interests of lot holders within its boundary. It held the property adversely for more than fifteen years before the right of the city of Latonia (assuming it to have a right) to claim the streets arose, or could have arisen. The bar of the statute was complete long before the city of Latonia annexed the property of appellee. It has erected upon the land improvements said to be worth from two hundred thousand to two hundred and fifty thousand dollars. To permit the city to project the streets in question through its property now would be to entail upon it a complete loss of the property as a race track. No court would permit this to be done without the establishment on the part of the city of a clear legal right so to do. This the city has failed to do, and we concur in the opinion of the chancellor, that the injunction restraining the public authorities from interfering with the property of the appellee should be perpetuated.

Judgment affirmed.

COMMONWEALTH v. MURPHY.

(Filed April 22, 1908—Not to be reported.)

1. Criminal Prosecution—Total Failure of Proof—Peremptory Instruction—Duty of Court—The trial court has the same authority to give a peremptory instruction in a criminal prosecution as in a civil action, and where the evidence by the Commonwealth wholly fails to incriminate the defendant it is not only the right, but the duty of the trial judge to instruct the jury to return a verdict of not guilty.

2. Same—Slight Evidence—It is not, however, within the province of the trial court to take from the jury a criminal prosecution if there is any evidence, however slight, conducing to show the guilt of the defendant in any of its degrees mentioned in the Criminal Code.

Loraine Mix and James Breathitt for appellant.

Aaron Kohn and J. T. O'Neal for appellee.

Appeal from Jefferson Circuit Court, Criminal Division.

Opinion of the court by Judge Carroll, certifying the law.

The appellee was indicted in the criminal division of the Jefferson Circuit Court, presided over by Judge Joseph Pryor, charged with the murder of Catherine L. Bryant, caused in producing, or attempting to produce, an abortion upon her.

Upon the conclusion of the evidence for the Commonwealth the trial judge directed the jury to return a verdict of not guilty, resting his conclusion upon the ground that there was a total failure of proof upon the part of the Commonwealth to connect the accused with the commission of the crime. The trial judge has the same right and authority to give a peremptory instruction in a criminal proceeding that he has in a civil action. And if the evidence introduced in behalf of the Commonwealth fails to incriminate the defendant, or is wholly insufficient to show that he is guilty of the offense charged, it is not only the right, but the duty of the trial judge to instruct the jury to return a verdict of not guilty. It is not, however, within the province of the trial court to take from the jury a criminal prosecution if there is any evidence, however slight it may be, conducing

to show that the defendant is guilty of the offense charged, or any of its degrees mentioned in the Code. This rule of practice is not found directly in either the Code or the Statutes, but it is firmly established as a part of the criminal jurisprudence of the State, and is uniformly applied by this court in considering appeals in criminal cases when a reversal is asked because the verdict is flagrantly against the evidence, or is not supported by sufficient evidence and should control the lower courts in the disposition of criminal cases. (*Vowels v. Commonwealth*, 83 Ky., 193; *Patterson v. Commonwealth*, 86 Ky., 313; *Green v. Commonwealth*, 26 Ky. Law Rep., 1221; *Martin v. Commonwealth*, 32 Ky. Law Rep., 657.)

Although the disposition of this appeal will not affect the accused, as the verdict of acquittal under the direction of the court operated to free her from the accusation, and to prevent a subsequent prosecution for the same offense, yet, as an appeal has been prosecuted by the Attorney General of the State, under section 337, of the Criminal Code, providing in part that "if the Attorney General, on inspecting the record, be satisfied that error has been committed to the prejudice of the Commonwealth, upon which it is important to the correct and uniform administration of the criminal law, that the Court of Appeals should decide * * * he may take an appeal."

We have examined, with great care, the evidence for the purpose of determining whether or not there was any testimony conducing to show that appellee Murphy was guilty of the crime charged against her. Our conclusion is that there was not, and that the trial judge correctly directed the jury to return a verdict of not guilty. Under the indictment, it was indispensable to make out a case for the Commonwealth authorizing a submission to the jury that some evidence should be introduced tending to establish, first, that Catherine L. Bryant's death was produced by an abortion or an attempted abortion; second, that appellee Murphy was guilty of producing, or attempting to produce, the abortion from which she died, if this was the cause of her death, although proof of either, or both of these facts, could have been made by circumstantial evidence. (*Johnson v. Commonwealth*, 81 Ky., 325; *Laughlin v. Commonwealth*, 18 Ky. Law Rep., 641; *Flinchem v. Commonwealth*, 28 Ky. Law Rep., 653; *Roberson's Criminal Law*, section 151.) There is some evidence by Drs. Weidner and Spears, who made an examination of the organs of the deceased several days after her death, after the post mortem examination had been held, and the organs examined by them had been subjected to other tests, that there were slight indications of injury, such as might have been produced in an attempt to commit an abortion, although Dr. Woody, the surgeon who performed the autopsy on the body of the deceased for the purpose of ascertaining the cause of her death, testified that there were no evidences whatever of an attempt to commit an abortion, or that her death resulted from this cause. While it is doubtful if the evidence of Drs. Weidner and Spears was sufficient to show that Catherine L. Bryant came to her death from an attempt to commit an abortion upon her person, yet conceding it was, this would not be sufficient to authorize a submission of the case in the absence of some evidence conducing to show that the abortion, or the attempted abortion, was committed by the accused. Upon this point, there was a total failure of proof. There was no evidence whatever tending, in any degree, to establish that the accused either committed, or attempted to commit, an abortion upon the person of the deceased.

This opinion is ordered to be certified to the lower court as the law of this court.

NELSON v. COMMONWEALTH.

(Filed April 22, 1908—To be reported.)

1. Attorneys at law—Disbarment—Power of Courts—Section 97, Kentucky Statutes, provides that “no person convicted of reason or felony shall be permitted to practice in any court as counsel or attorney at law.” Section 98, sub-section 2, requires that “a person desiring to practice law in this State shall first procure a certificate from the county judge of the county of his residence that he is a person of honesty, probity and good moral character.” In this State the courts have the power, independent of the statute, to disbar an attorney who has been guilty of forgery, upon the ground that the commission of the offense shows that he is lacking in those qualities which are necessary for him to possess in order to continue as an attorney at law.

2. Same—Conviction for Forgery—Pardon by Governor—Effect of Disbarment—While the effect of a pardon by the Governor, of an attorney who has been convicted of forgery, is to relieve him of the penal consequences of his act, it could not restore his character or re-invest him with those qualities which are absolutely essential for an attorney at law to possess.

C. H. Wilson and G. W. Landrum for appellant.

James Breathitt and Chas. H. Morris for appellee.

Appeal from Livingston Circuit Court.

Opinion of the court by Wm. Rogers Clay, Commissioner, affirming.

By a judgment of the Livingston Circuit Court, entered on December 16, 1907, the appellant, M. C. Nelson, was disbarred from the practice of the law in all the courts of this Commonwealth. From that judgment he prosecutes this appeal.

It appears from the record that appellant, at the April term, 1907, of the Livingston Circuit Court, was indicted for the crime of forgery. At the December term of said court the case was called for trial. Appellant waived formal arraignment and entered a plea of guilty. A jury was impanelled, and, after hearing the evidence and being instructed by the court, returned the following verdict: “We, the jury, fix the defendant’s punishment at two years in the State penitentiary.” During the same term appellant filed a pardon from the Governor of Kentucky. Excluding its formal provisions, the pardon is in words and figures as follows:

“Now, know ye, that in consideration of the premises and by virtue of the power vested in me by the Constitution, I do hereby grant unto the said M. C. Nelson a full and free pardon for said offense, and do order that he be forthwith liberated from confinement, and released from all liability in consequence of said judgment of conviction, and I direct that all officers of this State respect this pardon.”

Upon the filing of the pardon the court ordered appellant released from custody. At the same time the court ruled Nelson to appear and show cause why he should not be disbarred as an attorney at law. At the hearing of the disbarment proceedings appellant introduced and re-filed the pardon theretofore obtained. The trial court held that the pardon was no defense to the disbarment proceedings, and entered judgment accordingly. The record does not disclose what occurred at the hearing; it simply shows that appellant was made to appear, and upon his appearance tendered his pardon. The only error complained of is the failure of the court to adjudge that the pardon was a bar to

the disbarment proceedings; we are, therefore, confined to a consideration of that question alone.

It is the contention of appellant that, by the terms of the pardon, he was released from all liability and consequences of the judgment of conviction; that section 97, Kentucky Statutes, provides that "no person convicted of treason or felony shall be permitted to practice in any court as counsel or attorney at law;" that this statute creates a liability which is connected with the offense of which appellant was convicted, and that the pardon, therefore, released him from such liability. We must admit that there are very respectable authorities which support, or tend to support, the position of appellant. Thus in the case of *Penobscot Bar v. Kimball*, 64 Me., 150, where an attorney was guilty of having forged a deposition and of having offered the same in court, and produced a pardon from the executive for the offense of forgery, the court held that the effect of the pardon was not only to release the attorney from the punishment prescribed for that offense and to prevent the penalties and disabilities consequent thereupon, but also to blot out the guilt thus incurred, so that in the eye of the law he was as innocent of that offense as if he had never committed it; that the pardon made a new man in respect to that particular offense, and gave him a new credit and capacity; that to exclude him from the office he held when he committed the offense would be to enforce a punishment for it notwithstanding the pardon. The court, however, upheld the disbarment proceedings upon the ground that the attorney had offered the forged deposition in court, and that this was a violation of his official oath, and another offense for which he had not been pardoned.

In the case of *Scott v. State*, 6 Tex. (Civ. App), 343, the court held that under the statutes of Texas, a pardon for an offense was a complete bar to and disbarment proceedings on account of that offense.

Likewise it has been held that the effect of a pardon, unless limited by its terms, is to restore to the offender personal rights and privileges forfeited by his conviction, and these include the privilege to follow his professional calling or means of livelihood. Thus, where by statute a conviction of felony worked a disqualification to sell liquors by retail, it was held that a pardon removed the disqualification. (*Hay v. Justices*, 24 Q. B. D., 561.) And where, by participation in rebellion against the Federal government an attorney at law, practicing in the Federal courts, became disqualified, it was held that by accepting a full pardon from the President and taking the required oath of allegiance he became entitled to resume practice. (*Ex. p. Law*, 35 Ga., 285 U. S. Dist. Ct., So. Dist. of Ga.)

On the contrary, it has been held that while the general effect of a pardon, as to the restoration of rights and privileges and the creating of a new credit and capacity may be conceded, the fact that a pardon has been granted to a person convicted of an offense can not warrant the assertion that such a person is as honest, reliable and fit to hold a public office as if he had constantly maintained the character of a law-abiding citizen; hence it has been held that the fact that a person has been convicted of offenses disqualifying him to hold the position of a police officer is not altered or affected by the pardon, and he may still be held unfit for the office. (*Am. & Eng. Encyc. of Law*, volume 24, page 588; *State v. Hawkins*, 44 Ohio St., 117.)

In the matter of "E," formerly an attorney, 65 How. Pr. (N. Y.), 171, it appears that "E" had been twice convicted of perjury, and had been warned to appear and show cause why he should not be disbarred. While the matter was pending, the Governor pardoned "E," who afterwards moved the court to vacate the order by which he had been disbarred, on the ground that he had been pardoned. The court, in passing upon this ground, said:

"In the matter of Niles (48 How., 246), it was held that by conviction and sentence for a crime punishable in the State Prison, the office of an attorney and counselor was forfeited, that such forfeiture was like that of the forfeiture of any other public office, and was not a temporary suspension. If this view is sound, and we are inclined to think that it is, then the conviction and sentence had worked a forfeiture to 'E' of the office of attorney and counselor, and the pardon does not re-instate him. In that view he stands very much as if he had held some office, as for instance that of county judge, his pardon would not have re-instated him in office."

In the matter of ———, an attorney, 86 N. Y., 563, where the attorney disbarred had been tried and convicted of forgery, the learned Chief Justice very ably discussed the question involved, and we quote from him at length as follows:

"It is contended that the executive pardon of that offense had wholly blotted it out, and has given him new credit and capacity, and that, in the eye of the law, he is as innocent as if he had never committed the offense. (Ex parte Garland, 4 Wall, 380; In re Deming, 10 Johns, 232, 483.) Doubtless the effect of the pardon is that, so far as the violation of the criminal law, the offense against the public, is concerned, he is to be looked upon as innocent thereof. The pardon does reach the offense for which he was convicted, and does blot it out, so that he may not now be looked upon as guilty of it. But it can not wipe out the act that he did, which was adjudged an offense. It was done, and will remain a fact for all time. Notwithstanding the extensive language used in Ex parte Garland (supra) and In re Deming (supra), and that which we have used, there are limits to the effect of such a pardon. The word pardon includes a remission of the offense, or of the penalties, forfeitures or sentences growing out of it.' (Per Edmonds, J., The People v. Potter, 1 Park, Cr. 51.) The pardoned man is relieved from all the consequences which the law has annexed to the commission of the public offense of which he has been pardoned, and attains new credit and capacity, as if he had never committed that public offense. (In re Deming, supra.) Yet the pardon does very little toward removing the other consequences which result from the crime. (Per Bronson, J., 5 Hill, supra.) It does not restore offices forfeited, or property or interests vested in others in consequence of the conviction and judgment (Ex parte Garland, supra; In re Deming, supra); and it has been said that it does not restore the capacity for civil office. (Commonwealth v. Fugate, 2 Leigh. [Va.], 724.) We do not, at this time, follow that case to that length. It can not take away the right of an informer to his part of a fine or penalty fixed by the law upon the commission of the offense (3 Inst., 238; Rowe v. State, 2 Bay, S. C., 565); nor the perfected right to a moiety of the penalty going to the custom-house officer U. S. v. Lancaster, 4 Wash., C. C., 64); nor the costs of the prosecution. (Holliday v. People, 5 Gilman, Ill., 214; 2 Bay, supra; Ex parte McDonald, 2 Whart, 440; The King v. Amery, 2 T. R., 515, 569.) Judge Thompson, of the United States Supreme Court bench, charged a jury, that though a pardon restored the person to competency as a witness, it did not give back credibility to him, and that they should not believe a witness in that plight unless his testimony was corroborated. (U. S. v. Jones, 2 Wheeler's Cr. Cas. 461.) And so Bronson, Jr., said in Baum v. Clause, (5 Hill, 196), 'Pardon removes the legal infamy of the crime, * * * but can not * * * wash out the moral stain;' 'the crime still goes to the credit of the witness,' citing 1 Phil. on Ev., 35; 1 Strakie on Ev. (ed. of 1842), 100. Elghmy v. The People, 78 N. Y., 330.) The effect of a pardon is to protect from punishment for the crime committed, and for no other. (Case of

Nicholas, Foster's Cr. Law, 64.) That case shows, too, that though the pardon would wipe out the offense against the public of an act in one stage of progress of the effects of it, it will not affect the public offense of the same act in a further stage of its progress. The act there was giving poison. The subject languished, but did not die. An act of Parliament was meanwhile passed, pardoning public offenses, with some exceptions among which was murder. Had the subject not died from the poison, the act of Parliament would have taken in the guilty man's case, and freed him from the legal consequences of his act. But, after the passage of the act, and within a year and a day, the subject died from the poison, and then the giving of it was murder. It was held that the general pardon by the act of Parliament did not relieve the felon from the penalty of his act, though it did relieve him until the death ensued.

"Though it is held that one pardoned for a larceny may maintain an action of slander against him who says he is a thief, and that justificatory proof of the thieving act is overcome by proof of the pardon (Cuddington v. Wilkins, Hobart, 67, 81b), yet it is said there that Wilkins might say that Cuddington had been a thief. (Id. 81b.) It is also said in the case in Hobart (supra) that it might well be said that a man, not knowing of the pardon, might justify apprehending him for the felony because it was for the advancement of justice. A justification thus made would, of necessity, be on proof that would show the criminal act and the former guilt of the pardoned man.

"We have cited these instances to maintain, by authority, our position that, though the pardon obliterates the offense against the public the infraction of the criminal law, relieves the offender from the punishment affixed to it by that law, washes him white from the guilt that the criminal law saw in the act, and frees him from the disabilities consequent upon the act as a guilty act against the public; it does not annul the act and relieve from all consequences of it. For a pardon can not take away the consequences of the act where private justice is principally concerned. (4 Bl. Com. 398.)"

To the same effect is the case *In re Davis*, 93 Pa. St., 116.

By the statutes in force in this State, it is necessary to procure from the county judge of the county of the residence of the applicant a certificate to the effect that the applicant is a person of honesty, probity and good moral character, before obtaining a license to practice law; and the license so obtained only authorizes the person to whom it is granted, to practice as an attorney or counselor at law for and during good behavior in said practice.

In the recent case of *Underwood v. Commonwealth*, 105 S. W., 151. wherein the county attorney of Barren county had been twice convicted of the offense of retailing intoxicating liquor in violation of the local option law, and had also been indicted for accepting a bribe to shield others from prosecution, this court held that he was properly disbarred from the practice of the law, and, in discussing the case, said:

"The charge of bribery may be laid out of the case. It was denied. There was no evidence. A mere indictment is not enough to justify disbarment of an attorney. He must be at least guilty of the offense charged in the indictment, and, while neither indictment nor conviction of the offense is essential as a prerequisite to the proceedings to disbar an attorney (*Baker v. Commonwealth*, 10 Bush, 592), guilt of some act which shows him to be unfit, or no longer entitled to confidence, must be established. To be admitted to the bar, a person must not only be learned in the law, but possess a character of honesty, probity, and good demeanor. A certificate of such character, furnished by the county court of his residence, is a prerequisite to the granting of the license. It is the possession of the character de-

scribed that entitled him to admission to the bar, allowing that, he is able to pass the requisite examination touching his learning. The continued possession of character is as essential to maintain his relation as an attorney at law, as it is to have it in the first instance to be admitted. The office is one peculiarly of confidence. Not only do his clients repose trust in his integrity, but as an officer of the court in the matter of administering justice, his privileges and duties are such as to constantly call for the exercise of fidelity, both to his client and to the State. A lawyer without good character is not only a reproach to his profession, but he brings into public distrust, and is a very menace to, the administration of justice itself. All courts have, as an incident to the power to admit attorneys to their bar, the power to disbar them for such conduct as shows they are not longer worthy of confidence. It is not necessary that the misconduct should be such as would render him liable to criminal prosecution. If it shows that he is unfit to discharge the duties of his office, is unworthy of confidence, even though the conduct is outside of his professional dealings, it is sufficient. If he is not honest, if he is not moral, if he is not of good demeanor, he may be disbarred, and should be. His office is a very badge of respectability, a patent of trustworthiness, derived from his position on the court's roll of counsel. He ought not to be suffered to pass for what he is not."

Thus it will be seen that, while the Kentucky Statute provides that no person convicted of treason or felony shall be permitted to practice law, this statute is simply confirmatory of the right and power already existing in the courts to disbar an attorney who does not possess a character for honesty, probity, and good demeanor. We think a careful analysis of those decisions holding that an attorney can not be disbarred for an offense for which he has been pardoned, shows that the rule is confined to those cases where disbarment is a part of the penalty for the offense, and the courts have no inherent power to disbar except for a conviction of the offense. In this State, however, the courts have the power, independently of the statute above referred to, to disbar an attorney who has been guilty of forgery, upon the ground that the commission of the offense shows that he is lacking in those qualities which are necessary for him to possess in order to continue as an attorney at law. As is well said in the case last cited, "neither indictment nor conviction of the offense is essential as a prerequisite to the proceedings to disbar an attorney," but "guilt of some act which shows him to be unfit, or no longer entitled to confidence, must be established." In this case appellant pleaded guilty. This plea was made in the presence of the court. No other evidence was necessary to show his moral unfitness. While the effect of the pardon was to relieve him of the penal consequences of his act, it could not restore his character. It did not reinvest him with those qualities which are absolutely essential for an attorney at law to possess. It could not rehabilitate him in the trust and confidence of the court. Lawyers are officers of the court. They are agents through whom justice must be administered. They should always be worthy instruments of justice. Courts should never hesitate to disbar those who are morally unfit to act as such agents.

For the reasons given, the judgment is affirmed.

BAUGH, &c. v. BAUGH'S ADM'R.

(Filed April 22, 1908—Not to be reported.)

Parent and Child—Action by Latter for Care of Parent—Contract—Pleading—In this action to recover for services rendered in caring for their father during his latter years, the petition was properly dismissed because it was not alleged that there was a promise on the part of the parent to pay for the services. While the services were necessary, under the repeated decisions of this court, in the absence of an express contract, there can be no recovery for them.

Browder & Browder for appellants.

S. R. Crewdson for appellee.

Appeal from Logan Circuit Court.

Opinion of the court by Judge Lassing, affirming.

Appellants sued the administrator of their father's estate to recover the sum of \$1,700.00 for services alleged to have been rendered to their father during the last seventeen years of his life-time in waiting on, caring for and nursing him. It is alleged that these services were rendered by appellants to their father at his special instance and request. That they were reasonably worth the sums charged therefor, to-wit: \$100 per annum. That their father was old, feeble and infirm, and that his condition required that the services be rendered. They proved the extent and value of the services by the affidavits of neighbors familiar therewith, and presented the proof of their claim to the administrator and demanded payment thereof. This was refused. They thereupon filed their suit setting up the facts and prayed judgment for the amount of their claim. The administrator demurred to their petition and the demurrer being sustained they declined to amend. Their petition was dismissed and they appeal. The sole question is the sufficiency of the petition.

The question raised here has been many times before this court, and it has been invariably held that in order to support a cause of action for services of this character, rendered a parent by a child, it must be alleged and proven that there was a direct, positive and unequivocal promise on the part of the parent to pay for such services, otherwise it is presumed that the services were gratuitously rendered. In the case of *Reynolds' Adm'r v. Reynolds*, 92 Ky., 556, wherein it was shown that a daughter, after reaching her majority, had remained with her father and rendered valuable services to him in his home, this court held that she was not entitled to compensation therefor, although it recognized that the services which she rendered were not only valuable but deserving, and, in denying her right to recover, said:

"If this daughter or the children of any parents were permitted to claim compensation on such facts as are here presented, then the question would constantly arise between them as to the merits of their several claims, and the obligation on the parent to pay each child claiming to have contributed more than another, and all enjoying the comforts, the support and the enjoyments of the same parental home. * * * We are not inclined to concur in the doctrine that after the child arrives at age the law raises a promise to pay for such services, although some of the authorities go to that extent. In this case the children, save the appellee, had left the parental roof, and she was mistress of the household. * * * The filial devotion of this plaintiff to her parent is to be admired, and whatever may be said, and truly said, of her real worth, still if a precedent should be established by which the mere declaration of the parent, that his child should be well paid for her services, and she deserved pay, and he intended to pro-

vide for her, is to be regarded as a contract, or as evidence sufficient upon which to infer that such a contract existed, then almost every child could make out a case against parents for services rendered after arriving at age, and in families with many children would result, in almost every instance, after the death of the parents, in litigation and strife."

In the case of *Price v. Price's Ex'r*, 101 Ky., 28, a claim was presented by appellant against the administrator of her brother's estate, for services rendered at his especial instance and request, and, in compliance with his earnest entreaty, in house-keeping, cooking, washing, and nursing and waiting on him for some time prior to his death. In denying her right to recover this court said:

"It may be conceded that her services were such as to justify her in expecting that her brother would provide for her liberally. But the relationship between the parties was such as to raise the legal presumption that they lived together as a matter of mutual convenience, and, with such relationship existing, the law will not imply a promise of compensation. * * * The law implies no contract to compensate for services rendered by one person to another when the parties stand in relation of parent and child or brother and sister. Much stricter proof is and should be required in such cases than in cases arising between strangers."

And, in the case of *Wallace v. Denny's Adm'r.*, 28 Ky. Law Rep., 978, in which a son sought to recover for services rendered his mother during the after years of her life, this court held:

"Where the relationship of the parties is such as to raise the presumption that they lived together as a mutual convenience the law does not imply a promise that compensation will be made for services thus rendered."

It may be admitted that the services rendered by appellants to their father in his declining years were necessary and were valuable, yet, in the absence of an express contract and agreement on his part to compensate them for same, under the authority of the cases above cited, it must be conceded that they can not recover therefor, nor do the facts alleged in the pleading justify the conclusion that at the time this service was being rendered appellants contemplated making a charge therefor.

For the reasons indicated the judgment is affirmed.

VENTURA HOTEL CO. v. PABST BREWING CO.

(Filed April 22, 1908—Not to be reported.)

1. Landlord and Tenant—Sale of Leased Premises—Right of Purchaser to Collect Rent—By a sale of a house the purchaser acquires all the rights of his vendor and is entitled to collect the rents of that part of the premises occupied by any tenant thereof so long as such tenant continues in occupation under his contract with the former owner.

2. Same—At the expiration of a tenant's lease, though there may be no contract for a renewal thereof, if he remains in possession for ninety days after the expiration of his term he thereby acquires the right to remain the whole year, and so on, year after year, until he is turned out or abandons the premises or makes a new contract.

John W. Woods and S. S. Willis for appellant.

Brown & Malin for appellee.

Appeal from Boyd Circuit Court.

Opinion of the court by Judge Barker, reversing.

The appellee, The Pabst Brewing Company, by a written lease, rented of G. W. Wagner (the then owner) a room in the northwest corner of the Ventura Hotel building, in Ashland, Kentucky, for a term beginning August 1st, 1901, and expiring August 1st, 1902, with a provision that the lessee, by giving notice to the lessor in writing thirty days prior to the expiration of the lease, should have the option of extending to June 1st, 1903. During the term of the lease, in January, 1902, the Ventura Hotel Company purchased the property, and the lease was assigned to it by Wagner. Pending the first year of the lease the Pabst Brewing Company placed Josselson Brothers in possession of the rented premises as its tenants, and they held and occupied the same up to and after the commencement of this litigation. The lease in question is as follows:

"This lease between George W. Wagner, of Ashland, Kentucky, party of the first part, and Samuel Fine, manager of Cincinnati branch of the Pabst Brewing Company, of Cincinnati, Ohio, party of the second part:

"Witnesseth, That the party of the first part, in consideration of a monthly rental of sixty-five (\$65.00) dollars per month, payable on the last day of each and every month from and after August 1st, 1901, by the party of the second part to the party of the first part.,

"Does hereby let, lease and rent unto the party of the second part, the following described premises, to-wit:

"The northwest corner room on the ground floor of the Hotel Ventura building, in Ashland, Boyd county, Kentucky, and fronting on the south side of Winchester avenue, between 12th and 13th streets in said city, and being the same room formerly occupied by the Tripple State Natural Gas and Oil Company.

"For a period of one year from and after August 1st, 1901, with the privilege of occupying same thereafter until the 30th day of June, 1903, at a monthly rental of seventy-five (\$75.00) dollars per month, payable monthly from and after August 1st, 1902.

"Provided, however, That the lessee will surrender this lease and vacate these premises to the lessor upon twelve months notice, in the event of a sale of the property thereby leased at any time during the continuance of this lease.

"Should the party of the second part elect to occupy said premises longer than August 1st, 1902, he shall give to the party of the first part written notice of such intention at least thirty days prior to August 1st, 1902, and the giving of such notice shall extend this lease until June 30th, 1903, unless terminated by sale of property as herein provided, and the rental after August 1st, 1902, at seventy-five (\$75.00) dollars per month as hereinbefore provided.

"Should the party of the second part fail to pay his rental as same becomes due, the party of the first part may, at his election, require the party of the second part to surrender and give possession of said premises upon ten days notice that such possession is desired.

"In witness whereof, this contract has been executed in duplicate, this 29th day of July, 1901.

"PABST BREWING COMPANY,
"Cincinnati Branch,
"SAMUEL FINE, MG'R,
"GEORGE W. WAGNER."

The Pabst Brewing Company did not extend the lease by giving thirty days' notice in writing as provided by its terms, but the subtenants, Josselson Brothers, continued to occupy the premises with the consent of appellant, as said before, up to and after this litigation

commenced. After the expiration of the first year of the lease the rent was paid either by the Bapst Brewing Company or its sub-tenants up to October 1st, 1902, after which time both refused to pay further. Two suits were instituted by the appellant to recover the rent for the three months of October, November and December. One of these was instituted in the Boyd Circuit Court, and the other in the Boyd Quarterly Court; but the suit in the quarterly court was transferred to the circuit court, and there the two actions were consolidated, and thereafter treated as one action for the sum of two hundred and twenty-five dollars, being the aggregate of rent claimed to be due for the three months at seventy-five dollars per month.

In the answer to the action originally instituted in the Boyd circuit court the appellant undertook to traverse all of the material allegations of the petition, but subsequently withdrew all of the material denials of its answer, and for all practical purposes stood upon the defense alleged in the answer and counter-claim filed originally in the quarterly court, but transferred to the circuit court as before said.

In its petition the appellant, in stating its cause of action for the rent due, alleged affirmatively that the appellee failed to take advantage of that provision of the lease which entitled it to an extension thereof by giving to the lessor thirty days' written notice of its desire so to do; but that appellant had entered into a verbal agreement with the appellee for it to remain in the demised premises until January, 1903, at a rental of seventy-five dollars per month. This allegation was controverted by the answer. In the answer, filed originally in the quarterly court—transferred as before said, and which may now be treated, for all practical purposes, as a second paragraph of the original answer—the defendant sets out the lease between the parties, in extenso, and alleges that, with the consent of the lessor, it had sublet the premises to Josselson Bros.; that Josselson Bros. had obtained the consent of the lessor to remain in possession of the demised premises until January, 1903, and that they had paid the rent to the lessor until it wrongfully broke the lease by depriving the sub-tenants of the use of the lavatory of the hotel, thereby partially evicting them and seriously injuring their business. In its counterclaim appellee claims damages in the sum of two hundred and fifty dollars, accruing to it by reason of the injury to its sub-tenants, and alleges that the latter are proper parties, and calls on them to come in and answer, which they did, setting up the same facts with regard to the sub-leasing of the premises to them, and their payment of the rent to the landlord, except for the months of October, November and December, and alleging the wrongful deprivation of the use of the lavatory and their consequent injury. A general demurrer was sustained to the pleading of the sub-tenants, and they, failing to amend, their petition was dismissed without prejudice to their right to bring another action for the same cause at another time; and of this judgment they are not complaining.

Afterwards, the appellant filed what it calls a substitute petition, which, as we understand it, in nowise changed the issues between it and appellee.

Upon the trial, after the evidence of the appellant was in, the trial court sustained a motion for a peremptory instruction to the jury to find for the appellee, which was done; and to test the correctness of this judgment the appellant has prosecuted this appeal.

The pleadings in this case are more than usually confused, but, after carefully considering them, we are convinced that this case was allowed to go off on a wholly immaterial issue. It seems to have been considered by the trial court that the appellant's cause of action rested upon the verbal agreement set out in the petition, by which it alleged that it permitted the Pabst Brewing Company to remain in the demised premises after August 1st, 1902, until January 1st, 1903. This

allegation was wholly immaterial. The lease speaks for itself. When the appellant purchased the property, as is not denied, it became entitled to all the rights of its vendor under the existing lease both by the assignment of the lease to it and also under the provisions of section 2304 of the Kentucky Statutes. Whether the lessee took advantage of the right to extend the lease for an additional year by giving the thirty days' notice in writing, is immaterial. As a matter of fact, it retained possession of the premises through its sub-tenants, Josselson Brothers, and until they surrendered the premises it was liable for the rent. The possession of the sub-tenants was the possession of appellee, and, as long as they remained in the premises, appellee was liable for the rent stipulated in the written contract. Of course, we do not mean that the sub-tenants, with the consent of appellant might not have surrendered possession at the end of the term and taken out a new lease for themselves; but this is not alleged to be true. The allegation, that the sub-tenants obtained the right to stay in the premises until January, 1903, does not constitute an allegation of a tenancy in their name. There is nothing inconsistent between this allegation and Josselson Brothers holding on as sub-tenants of appellee. The court and counsel for appellee seem to have been under the impression that it was necessary, in order that appellant could recover, that it should be able to establish the verbal contract alleged by it, that appellee might remain in the premises until January, 1903; and the court held that it failed to do this because it was not able to show that the agent with whom the verbal contract of extension was made, was authorized to bind his principal (the appellee) in the matter of the extension; wholly overlooking the fact that whether or not appellee obtained permission to remain in the leased premises after August, 1902, that, as a matter of fact, it did remain in possession of the premises thereafter, and the cause of action of appellant was based upon the actual occupancy of the premises, and not upon the verbal consent of appellant that this might be done.

Assuming that there was no verbal contract between appellant and appellee, by which the latter acquired the right to remain in possession of the leased premises from August 1st, 1902, to January 1st, 1903, under the statute (section 2295 of the Kentucky Statutes), if it remained in possession ninety days after the expiration of the term, it would have obtained the right to remain the whole year, holding under the contract, and so on from year to year, until the premises were abandoned, or it was turned out of possession, or made a new contract. And certainly it will not be questioned, that, if it did remain in possession, it was bound for the rent.

Not only is it not alleged that the sub-tenants rented the premises on their own account after August 1st, 1902, but the contract for appellee to remain in possession until January, 1903, is specifically pleaded by the appellee. After setting forth the written lease between Wagner and it, the appellee in its answer makes the following statement:

"But said leased premises had theretofore, with the consent of said Wagner, been sub-let to Frank and Alex Josselson to have and to use and enjoy in accordance with said lease, and thereafter and before the assignment claimed by the plaintiff from said Wagner, said thirty days' notice, provided by said agreement, being waived, this defendant being interested in having said Josselsons occupy same, said Wagner and Fine and Josselsons made an additional agreement, to-wit: That the said lease should be and was extended to and terminated January 1st, 1903, and that said Josselsons should have, hold and enjoy same as he then was using and having same and appurtenances for said time and to pay this defendant, and this defendant pay said Wagner therefor, the sum of \$75.00 per month."

For all practical purposes this allegation of defendant's answer is the very allegation made by the appellant in its petition and its substitute petition, and which the court non-suited the plaintiff because it could not prove; the only difference between the allegation in the answer and that in the petition being that in the petition the extension is said to have been granted by appellant, and in the answer it is said to have been granted by appellant's assignor.

Upon the whole case, we are of opinion that if the appellee has a defense at all, it is because of the alleged partial eviction of its subtenants by the wrongful acts of the landlord. We do not pass upon the merit of this defense—it not being necessary to do so; but assuming (without deciding) that the counter-claim contains a cause of action for a violation of the lease on the part of the landlord, these affirmative allegations were placed in issue by the reply, and the burden of proof was upon the appellee, and, in default of establishing the counter-claim, the appellant was entitled to a judgment for the rent it claimed—it not having been claimed that payment thereof had been made.

For these reasons, the judgment is reversed for proceedings consistent herewith.

SUMMERS FIBER CO. v. WALKER.

(Filed April 22, 1908—Not to be reported.)

1. Contracts—Action on—Breach or Rescission—Facts Authorizing—Remedy Sought—It is not every case of breach of contract or a failure to perform stipulated contract duties with reference to an article, that will authorize a rescission of the contract. Generally the parties must look to an action in damages for a remedy. Rescission may be invoked when no other remedy will afford adequate relief and the parties can not obtain reasonable satisfaction in damages.

2. Same—Sale of Hemp—Contract to Stack—Care Implied—Action for Breach—Proper Remedy—In an action by the purchaser for damages for a breach of contract for the sale of a lot of hemp at a stipulated price, which the seller agreed to haul and stack in good condition by a named date, alleging that it was negligently stacked and exposed to the weather and thereby injured in value, Held—That although the contract did not provide that the hemp should be taken care of, and stacked in a careful and prudent manner, the contract implied that the seller would care for it in the usual and customary manner, and the proper action of the purchaser was for a breach of the contract, and not for a rescission.

3. Same—Acceptance by Purchaser—Condition not Discernible—Right of Inspection—In this action the purchaser having paid a large part of the purchase price of the hemp and not being able to ascertain the exact damage done to it until the stacks were opened and the hemp examined had the right to accept it and bring an action to recover the damages sustained by the failure of the seller to put the hemp in proper condition, according to the contract.

4. Same—Damages Recoverable—Negligence of Purchaser—Consideration of Sale—In such case, however, if after the seller put the hemp in stacks, the purchaser permitted it to remain in stacks for an unreasonable length of time and it was damaged by his failure to remove it, he could not recover for such damage, neither could the purchaser show on the trial or recover damages for the use for which the hemp was intended, as such use formed no part of the consideration of the sale.

J. A. Sullivan for appellant.

J. Tevis Cobb for appellee.

Appeal from Madison Circuit Court.

Opinion of the court by Judge Carroll, affirming.

The Summers Fiber Company in 1903 and 1904 had established in Madison county a plant for the purpose of converting hemp, in its raw state, into fiber, to be used in making binding twine, and on December 21, 1903, it entered into the following contract with the appellee, Walker, a Madison county farmer:

"This agreement by and between James Walker, of the first part, and the Summers Fiber Company, of the second part, Witnesseth: The party of the first part has this day sold to the party of the second part 45 and 21-100 net acres of hemp at \$36 per acre.

"The party of the first part agrees to haul the hemp to the second party situated on the border of the Arbuckle farm, nearest the mill of the second party, and stack same in stacks, approved by the second party, where second party may designate, as soon as the hemp is in suitable condition for stacking.

"The first party hereto further agrees to haul the clean fiber manufactured from this hemp from the mill of the second party to the Silver Creek freight station of the L. & N. R. R. Co., free of expense to the second party. In consideration of the above, the second party agrees to pay to the first party on the second day of January, 1904, \$406 and 89-100 dollars (\$406.89), on the first day of March \$610 and 33-100 dollars, and on the first day of April \$610 and 33-100 dollars.

"It is further agreed by parties hereto that any damage to the hemp, resulting from the first party's neglecting to haul the hemp as soon as it is in suitable condition to stack, shall be deducted from the purchase price herein specified."

The hemp was not stacked by Walker until the last days of March, the stacking being completed by the 1st of April, 1904. Before the hemp was stacked, and while it was in the shock, and in January and February, 1904, the fiber company wrote several letters to Walker, calling his attention to the fact that the shocks had blown down and that the hemp was being damaged by the condition in which it was permitted to remain, and on March 26, 1904, it wrote the following letter:

"We wish to call your attention to the fact that your prolonged delay in stacking and caring for the hemp has caused a heavy depreciation in value. The shocks have been allowed to remain down and bad weather has weathered the hemp from this cause. Furthermore, you went over your field and tied the hemp in bundles, thus exposing the inside of the shock to the weather and left the hemp in this state until a large percentage of the hemp is badly weathered. We have frequently called your attention to this fact without effect.

"We wish to advise you that the final payment will not be made until you stack the hemp as per contract, and will hold you responsible for the loss occasioned by this negligence."

On April 24, 1904, Walker sent to the company the following reply to the above letter:

"Yours of the 26th last to hand and contents carefully noted, so would like to have you come there by May 1, 1904, and receive my hemp, settle with me, and the writer will turn it over to you."

On May 26, 1904, the company wrote Walker the following letter:

"Pursuant to your request, I called you on the telephone before leaving for the North, confirming conversation of to-day we beg to state.

"That we have made you two propositions, both of which you have refused. We offer to settle arbitrarily for \$300 of contract price. We further made you the proposition to let the hemp stand where it

is until we can run it through and gauge the damage by actual results. As an element of good faith, we agree to pay you \$200 on account, if this proposition was accepted.

"Having made you a proposition for arbitrary settlement and another by which we could gauge the damage, we think we have done all one could reasonably expect. This we consider especially true, as the fault lies with you. You have repeatedly admitted that the hemp was damaged and that the damage was due to yourself, or your agent's negligence.

"Our Mr. White will be pleased to see you at any time and receive from you a proposition, in case you should care to make one. We beg to again state to you that we would be pleased to have this matter settled and are ready to settle at any time the damage can be reasonably appraised. We can not accept an arbitrary figure unless it is sufficient to protect us."

Walker declined to accept the propositions of settlement contained in this letter, but offered to deduct \$100 from the purchase price, which the company refused to accept.

It is convenient here to state that the hemp was stacked on premises owned by or in the control of Walker, and that the company had paid to him the installments on the purchase price payable in January and in March, leaving due the payment of \$610.33 that was payable on April 1.

After the correspondence above mentioned between the parties, no further action was taken by either until August, 1904, when the company filed its petition in equity, in which it charged that Walker failed to put the hemp in suitable condition for stacking, and failed to bundle the hemp and haul the same as soon as it was in suitable condition, or to properly stack it. That after the contract was made, many of the shocks blew down, others were partially disarranged, and Walker left it in this condition, exposed to the weather until much of it became badly weather-worn and rotten, and when re-shocked it was so negligently done as to leave the hemp in bad condition—the result of his careless handling and failure to give it proper attention being that the hemp was unsuitable for the purpose for which it was bought. It further charged that Walker had refused to deliver any of the hemp until the last payment was made, and it refused to make said payment or receive the hemp because of its condition. It further set out that the extent to which the hemp was injured and reduced in value was uncertain and impossible of accurate ascertainment until after the fiber could be extracted and manufactured. It asked that the contract be rescinded, and for a judgment against Walker for the recovery of the payments made to him.

The lower court sustained a general demurrer to this petition upon the ground that it did not present a state of case authorizing a rescission of the contract. Thereupon the company filed an amended petition, setting out the contract and the alleged breaches thereof by Walker, and that the salable value of the hemp had been damaged \$1,000, for which sum it asked judgment. When this pleading was filed, the action was transferred to the ordinary docket, and the pleadings completed—Walker making his answer a counterclaim against the company, and seeking to recover from it the \$610.33 due on April 1, no part of which had been paid. Upon a trial before a jury, the company was allowed \$300 in damages—Walker recovering on his counterclaim, except to this extent.

We are asked to reverse the judgment on this verdict, first, because of the assigned error of the lower court in sustaining a general demurrer to the petition, seeking a rescission of the contract; second, in misinstructing the jury; third, in striking from the petition the allegations as to the purpose for which the hemp was purchased and

Walker's knowledge thereof, and in refusing to admit evidence upon this point.

At the very outset, it may be remarked that although the contract did not provide that the hemp should be shocked, taken care of and stacked in a careful and prudent manner, yet it was nevertheless the duty of Walker to have done this. The contract implied that he would care for the hemp in the usual and customary manner. This was evidently contemplated by the parties and may be considered as much a part of the contract as if expressly stipulated in it. It may also be conceded that the hemp was not given proper attention in the field and that it was defectively stacked, and further that a considerable portion of it was damaged by the failure of Walker to use due care in these particulars. When the suit was brought the hemp was in the possession of Walker. He refused to deliver or surrender it until the last payment was made. This payment was long over-due when the action was instituted, as the company would not accept the hemp except on the terms mentioned in its letter of May 26. Looking at the case from this standpoint, which states in substance the averments of the petition, the first question is, did the lower court err in sustaining a demurrer to the petition, which was in effect ruling that the company was not entitled to a rescission of the contract. It is manifest from the letter, written by the company on May 26, that it did not regard the hemp worthless or consider that Walker, by his failure to give it proper attention, had wholly destroyed its value. Nor is this claim made in the petition. The company in the petition which stated the case in its behalf as strong as the facts warranted, did not show itself entitled to a rescission of the contract. The respective rights and remedies of the buyer and seller of commodities of this character under facts like these can be ascertained and fixed with reasonable certainty in an action at law for damages. It is not every case of a breach of contract or a failure to perform stipulated contract duties with reference to an article that will authorize a rescission of the contract. Generally, the parties must look to an action in damages for a remedy. Rescission goes to the very root of the contract. It proceeds upon the theory that the contract should be entirely set aside and the parties restored to the position they occupied before the contract was made. It is more frequently resorted to in matters involving real estate, although the doctrine may be invoked in controversies concerning personal property when no other remedy will afford adequate relief and the parties can not obtain reasonable satisfaction in damages.

In American & English Encyclopaedia of Law, volume 24, page 611, it is well said: "In order for the court to grant relief by way of rescission, the case presented must embrace facts bringing it within some recognized head of equity jurisdiction, such as fraud, accident, mistake, duress, undue influence, or the like, or at least, it must be shown that the complainant if denied equitable relief will sustain an injury for the redress of which a court of common law can afford no adequate remedy."

Here, it is not insisted that the contract is tainted by fraud, accident, mistake, duress or undue influence; nor is it claimed that there was a total failure of consideration; or that Walker was insolvent, or that any damages awarded could not be recovered. In short, the petition failed to state any ground of equitable jurisdiction authorizing a rescission of the contract.

It is argued that as the hemp was in the possession of Walker, and he refused to deliver it until the last payment was made, that if the company made the last payment and accepted the hemp, knowing its condition, it would waive its right to recover from him damages for his breach of the stipulations of the contract by which he was obligated to take proper care of the hemp. That Walker would have received

for his hemp the full purchase price and the company be left without redress on account of the damages sustained by his breach. This is not our understanding of the law of the case. The company had paid a part of the purchase price, and refused to pay the remainder. Walker had possession of the property, and declined to surrender it until the entire purchase price was paid. Under this state of case, what were the rights and remedies of the respective parties? It is said in *Munford v. Kevil*, 109 Ky., 246, which was a case in many respects like this, that "The rule in this State is that where there is a contract to deliver goods or chattels of a particular description or quality, at a future day, and the vendor tenders goods not of the agreed description or quality in discharge of the contract, and the vendee, after inspecting them or having had a fair opportunity to do so, receives them in discharge of the contract, he can not thereafter maintain an action against the vendee to recover damages for the defects in the description or quality. The stipulation that goods of a certain description or quality are to be delivered is made the essential part of the contract which must be complied with by the vendor as a condition preceding the obligation of the vendee to receive the goods and pay for them. And if the goods are not of the description or quality described, the vendee has the right to reject them and hold the vendor responsible in damages. But if he inspects the goods, or after having had a fair opportunity to do so, receives them in discharge of the contract, although they are not of the description and quality sold, he waives their defects by their acceptance and is not entitled to recover damages." (*Jones v. McEwan*, 91 Ky., 376.)

But this general rule is subject to exceptions, one of which is illustrated by the *Munford* case. It is more particularly applicable when no part of the purchase money has been paid, and when the purchaser is in a position that he can refuse to accept the articles without sustaining any loss except such as might grow out of the difference between their market price and the price he agreed to pay; and if in this class of cases the purchaser, with full knowledge of the defects in the article accepts it in discharge of the contract, he will be held to have waived his right to recover damages. But, under the facts of this case, if the company could not accept the hemp, and after a thorough inspection, recover the damages they suffered by the failure of Walker to care for it as provided in the contract, the company would be, in a measure, remediless, or at least, denied the right to recover compensation for the loss sustained. The hemp being in the possession of Walker, who refused to deliver it until the full purchase price was paid, it would be a most unreasonable rule to lay down that the company could not receive the hemp without waiving its right to recover damages. The result of such a rule would be that if Walker failed or refused to take any action, it must see the hemp for which it had paid two-thirds of the purchase price rot in the field and become totally worthless, thereby possibly causing it to lose the money it had advanced, or else by accepting the hemp, waive the right to the damages it ought to recover.

Our view of the law applicable to this case is, that on the one hand, Walker might, at any time after the hemp was stacked, have brought a suit against the company to recover the balance of the purchase price. On the other hand, the company, having paid a large part of the purchase price, and not being able to ascertain the exact damage done to the hemp until the stacks were opened and the hemp examined, had the right to accept it and bring an action against Walker to recover the damages sustained by his failure to put the hemp in proper condition, according to the contract; or it might have applied to the court to appoint a receiver to take charge of the hemp, if it was in danger of being lost or materially injured, for the purpose of preserving it, until the rights of the respective parties could be

adjudged. We think this remedy is allowable under section 298, of the Civil Code, as the purchaser who has paid a part of the purchase price has a lien as between the parties upon the property purchased.

A number of witnesses were introduced, and there was conflict in the testimony, as to the condition of the hemp, and the extent of the damage done it; and the court instructed the jury that: "If they believed from the evidence that the defendant, Walker, after selling his hemp to the plaintiff, failed to use such diligence in caring for same as the jury might believe from the evidence was reasonably necessary, in order to preserve the hemp, and bring it to a reasonably suitable condition for stacking, or fail to haul and stack same as soon as it was in a suitable condition to stack, or that he failed to stack said hemp in such manner that met the approval of plaintiff; and if the jury further believe from the evidence that by reason of defendant's failure to so care for said hemp or to so haul same, or to so stack same, said hemp was damaged and rendered less valuable, the jury should allow the plaintiff such a sum in damages as they may believe from the evidence will fairly and reasonably represent the depreciation, if any, in the value of the hemp, due to the defendant's failure, if any, to use such diligence as is above defined to preserve said hemp and bring it to a reasonably suitable condition for stacking, or to defendant's failure, if any, to so haul same, or to his failure, if any, to stack said hemp in the manner that met the approval of plaintiff, not exceeding \$1,000, the amount claimed by plaintiff on that account. But, if the jury believe from the evidence that the plaintiff kept said hemp in the stack for an unreasonable length of time after it was delivered to plaintiff, the jury should not allow the plaintiff any damages which they might believe from the evidence occurred to said hemp, if any, by its being kept in the stack for an unreasonable length of time."

This instruction is criticised by counsel for appellant because it virtually fixed the date when the hemp was put in stacks as the time when the damage should be estimated and directed the jury that if the company permitted the hemp, to remain in the stacks for an unreasonable length of time, they should not allow any damages accrued after it was stacked. Walker's obligation was to put the hemp in stacks, and if after that time the company permitted it to remain in the stacks and it was damaged by the failure to remove it, it could not recover from Walker this damage. Walker could not control the action of the company after he stacked the hemp. If it was stacked properly his duty in this particular was completed. If it was not properly stacked, the company had a right to look for redress to the remedies heretofore pointed out. Walker should not be held responsible for anything that happened to the hemp after it was stacked, due to the failure of the company to remove it within a reasonable time.

Nor did the court err in striking from the petition, or in failing to permit the appellant company to show the use for which the hemp was intended, or that this was known to Walker. Walker was bound by the contract to take reasonable and proper care of the hemp, and this was the full measure of his duty. The use for which it was intended was entirely immaterial. It did not affect the question of damages, because the measure of damages was, as stated by the court, the depreciation in the value of the hemp sustained by reason of the failure of Walker to use reasonable care in attending to and stacking it.

The point is made that the company under the verdict and judgment is required to pay the whole costs, when it should have had a judgment for its costs on so much of the issue as related to the question of damages, as it recovered \$300 in damages, and there was no dispute about the fact that the last payment for the hemp was due and unpaid. Upon this issue the court instructed the jury in substance that if

they allowed the company damages, they should take the difference between the damage allowed and the \$610.33 admitted to be due by it; and if the amount of damage awarded was less than \$610.33, they should find for Walker the difference, and if it was over \$610.33, they should deduct the \$610.33, and give the company a judgment for the remainder. This instruction was proper, and under it a verdict in favor of either of the parties would carry the costs of the entire action. In short, there were two actions, in one of them the company sought to recover a judgment for \$1,000 damages, and in the other Walker sought to recover judgment for \$610.33 against the company. These two actions were heard and tried together, as they should have been under the pleadings and the provisions of the Code, and the costs, as in other cases, followed the judgment. (Moore v. Caruthers, 17 B. Mon., 669.)

Wherefore, the judgment of the lower court is affirmed.

JAILETTE, &c. v. BELL, &c.

(Filed April 22, 1908—Not to be reported.)

Land—Devise to Daughter—Contingent Remainder to Children—Sale of Property Interest of Children—Testator, by his will, devised a certain fund to his daughter, Lucy, "to be invested, upon her marriage, in a home for her, and upon her death to pass to her issue, if she should leave issue living, at her death." She subsequently married and had three children. A part of said fund was invested in a home by her trustee which it became necessary to sell. Held—That no present interest passed to her children under the will, their interest being a contingent remainder therein, and the purchaser at the sale acquired a valid title to the property.

W. A. Perry, A. J. Bizot and Edward Bloomfield for appellants.

Gregory & McHenry for appellees.

Appeal from Jefferson Circuit Court, Chancery Branch, First Division.

Opinion of the court by Wm. Rogers Clay, Commissioner, affirming.

George W. Hall died in Fayette county in the year 1877, leaving a will, the third clause of which is as follows:

"I hereby give to my unmarried daughter, Lucy W. Hall, for her sole and separate use, free from the marital rights and control of any husband she may have, the like amount of five thousand dollars in money and five hundred dollars in furniture. While unmarried the said money is to be loaned or otherwise invested for her use, and upon her marriage is to be invested in a home for her if she should desire such investment. But, however invested, it may be sold by executors or the survivor and reinvested from time to time as the said Lucy may prefer. The fund, however invested, is upon her death to pass to her issue, if she should leave issue living at her death. Should the annual income from said five thousand dollars be insufficient for the comfortable maintenance of said Lucy while unmarried, then in such case the deficiency while she is unmarried is to be made up out of the residue of my estate. On her marriage this charge on the residue of my estate is to cease. The furniture given to said Lucy, as above, is to consist of the furniture heretofore given to her by me, and of a wardrobe in addition corresponding in style with the furniture heretofore given to her by me as above."

By the fifth clause the testator's wife, Elizabeth S. Hall, and E. D. Sayre are appointed executrix and executor, and also trustees of his daughter Lucy.

A part of the money devised to Lucy W. Hall was used in purchasing a home for her on Haldeman avenue, in the city of Louisville. The property was conveyed by James E. Bell and wife to Elizabeth S. Hall as trustee for her daughter, Lucy Van Dalsem. The purchase price of the property was \$1,300, of which \$600 was paid in cash and lien notes executed for the balance. The deferred payments on the property not having been made, the vendor instituted suit against Lucy Van Dalsem and her mother, as executrix of the will, and as her trustee. The property was sold, and purchased by appellee, James E. Bell.

At the time of the institution of the action Lucy Van Dalsem had three children, the plaintiffs below, Roberta Jaillette (formerly Roberta Van Dalsem), Bessie Van Dalsem and William Van Dalsem, who subsequently conveyed his interest in the property aforesaid to appellants, Perry and Bloomfield. After the property had been bought in by appellee, James E. Bell, he subsequently conveyed it to his co-defendant, Carrie Gough, who thereafter mortgaged the property to Bell.

In this action it is contended that, as the children of Lucy Van Dalsem were not made parties to the above suit, in which a lien for the deferred purchase money was enforced, the only estate which appellee, James E. Bell, procured by the judgment in that action was the life estate of Lucy Van Dalsem; that she being dead, appellants are now entitled to the property. The chancellor entered judgment against the contention of appellants, and from that judgment this appeal is prosecuted.

The first question to be determined is, what kind of estate in remainder was created by the will of George W. Hall? The distinction between a vested and contingent remainder, is that in the former the interest must vest immediately, but the right to the enjoyment of the property is made to depend on some future event. In the latter, the interest does not vest immediately, but is made to depend on some uncertain future event. In this case the vesting of the estate depended upon Lucy Van Dalsem's having issue and upon the issue surviving her. No present interest passed to her children under the will. Unless they survive their mother, they took no estate whatever in the property in question. There can be no doubt that the remainder thus created was a contingent one. (*Augustus, &c. v. Seabolt, &c.*, 3 Met., 162; *White's Trustee v. White, &c.*, 86 Ky., 602; *Whallen, &c. v. Kellner, &c.*, 31 Ky. Law Rep., 1285.)

The next question to be determined is, whether or not the children of Lucy Van Dalsem were necessary parties in the action to enforce the lien. In the recent case of *Whallen, &c. v. Kellner, &c.*, supra, the rule applicable to such cases, is thus stated: "It is sufficient in such cases if there is before the court the life-tenants, or those having vested interests, whose duty and interest it would be to defend the action if necessary to protect the estate, their interests and the remaindermen's being identical. Such contingent interests must in such state of case be represented by the life-tenant, or tenant of the estate in possession, who is deemed the representative in estate of those contingently entitled, whether born or not, as otherwise it would be impossible to ever bring them all before the court during the existence of the life estates. So long as the life-tenant lived, it could not be ascertained with any legal certainty, who would be the one entitled to take at the period of distribution." (*Hermann v. Parsons, &c.*, 117 Ky., 239.)

But counsel for appellant contend that the above rule of law does not apply in this case for the reason that the vendor of the property,

James E. Bell, was not a stranger to the instrument by which the contingent limitations upon the title to the property were created, according to the principle laid down in *Johnson, &c. v. Jacob, &c.*, 11 Bush, 646. It will be observed, however, that the deed from appellee Bell to Lucy Van Dalsem simply conveyed the property upon the trust and conditions prescribed in the will of George W. Hall. The deed did not purport to establish the conditions or limitations of the trust, but merely conveyed the property upon the same trust created by the will. Appellee Bell was not a party to those conditions; he had neither the power nor right to prescribe or alter any of the limitations. It would have been a breach of trust on the part of the trustee to have invested any portion of the \$5,000 devised to Lucy Van Dalsem except upon the terms and conditions prescribed in the will. Appellee Bell could not have sold the property in question without having conveyed it subject to those limitations. The deed did not create the trust and contingent remainder; it simply conveyed the property subject to the trust and imitations already imposed by the will. This rule was recognized by this court in the case of *Lewis, &c. v. Citizens National Bank*, 95 Ky., 79. In that case the trust fund had been invested under the deed upon other conditions than those prescribed in the will creating the trust, and the court said: "The character of the holding by the trustee, therefore, and the ultimate disposition of the interest of Georgette at her death, are matters to be controlled by the will of Garnett Duncan. The chancellor seems to have regarded this deed of November, 1878, as alone creating this trust, and from this premise correctly construed the holding to be in fee. But this instrument, though it declared, did not create any trust. The will of Garnett Duncan alone did that." Thus it will be seen that appellee Bell was an absolute stranger to this trust, and had no voice whatever in prescribing its terms. As the holder of the vendor's lien upon the property to secure the unpaid purchase money, he, therefore, clearly had an "outstanding paramount title," which, under the express language of *Johnson, &c. v. Jacob, &c.*, and *Hermann v. Parsons, &c.*, supra, he was entitled to enforce without bringing before the court the contingent remaindermen. It would manifestly be unjust to hold that he, in order to get all the purchase money to which he was entitled, would have to postpone his action until the termination of the life estate, to determine what remaindermen to bring before the court, for, prior to that time, this could not be determined. If he had made the children of Lucy Van Dalsem parties to the action, they might not, as a matter of fact, have been the parties entitled to any interest in the estate upon the death of their mother; they might have died and the remainder interest have vested in other parties. As the trust and contingent remainder were created alone by the will of George W. Hall, and the deed executed by appellee Bell simply conformed to the trust already created, and as the life tenant and her trustee were properly before the court, and it was then impossible to determine who the contingent remaindermen would be, we are of opinion that all the necessary parties were before the court in the action in question, and that the judgment was sufficient to pass to the purchaser all the title to the property involved in this action.

Judgment affirmed.

CROOKE v. HUME'S EX'TX, &c.,
NATIONAL BANK OF CYNTHIANA v. HUME'S EX'TX, &c.

(Filed April 22, 1908—Not to be reported.)

1. Fraudulent Conveyances—Conveyance or Devise by Parent to Child—Void as to Existing Creditors—A father can not by his will give to his child property to the detriment of his creditors, and such gifts or conveyances, where they are in the shape of real estate, will be set aside at the suit of existing creditors as fraudulent.

2. Same—Rule as to Subsequent Creditors—Intent Must be Shown—While all voluntary conveyances are, under the statute, void as to existing liabilities, a different rule obtains as to subsequent creditors, and in order that such conveyance may be successfully assailed by a subsequent creditor it must be shown that it was made with a fraudulent intent.

3. Creditor and Debtor—Return of "No Property"—Necessity Therefor—Under Kentucky Statutes section 1907a, enacted in 1896, the old rule of practice was abrogated and an entirely new rule substituted therefor, so that now a creditor upon learning that his debtor is disposing of his property and conveying away his real estate with making provision for the payment of his debt, he may go into a court of equity and subject the property so conveyed without first having reduced his claim to a judgment and had return of "no property found," thereon.

Hazelrigg, Chenault & Hazelrigg and Wm. McKee Duncan for appellant, National Bank, of Cynthiana.

C. H. Breck and W. S. Prior for appellant, Crooke.

A. R. Burnam & Son, C. J. Wimberly and L. B. Herrington for appellees, W. S. Hume's Ex'tx, &c.

Appeals from Madison Court.

Opinion of the court by Judge Lassing, reversing.

These appeals involve a common question and are, therefore, considered together.

In the Spring of 1906, Virginia Crooke filed a petition in equity in the Madison Circuit Court against the Executrix, heirs-at-law, &c., of W. S. Hume, wherein she alleged, in substance, that W. S. Hume, a resident of Madison county, Kentucky, died in August, 1885, the owner of a large landed and personal estate. That he left a will by the terms of which he directed his wife, whom he named as Executrix, to keep his estate intact until his youngest child, a daughter, became 18 years of age, when the estate should be settled up and divided among his children and heirs-at-law. At the time of his death, W. S. Hume was operating a distillery on Silver Creek, known as W. S. Hume & Company, and was the owner of practically all of its capital stock. The stock of this distilling company constituted the bulk of his personal estate. Under his will, he directed that his executrix continue to operate the distillery until the period for distribution should arrive. That in accordance with the express provisions of the will, the executrix did so operate the distillery, and, as authorized by the will of her deceased husband, she borrowed a sum of money from one, Patty M. Hume, to be used in operating the distillery. That the note evidencing this loan was renewed from time to time, until, on the 20th day of February, 1902, with accrued interest, it amounted to \$5,237.86. That on said date W. S. Hume & Company, together with E. B. Hume, S. B. Hume and E. M. Hume, the Executrix, executed to said Pattie M. Hume a renewal note for the amount of the debt then due. Said note was

drawn due twelve months from date with interest from date until paid, and was subsequently assigned by Patty M. Hume, for value received, to plaintiff, Virginia Crooke, and that plaintiff was the owner and holder thereof. That in the year 1898, the youngest daughter of W. S. Hume, having arrived at the age of eighteen, the executrix, in accordance with the provisions of the will, sold the distillery and the real estate left by her husband, and thereafter disposed of all of the whisky on hand; receiving from the joint sales of real and personal property of her husband approximately \$300,000. That, of the money so realized out of the sale of the real and personal estate of her husband, she invested something like \$12,000 in a house and lot in Richmond, Kentucky, taking the deed thereto in her own name, and invested the further sum of \$25,787.56 in a farm of 391 acres in Madison county, Kentucky, taking the deed thereto in the name of one of her daughters, Mary Chenault. The house and lot and the farm are described and set out in the petition by metes and bounds.

The petition further alleges that the executrix had distributed the estate of her deceased husband among his children and heirs-at-law and made the investments in favor of herself and her daughter, as above indicated, and settled the firm of W. S. Hume & Company, leaving the debt of plaintiff wholly unpaid. She prayed for the settlement of the affairs of W. S. Hume & Company and of the estate of W. S. Hume, and for the payment of her debt, interest and cost, and for all proper and necessary relief. A demurrer was sustained to this petition and thereafter the plaintiff filed an amended petition in which the allegations of the original petition were set out with more particularity, and it was further pleaded that the executrix had made an assignment for the benefit of her creditors to her son-in-law, Harvey Chenault, husband of the defendant, Mary Chenault, to whom the farm of 391 acres had been conveyed, and that Harvey Chenault, as assignee, had sold the Richmond property to Mrs. Annie Collins for about \$8,600.00, and that the purchaser had executed her bonds therefor, and that this purchase money represented a part of the assets of W. S. Hume & Company, or of the estate of W. S. Hume.

In this amended petition she prayed judgment against W. S. Hume & Company, E. B. Hume and E. M. Hume for her debt, and asked that she be adjudged a lien for the amount of her judgment and debt upon the 391 acres of land described in the original petition, and upon the proceeds arising from the sale of the house and lot in Richmond, which was fully described in the original petition. Copies of the will of W. S. Hume and of the deed to Mary Chenault were filed with these pleadings. Demurrers were filed on behalf of the several defendants to the petition as amended, and, upon hearing, these demurrers were sustained with leave to amend. The defendants, E. B. Hume and E. M. Hume, filed their answers pleading their discharge in bankruptcy, and asked to be dismissed. The defendant, Patty M. Hume, pleaded that the note was assigned by her to plaintiff without personal recourse, and she asked to be dismissed.

Thereafter the plaintiff appeared in court and asked leave to withdraw the amended petition filed by her and file a new amended petition in lieu thereof. To this motion the defendants objected, the court overruled the objection, the amended petition was withdrawn and a new amended petition was filed in lieu thereof. In this amended petition she sets out fully the incorporation of the company of W. S. Hume & Company, the sale of its corporate business and property, the investment of the sums of money made by it in the house and lot and farm, as fully set out in the original petition, and, pleaded that, with a full knowledge on the part of the officers of the company of the existence of her debt, they wrongfully and illegally misapplied and paid out all of the assets of the company and left nothing with which

to satisfy her debt, and refused to pay same or any part thereof. She prayed as in the original and amended petition. The demurrer was renewed by the defendants and sustained. Plaintiff was given judgment against the firm of W. S. Hume & Company for the full amount of her debt with interest and cost. This was at the October term, 1906, and on the 9th day of January following execution was issued thereon and on the 10th day of January was returned "no property found." Thereafter the plaintiff filed another amended petition wherein she set up the recovery of the judgment against W. S. Hume & Company, the issual of the execution thereon, and the return of "no property found." She further, in this amendment, pleaded the purchase out of the funds of W. S. Hume & Company of the property described in the original petition, and prayed that it be subjected to the payment of her debt. To the petition, as thus amended, a demurrer was filed and sustained, in so far as plaintiff sought to have subjected to the satisfaction of her debt the farm or the proceeds arising from the sale of the house and lot in Richmond. The amended petition, which set up the recovery of the judgment, the execution thereon and the return of "no property found" was, on motion of the defendants, Mary Chenault, &c., stricken from the file and the petition was, as to all the defendants, except the firm of W. S. Hume & Company, dismissed.

Shortly after the institution of the suit, as above set out, by the plaintiff, Virginia Crooke, the National Bank of Cynthiana; filed its petition to be made a party, in which, after alleging its incorporation with capacity to sue, &c., it adopted the allegations of the petition of the plaintiff, Virginia Crooke, as amended, and alleged further that on the 27th day of May, 1905, the defendant, W. S. Hume & Company, executed and delivered to E. H. Taylor, Jr. & Sons, their promissory note, whereby they promised and agreed to pay to the said E. H. Taylor, Jr. & Sons, four months after date, at the Richmond National Bank, in Richmond, Kentucky, the sum of \$2,983.62, for value received and that prior to the maturity of said note it was sold, discounted and transferred by E. H. Taylor, Jr. & Sons to the National Bank, of Cynthiana and that it was then the owner and holder thereof. It asked that its petition be taken as its answer and made a cross-petition against the defendants to said suit. Demurrers were filed to this petition to be made a party by the several defendants. These demurrers were sustained with leave to amend. The said National Bank, of Cynthiana, thereupon filed an amended pleading wherein it alleged that the firm of W. S. Hume & Company was insolvent, and that certain of its creditors were seeking to have it adjudged a bankrupt, and, that the assets remaining in its hands were not more than sufficient to pay the costs of the litigation in the bankrupt court. A demurrer was sustained to this pleading with leave to amend. The petitioner declining to plead further, the petition was dismissed.

The correctness of the ruling of the trial judge in dismissing the petition of the plaintiff, Virginia Crooke, and the petition of the National Bank, of Cynthiana, to be made a party, are the only questions to be determined upon this appeal.

The petition in this case, while somewhat involved and awkwardly drawn, presents the following state of facts. W. S. Hume died in 1885, leaving a will, by the terms of which he directed his wife to take charge of his property, manage his firm and operate his distillery until his youngest daughter arrived at the age of eighteen, when he directed his estate to be distributed among his wife and children. In order that she might properly and successfully operate and conduct the distilling business he gave her ample power to pledge his estate in her hands, as though it was willed to her in fee, should it become necessary. She did so manage the business and operate the distillery, and, in the conduct of the distilling business,

borrowed a sum of money from Patty M. Hume in the name of the firm and the note evidencing this indebtedness was renewed from time to time, the last time it was renewed being on the 20th of February, 1902, when it amounted to \$5,237.86. That this note was for a valuable consideration assigned to the plaintiff, who was, at the date of the institution of this suit, the owner and holder thereof. That the assets of the firm of W. S. Hume & Company had been illegally, improperly and wrongfully appropriated by the executrix and one of the devisees, and that the assets so improperly appropriated had been invested in the house and lot and a farm, both of which are described with such particularity as that they could be readily identified. Under this state of facts she asks that this property be subjected to the payment of her debt. The pleading does not give the date upon which the loan was originally made, but, inasmuch as it alleges that the money was used in the conduct of the distilling business, and the note was renewed from time to time as it fell due prior to February 20th, 1902, this is in substance an allegation that this money was borrowed before the date of the sale of the distilling business in 1898 or 1899.

The deed to the 391 acres of land which it is sought to have subjected to the satisfaction of this debt shows that this land was purchased for the defendant, Mary Chenault, in April, 1901, or some years after the money in question was borrowed from Patty M. Hume.

The pleadings do not show when the house and lot in Richmond was purchased, but it is stated by counsel in brief, and not contradicted, that this transaction took place about 1889, or at least, many years before the institution of this suit.

Under the rule that pleadings be construed most strongly against the pleader, in the absence of any allegation in the petition or its several amendments which could be taken as even inferentially declaring that the Patty Hume debt was created prior to the purchase of the house and lot, it must be presumed that it was created subsequent thereto. The debt of the National Bank of Cynthiana was created in 1905, or something like four years after the purchase for Mary Chenault of the farm in question and many years after the purchase of the house and lot by the executrix and many years after all of the other transactions complained of therein.

By the terms of the will of W. S. Hume, his wife, as executrix, was to conduct the affairs of his business until his youngest daughter arrived at the age of eighteen. The pleadings show that she arrived at this age in the fall of 1898, or the spring of 1899, at which time, in accordance with the provisions of the will, the executrix proceeded to sell the property and distribute the estate. After this time the executrix had no further right, power or authority, under his will, to continue to operate the distilling business and it was her plain duty, as executrix and trustee of the estate, to make distribution thereof according to the terms of the will. No trust was created by the will for the purpose of operating the business of W. S. Hume & Company. The most that can be claimed for appellant in regard thereto is that the executrix, by the terms of the will, was authorized to pledge the estate of her husband to enable her to secure funds to properly conduct the business during the years when she was authorized to so conduct it. In other words, it was the desire of the decedent, W. S. Hume, that his wife should conduct the distilling business and manage his property, as he himself had done, until his youngest child arrived at eighteen years of age, at which time he wanted his estate settled up and divided among his children.

For appellants it is insisted that the purchase of the house and lot in Richmond, and of the farm in Madison county, by the executrix with the funds of W. S. Hume & Company was in direct violation of

the provisions of section 1907, of the Kentucky Statutes, which provides that: "Every gift, conveyance, assignment, transfer, or charge made by a debtor, of or upon any of his estate, without valuable consideration therefor, shall be void as to all his then existing liabilities." * * *

And, that the said executrix, or W. S. Hume & Company, had no more right or authority, in law, to make these voluntary conveyances or settlements than W. S. Hume himself, if living, would have had. The correctness of this contention, as to debts created prior to the date of the voluntary conveyance, is too well settled to admit of argument, for in the cases of *Trimble v. Ratliff*, 9 Ben. Monroe, 511; *Enders v. Williams*, 1 Met., 346; *Duhme v. Young*, 3 Bush, 343; *Loury v. Fisher*, 2 Bush, 70, and *Rucker v. Abell*, 8 Ben Monroe, 566, this court has expressly held that a father could not give to his child or children property to the detriment of his creditors, and such gifts or conveyances, where they are in the shape of real estate, will be set aside at the suit of existing creditors as fraudulent. It is true that there are instances in which this court has upheld a reasonable settlement by a husband or father upon his wife or child (*Stokes v. Coffey*, 8 Bush, 533, and *Thompson v. Cundiff*, 14 Bush, 566), but in these and kindred cases it was expressly held that, where the settlement or advancement was not reasonable, taking into consideration the financial condition and circumstances of the donor, the conveyance would not be upheld.

In the case at bar, for the purposes of the demurrer it is admitted that, since the purchase of the house and lot and the farm in question, there remains nothing whatever with which to satisfy the debts of the plaintiff and petitioner herein, hence, under the present condition of the pleadings in this case, a consideration of that class of cases which would permit a settlement of a reasonable sum upon the widow or child, without violating the provisions of the statute, will not be entered into.

The purchase of the house and lot having been made prior to the creation of the debt, of which plaintiff's note is a renewal, plaintiff is not in a condition to complain of the ruling of the trial judge, in so far as this conveyance is concerned, but not so as to the farm; her debt was created before the purchase of the farm, and, at the date of its purchase, was an existing liability against the firm of W. S. Hume & Company, and was a debt which, under the express provision of the will of W. S. Hume, his wife, as executrix, was authorized to create, and this being true, the purchase of the farm and voluntary conveyance thereof to the appellee, Mary Chenault, taking the allegations of the petition as true, was a constructive fraud and void as to this liability. While all such conveyances are, under the statutory provision, declared to be void, as to existing liabilities, a different rule obtains as to subsequent creditors, and in order that a voluntary conveyance may be successfully assailed by a subsequent creditor it must be shown that it was made with a fraudulent intent. The mere fact that it was voluntary being held insufficient to authorize a court to set it aside. (*Place v. Rhem*, 7 Bush, 585; *Enders v. Williams*, 1 Met., 346; *Hanson v. Buckner*, 4 Dana, 251, and *O'Kane v. Vinnedge*, 21 Ky. Law Rep., 1551.) In the case at bar, while the petition of the National Bank of Cynthiana charges that the executrix is wrongfully in the possession of the Richmond house and lot, and the appellee, Mary Chenault, is wrongfully in the possession of the farm, and that each of said properties in fact constitutes a part of the estate of W. S. Hume, still the petition fails to allege, for the reason, we presume, that it is not true, that these conveyances were made with a fraudulent intent to defeat its claim, and the same may be said of the other sales and transactions, the validity of which are attacked by this petitioner, hence the trial judge correctly held that

the said bank failed in its petition to state grounds which authorized a subjection of the said house and lot, farm or other property to the payment of its debts. It was manifestly upon this ground that the trial judge held the petition of the bank to be insufficient. The record does not show the ground upon which he held the petition as amended to state no cause of action. Two possible grounds are suggested. First, that plaintiff's claim bears a later date than that of either of the conveyances sought to be set aside, but it is alleged that the note evidencing this debt is a renewal of an older debt, and in the case of *Loury v. Fisher*, 2 Bush, 70, it was expressly held that a creditor was not deprived of his right to attack a fraudulent conveyance by reason of the fact that the note evidencing his debt had been renewed after the date of the conveyance which he sought to avoid, hence the plaintiff, being substituted to all of the rights which Patty M. Hume would have had if suing in her own proper person, this ground must fail, and, though the note bears a date later than that of the conveyance, still, under the allegations of the petition, it must be held to be a debt antecedent, at least, to the conveyance of the farm in question. The other, and apparently the real, ground upon which the trial judge held the petition to be insufficient, is one of practice.

From the briefs in the case we conclude that appellees, and the court, as well, were of opinion that, in order for plaintiff to maintain her suit at all it was necessary for her first to have reduced her debt against W. S. Hume & Company to a judgment and have a return of "no property found" thereon. That this was the ground upon which the court held the petition insufficient is further evidenced by the fact that during the progress of the trial plaintiff took a personal judgment in this suit against W. S. Hume & Company, had an execution issued thereon and returned "no property found," and thereafter filed an amended petition setting up these facts and prayed as in her original petition. Of course, if plaintiff's right to subject this property had to be based upon a return of "nulla bona," then clearly the learned judge correctly held that she stated no cause of action, for she could not, by a subsequent act, acquire a right which did not then exist and in this way cure a pleading which was fatally and wholly defective at the time she instituted her suit, as each amendment must relate to and speak as of the time of the filing of the original suit. Formerly it was held that in order for one to successfully attack and set aside a conveyance as fraudulent he must first reduce his claim to a judgment and have a return of "no property found" thereon. This return, in fact constituted the basis or foundation of the suit in equity seeking to set aside the conveyance. This procedure was necessarily tedious and frequently worked great, if not irreparable, hardships upon creditors, and to remedy this fault and give to a creditor a more speedy trial and expeditious remedy the Legislature, in 1896, enacted section 1907a, which is as follows: "That hereafter in this Commonwealth it shall be lawful for any party who may be aggrieved thereby, when any real property has been frequently conveyed, transferred or mortgaged, to file, in a court having jurisdiction of the subject-matter, a petition in equity against the parties to such fraudulent transfer or conveyance or mortgage, or their representatives or heirs, alleging therein the facts showing their right of action and alleging such fraud, or the facts constituting it, and describing such property, and when done a *lis pendens* shall be created upon the property so described, and said suit shall progress and be determined as other suits in equity, and as though it had been brought on a return of *nulla bona*, as has heretofore been required. All laws, or parts of laws, in conflict herewith are hereby repealed."

By this enactment the old rule of practice was abrogated and an entirely new rule was substituted therefor, so that now a creditor upon learning that his debtor is disposing of his property and conveying away his real estate without making provision for the payment of his debt can go into a court of equity and, by complying with section 1907a, Kentucky Statutes, subject the property so alienated or conveyed, without having first reduced his claim to a judgment and had a return of "no property found" thereon. The validity of this act of 1896 has been considered and upheld by this court in the cases of O'Kane v. Vinnedge, 21 Ky. Law Rep., 1551; Campbell v. Trosper, 22 Ky. Law Rep., 277, and Lochelm v. Eversole, 24 Ky. Law Rep., 1031.

We are of opinion that plaintiff, in her petition as amended, stated a cause of action in so far as it asserted a right to have subjected to the payment of her debt the land which had been conveyed to the appellee, Mary Chenault; that she did not state a cause of action against, nor show in herself a right to subject to the payment of her debt, the house and lot in Richmond.

For the reasons indicated the demurrer to the petition should have been overruled.

The case of Virginia Crooke v. W. S. Hume's Ex'tx, &c., is reversed and remanded, for further proceedings consistent with this opinion; and the case of the National Bank of Cynthiana v. W. S. Hume's Ex'tx, &c., is affirmed.

LOUISVILLE RAILWAY CO. v. WILLIAMS.

(Filed April 23, 1908—Not to be reported.)

1. Street Railway—Action for Tort—Amended Plea for Settlement—Responsive Plea—Tender of Money—In an action against a railway company for a tort by a passenger being negligently thrown from its car, in alighting therefrom, in which an amended answer was filed, pleading a settlement, to avoid this plea the plaintiff might show that the settlement was obtained when she was unconscious, and that she had promptly tendered the money back, and when the tender was refused, paid it into court, and, upon proof of such tender and its payment into court, the plaintiff was properly allowed to proceed with her action.

2. Witness—Employee of Railway—Offer to Compromise—Evidence of—Competency—Bias of Witness—On the trial of action against a railroad company, Dr. R. gave testimony in its defense. On cross-examination, the plaintiff attempted to show that he was in the service of the company, and, in order to show his bias, he was asked if he had not, during the trial, proposed to compromise it at \$400, which he denied. Held—That the proof of such offer was competent to show the bias of the witness.

Fairleigh, Straus & Fairleigh and Greene & VanWinkle for appellant.

Bennett H. Young and Popham & Webster for appellee.

Appeal from Jefferson Circuit Court, Common Pleas Branch, Third Division.

Opinion of the court by Judge Hobson, affirming.

Mrs. Ora Williams was on a street car going south on Walnut street in Louisville. She rang the bell to stop at Seventh street. When the car stopped, she got up and went out on the platform.

Just as she was stepping from the platform, the car was started. This caused her to miss the step, and she was thrown to the street, falling on her shoulder and head. She sustained painful injuries, for which she brought this suit. The jury to whom the case was submitted found a verdict for her, in the sum of \$500, and the railway company appeals.

By an amended answer, the defendant pleaded that Mrs. Williams had compromised with it for \$25, paid her by it. Mrs. Williams testified that she did not know anything about the alleged compromise, that she was suffering intensely from her injuries, and that an opiate was administered to her; that when she came to herself, the money was on the bed, and she was told it was left there by the defendant, but that she did not know anything of the transaction. According to the proof for the defendant, the compromise was deliberately made; but, under the evidence, the question was properly left to the jury. The alleged settlement was made on the day after the injury, when Mrs. Williams was suffering intensely, and after an opiate had been administered to her. (L. & N. R. Co. v. Helm, 28 Ky. Law Rep., 603.)

After the evidence was closed, the court allowed the plaintiff's attorney to be sworn, and to testify that he had tendered the \$25 to the defendant. The court did not abuse a sound discretion in allowing this to be done, as an order had been made in the case, by which the \$25 was paid into court, and the rejoinder which put the tender in issue was not in the papers of the case; and, in this way, the attorney was misled. The proof was not offered earlier because the attorney did not know that there was an issue on the question. No objection was made, at the time, that the tender was not made soon enough; at least, no questions were asked to show the date of the tender, the only point made, at the time, being that the evidence came too late. But, aside from this, when the defendant, by an amended answer, set up the compromise, the plaintiff was properly allowed, after tendering the money to the defendant and paying it into court, to proceed with her action. The plaintiff sued upon her cause of action for the tort. The amended answer pleaded the settlement in bar of the action. To avoid this plea, the plaintiff might show that the settlement was obtained when she was unconscious, and that she had promptly tendered the money back, and, when the tender was refused, paid it into court. The tender was made to an officer of the defendant, acting in place of the treasurer. The tender to him was sufficient. His answer, when the tender was made, is sufficient to show, *prima facie*, that the tender was made before the suit was brought. (Hoyt v. Byrnes, 11 Me., 475; 24 Am. & Eng. Encyc., 320; R. R. Co. v. Dupree, 23 Ky. Law Rep., 2349; Union Tel. Co. v. Parsons, 24 Ky. Law Rep., 2008.)

Dr. Ryan was introduced as a witness for the defendant, and gave testimony important in its defense. On cross-examination, the plaintiff attempted to show that he was in the service of the defendant or employed by it, and to establish his bias, asked him if he had not, during the trial of the case, proposed to compromise it at \$400. He denied having made the statement and the court allowed the plaintiff to prove by another witness that Ryan had made this proposition, the court then telling the jury that the evidence was only to be considered as bearing on his credibility and not as showing a concession of liability on the part of the defendant. The evidence was properly admitted as the bias of a witness may always be shown on the question of his credibility. The evidence did not show that Dr. Ryan was a representative of the company and it was not admitted for that purpose, but it did tend to show that Dr. Ryan was taking an interest in the case for the railway company and tended to show his bias and was therefore properly admitted as affecting

his credibility. (Meaux v. Meaux, 81 Ky., 423; Railway Co. v. Constans, 25 Ky. Law Rep., 158.)

Judgment affirmed.

HARDING'S ADM'R, &c. v. WEISIGER.

(Filed April 23, 1908—Not to be reported.)

1. Executors—Administrators—Power to Sell Under Will—When an executor or administrator, with power under a will to sell and convey real estate, institutes an action asking the aid of a court with reference to any matter connected with the settlement of the estate, he does not by that act turn over to the court the exclusive charge of the estate and thereby lose all power and control over it.

2. Interlocutory Order—Estoppel—Pending the action to settle the estate, an order sustaining exceptions to the Commissioner's report was an interlocutory order, but H., who had been paid a sum under this settlement, which she received without objection, and failing to except to the final report of the Commissioner, is estopped from claiming any rights which she might have had under the order referred to.

3. Administrator With the Will Annexed—Powers of—An administrator, with the will annexed, has all the powers of the executor named in the will, whether that executor qualifies or not.

Robert Harding and C. H. Rodes for appellants.

M. C. Sauffley and Breckinridge & Breckinridge for appellee.

Appeal from Boyle Circuit Court.

Opinion of the court by Judge Nunn, reversing.

In the year 1894 Samuel Harding, a resident of Boyle county, Ky., made and executed his will and appointed his wife, Lucy W. Harding, as executrix thereof with full power to sell and convey any and all of his real estate. Harding died in January, 1903. The will was probated, but Lucy W. Harding failed to qualify as executrix, and appellant, J. L. Bruce, was appointed by the county court administrator of the estate with the will annexed. In the month of January, 1904, appellant, after due advertisement, sold at public sale many pieces of property belonging to Samuel Harding's estate, and appellee, Weisiger, purchased at the sale twenty-one parcels of the property upon the following terms: one-third in cash, one-third payable in six months and the balance in twelve months, with interest at six per cent on the deferred payments, from the date of the sale until paid. A few days after the sale appellee directed a written communication to appellant stating that he had been advised that he (appellant) did not have the power to convey to him a good title to the property purchased by him, and requested appellant to make and present to him a deed signed by the devisees under the will of Samuel Harding, and then named all the devisees, their wives or husbands, except Lucy W. Harding, who was a sister of appellee. Appellant made and executed a deed as requested, which appellee accepted, made the cash payment and executed his notes for the deferred payments, and afterwards paid the notes due in six months, but refused to pay the last notes upon which appellant instituted this action seeking a judgment thereon against appellee and to enforce the lien upon the twenty-one parcels of land. Appellee answered denying appellant's right to prosecute the action and his authority under the will to sell and convey the property. First, for the reason that the will did not give him power to sell.

Second, because he had instituted an action in the Boyle Circuit Court, before the sale of the property, for a settlement of Harding's estate, and this action was pending and undetermined at the time the sale of the property was made, which had the effect to divest him of the right to make the sale, even if such power was conferred by the will; that the pendency of the action to settle the estate placed the power to sell the property exclusively with the court in that action; and further pleaded that the question of the power of appellant to make this sale and conveyance was settled by the judgment of the court in the action referred to to settle the estate. Appellant filed a reply to this answer controverting it and set up matters occurring in the settlement action tending to show the court and all the parties, especially Lucy W. Harding, did not regard the judgment as effective and binding and waived all rights, if any they had thereunder. To this reply the court sustained a demurrer and dismissed appellant's action.

Harding acknowledged in his will an indebtedness to his wife of \$13,000.00, which he directed to be paid to her, and then devised to her one-third of all the remainder of his estate, after the payment of his debts, and then gave to her the other two-thirds during her natural life, with remainder to his brothers and sisters or their descendants. The third item of the will is as follows:

"I appoint my wife, Lucy W. Harding, executrix of this will and invest her with full power to sell and convey any and all of my real and personal estate as she may think best."

Appellee's counsel contends that appellant had no power to sell and convey this property under the will, and quotes sections 3888 and 3892 of the statutes, and argues that as Mrs. Lucy Harding never qualified as executrix of the will, that there was never an executor of the will, that no one as executor ever undertook to execute the will, that no one ever died in the office of executor of the will or vacated the office, that there must have been an executor before the power of sale conferred by the will passed to an administrator. We can not agree to this. Counsel has overlooked section 3891 of the statutes, which is as follows:

"If there be no executor appointed by the will, or if the executors therein named die, or refuse the executorship, or fail to give bond as required by law, which shall amount to such refusal, the court may grant administration, with the will annexed, to the person who would have been entitled to administration if there had been no will."

This section and the succeeding section, 3892, gives the administrator with the will annexed all power and authority given in the will to the named executor, and this power is given the administrator with the will annexed, even though he is not appointed by the court as the successor of the executor previously appointed by the court. It is plain that the administrator, with the will annexed, has all the powers of the executor named in the will, whether that executor qualified or not, if at the time of appointment the office is vacant, whether by failure to qualify or by resignation or by death after qualifying. (Gulley v. Prather, 7 Bush, 167, and Shields v. Smith, 8 Bush, 601.) Appellee's counsel also contends that the power to sell was given to Lucy W. Harding not as executrix, but was conferred on her as a donee of a special power. We think this incorrect. The language of the will shows that it was the intention of the testator that she should have that power as his executrix. It was not his intention to give her the exclusive power to dispose of all of his property as she wished without first qualifying and executing bond as executrix. Appellee further contends that the institution of the suit by the administrator to settle the estate brought the whole estate within the jurisdiction of the Boyle Circuit Court for administration and settlement, and it was alone within the power of the Boyle Circuit Court to direct a sale of the real estate, and by that act he renounced all the powers

he had ever had over the estate given him by the will, and the court took complete control of the whole matter. It appears that at the time appellant instituted the action to settle the estate he had twelve or fifteen thousand dollars on hand with which to pay creditors, but all the creditors had not presented their claims properly proven, and that Lucy W. Harding, the widow, had a claim and also her brother, John Weisiger, who had failed to prove and present them. Appellant had been informed that the \$13,000.00, acknowledged in the will to be due Lucy W. Harding, had been partly paid by the testator in his lifetime; and the action was brought with the view of having the creditors present their claims proven as required by the statute. The case was referred to the master commissioner to make a settlement with appellant showing the amounts he had received and paid out, and to take proof and report the claims against the estate. Lucy W. Harding presented a claim for about \$42,000.00, and her brother, John Weisiger, presented one for something over \$6,000.00. Both of these claims were litigated and greatly reduced.

Appellant did not describe any real estate in his petition nor ask for the sale of any. The purpose of that action was to ascertain the amount of the just claims against the estate so that he might sell enough of the real estate, taking into consideration the amount he already had in his hands, to pay them. This purpose was a commendable and proper one. By this method he saved all the cost that would have accrued had the court taken the real estate in charge and had it sold. He had no reason for asking the court to do for him what he had power, under the will, to do. It is not pretended that appellant was intending to do anything wrong, or that he sold the real estate for less than its value, or that he sold more of it than was necessary to enable him to pay the debts. In our opinion, when an executor or administrator, with power under a will to sell and convey real estate, institutes an action asking the aid of a court with reference to any matter connected with the settlement of the estate, he does not, by that act, turn over to the court the exclusive charge of the whole estate and thereby lose all power and control over the estate.

By section 428, of the Code, a representative, legatee, distributee or creditor of a deceased person has the right to bring an action for the settlement of the estate. If the principle contended for by appellee is correct, then it would follow that if a creditor brought an action it would have a like effect to place the whole estate and the settlement thereof in charge of the court. The case of *Messman v. Worthington's Ex'ors*, 24 Ky. Law Rep., 2116, was an action instituted under section 428, of the Code, by a creditor against the executors for a settlement of the estate. In that case the court held that a personal representative, who was empowered by the will to sell the real estate of his testator, might sell same while an action is pending to settle the estate, and that the purchaser would be required to take the property and comply with his contract of purchase; the purchaser having refused to take the property and sought to be relieved from his purchase, upon the ground that the personal representative could not sell same because there was an action pending to settle the estate when he made the purchase.

In the suit to settle the estate appellant made three settlements with the master commissioner in which he reported all the cash collected on claims due the estate, and the cash received from the purchaser of this real estate to the time of each settlement. Lucy W. Harding filed exceptions to the first two reports, and among the exceptions she filed was one excepting to the report charging appellant with the cash received and purchase money on the real estate. Upon hearing the exceptions the court entered the following order:

"The court having under consideration the exceptions of Lucy W. Harding, filed on April 19, 1906, to the master commissioner's

report of settlement with the administrator with the will annexed filed on September 14, 1904, and April 17, 1906, now being advised, the exceptions of said Lucy W. Harding to the commissioner's report in which he charges said administrator with the proceeds of the sale of said real estate, are hereby sustained, to which ruling of the court the administrator excepts. The court reserves further consideration (on) second ground of exceptions."

In our opinion this was an interlocutory order (*Adkisson v. Dent*, 88 Ky., 628), and it was afterwards so treated by the court and all the parties to this action. The court afterwards ordered the commissioner to pay out all the money received from the sales of the real estate, which had been paid over to him by appellant, to the creditors, Lucy W. Harding being one of them, and was paid something over \$21,000.00, which she received without objection or exception, and having done this and failing to except to the final report of the commissioner and to the order of the court directing the payment of this money to the creditors of the estate, she, in all events, is estopped from claiming any rights that she might have had under the order of the court referred to, if she ever obtained any rights thereunder. The order does not expressly adjudge that appellant had no right to sell the real estate, and there was no order directing the commissioner to refund to appellant the amounts turned over by him, which had been received from the sale of the real estate. It did not declare the deed made to appellee, Weisiger, ineffective or void, and did not direct him to surrender the possession of the real property which he had had since he accepted the deeds. Surely the court and parties in interest did not intend to let the purchasers hold the property and the devisees under the will be re-invested with the title to the property and the creditors of the estate to be paid by appellant out of his own means, which would be the effect of the action of the court and the parties, if appellee's contention herein be upheld.

For these reasons the judgment of the lower court is reversed and remanded, for further proceedings consistent herewith.

BOWE, &c. v. RICHMOND, &c.

(Filed April 23, 1908—Not to be reported.)

Deeds—Purchase of Land by Husband—Conveyance to Wife and Children by Said Husband—Interest of Afterborn Children—A deed to land was made by the owner, to Caroline Bowe and her children by A. J. Bowe, which was paid for by said A. J. Bowe. At the date of the deed A. J. Bowe and his wife had but two children. In a controversy between the children as to the ownership of the land, Held—That the deed conveyed to the wife of A. J. Bowe a life estate in the land, with remainder to her children by A. J. Bowe, including such as were born after the execution of the deed.

Vaughan, Howes & Howes for appellants.

C. B. Wheeler and Wells & Wells for appellees.

Appeal from Johnson Circuit Court.

Opinion of the court by Judge Settle, reversing.

This appeal involves the construction of the following deed:

"This deed between James E. Burgess and Martha M. Burgess, wife of the said J. E. Burgess, of the county of Johnson and State of

Kentucky, of the first part, and Caroline Bowe and her children by A. J. Bowe, of the aforesaid county and State, of the second part, witnesseth: That the said party of the first part, in consideration of the sum of \$1,000 in hand paid and \$100 secured by note, payable in twelve months from this date, the receipt of which is hereby acknowledged, do hereby sell, grant and convey to the party of the second part, her heirs, the following described property, viz: One tract of land being in the county of Johnson, State of Kentucky, on Miller's Creek, and bounded as follows, to-wit: Beginning at a red oak on a point nearly an east course from J E. Burgess' house; thence down the point nearly a straight line by a hornbeam on a steep bank to Miller's Creek; thence down the same as it meanders to the mouth of the branch near the main road; thence up the branch as it meanders to John Richmond's line; and with this line to the gap on the ridge where the road crosses; thence with the top of the ridge and with Richmond's line to an oak, George Walter's corner, and with Walter's line to Miller's Creek to two sycamores; thence crossing the creek a straight line to a white oak, corner between said Burgess and Nancy Akers, and with their line to Peter Elliot's line and with Elliot's line to the top of the ridge and down the same as it meanders to the beginning. To have and to hold the same with all the appurtenances thereon to the second party and her heirs and assigns forever, with covenant of general warranty. In testimony whereof, witness our signatures, this the 27th day of March, 1887.

"JAMES E. BURGESS,
"MARTHA M. BURGESS."

At the time of the execution of the above deed Caroline and A. J. Bowe had two children, Laura Bowe and Lucinda Bowe, but several years thereafter Lucinda Bowe died, leaving an only child, Dewey Bowe, an infant, to whom as heir at law descended such interest, if any, as she owned in the land conveyed by the Burgess deed.

After the execution of the deed referred to three other children were born to Caroline and A. J. Bowe, viz.: Nora Bowe, Andrew Bowe, and Ollie Bowe. A. J. Bowe and Caroline Bowe, about 1901, conveyed certain mineral rights in the land in question to E. C. Jones, trustee for J. E. Rittenhouse, J. E. Jones, Moses Morgan, and T. J. Hughes, and about the same time attempted to convey James Richmond the surface of the land, the deed purporting to vest in the latter the fee simple title.

This action was instituted by Laura Bowe, Dewey Bowe, infant son of Lucinda Bowe, deceased, and Caroline Bowe, his next friend, to recover the alleged interest of Laura Bowe and Dewey Bowe in the land mentioned, it being averred in the petition that they each own an undivided one-third interest therein, under the deed from J. E. Burgess and wife to Caroline Bowe and her children, by A. J. Bowe, the other undivided one-third, constituting, as alleged, the share of Caroline Bowe in the land, having been conveyed to James Richmond, and the mineral rights in such third to E. C. Jones, trustee, by deeds from Caroline Bowe and her husband, A. J. Bowe, to them respectively. In other words, it is alleged, in the petition, that the deed from J. E. Burgess and wife conveyed a joint estate in the land in question to Caroline Bowe and Laura and Lucinda Bowe, her children by A. J. Bowe, then in being; each taking title to an undivided third, and that the subsequent deeds from Caroline Bowe to Richmond and Jones, trustee, only conveyed them the undivided one-third interest of Caroline Bowe in the land and mineral rights, respectively.

It is further alleged, in the petition, that both Richmond and E. C. Jones, trustee, are in possession of and claiming the whole of the land and mineral rights therein, adversely to the appellants,

Laura and Dewey Bowe, and all others, and giving it out to the public that appellants own no part of the land, and that their (appellees') title to the land and mineral rights respectively is superior to that of appellants, which claim and statements, it is averred have cast a cloud upon plaintiffs' title, greatly depreciated the market value of the land, and thereby damaged appellants. The prayer of the petition asks that the appellants be adjudged the owners and given possession of two-thirds of the land, that their title be quieted, and for all proper, necessary and general relief.

The petition made Richmond, Jones, trustee, and his cestuis que trust, also Nora Bowe, Andrew Bowe and Ollie Bowe, children of Caroline Bowe by A. J. Bowe, born since the execution of the deed from Burgess and wife to Caroline Bowe, &c., parties to the action. Nora Bowe, Andrew Bowe and Ollie Bowe, by joint answer, counterclaim and cross-petition each, set up claim to an interest in the land in controversy upon the ground that, though born after the execution of the deed from Burgess and wife, they, by the provisions of that deed, are entitled, as remaindermen, to a third each of the land in controversy, or to share equally with their mother and sisters in the land, if the court should adjudge that the deed from Burgess conveyed it to Caroline Bowe and all her children by A. J. Bowe, jointly.

Appellees, James Richmond and E. C. Jones, trustee, and others, filed demurrers to the petition, and to the answer and cross-petition of Nora, Andrew and Ollie Bowe, which were sustained by the court, and the petition and cross-petition dismissed. From the judgment entered in conformity to this ruling of the court, the children and grandchildren of Caroline and A. J. Bowe have appealed.

We are of opinion that the circuit court erred in rendering the judgment appealed from. It was evidently based upon the idea that the deed under consideration created what, under common law, would be an estate tail, which section 2343, Kentucky Statutes, converts into an estate in fee simple, which, if true, made Caroline Bowe the sole and absolute owner of the land. This construction, we think, does violence to the language of the deed. We know no better rule of construction than that announced by Judge Kent, in *Jackson v. Mayes*, 3 John, 383:

"The intent, when apparent and not repugnant to any rule of law, will control technical terms; for the intent, and not the words, is the essence of every agreement. In the exposition of deeds, the construction must be upon the view and comparison of the whole instrument, and with the endeavor to give every part of it meaning and effect."

A. J. Bowe, the husband of Caroline Bowe and father of her children, paid a valuable consideration for the tract of land in controversy. The deed, though from one unrelated to the grantees, was made as directed by A. J. Bowe, the purchaser, and with the evident purpose of providing for his wife and children. In this respect, the instrument should be regarded as a deed made by the husband and father himself, or as a will by which he intended to dispose of his estate for the benefit of those who would naturally be expected to receive it because entitled to his bounty. The conveyance here is, by the direction of the husband and father, made to "Caroline Bowe and her children, by A. J. Bowe, of the second part." This expression is followed by the granting clause which says that, in consideration of \$900.00 and a note of \$100.00, the party of the first part "does hereby sell, grant and convey to the party of the second part," &c. What person or persons will the words "party of the second part," as here used, and the words "second party," occurring in the habendum, necessarily include? By referring to the caption which, as it is not in conflict with other parts of the deed, should be con-

sidered in arriving at its meaning, we find that they include Caroline Bowe and her children by A. J. Bowe. Neither the granting clause nor the habendum conflicts with the caption of the deed, and the word "children" being used in the caption, it does no violence to the meaning of the deed to conclude that the word "heirs," found in the granting and habendum clauses in connection with the pronoun "her," mean all the children of Caroline Bowe by A. J. Bowe, and were so intended. (*McFarland v. Hatchett*, 26 Ky. Law Rep., 276.)

Such words as "heirs of his body," or "heirs lawfully begotten of their body," are usually words of limitation, but not so with the word "children," which is generally held to be a word of purchase, and to embrace immediate descendants only. Such is its meaning, and also of the word "heirs," in the deed before us. The deed having been procured and the land paid for by A. J. Bowe, he had the right to control the form of the deed and select the persons to take under it; his intention, as shown by the deed as a whole, was that his wife should take a life estate, and his children, by her, the remainder in the land.

In *Hall v. Wright*, 27 Ky. Law Rep., 1185, the conveyance, as expressed in the caption and habendum of the deed, was to Joseph Hall and his children, without naming the latter. It was held that Joseph Hall was entitled only to a life estate in the land, and that his children then in being, and thereafter born, took the remainder in fee.

In *Smith v. Smith*, 27 Ky. Law Rep., 363, there was a devise of real estate from a father to "his son and his children;" this was held to give the son a life estate, with remainder to the children. In *Adams v. Adams*, 20 Ky. Law Rep., 655, there was a devise of land by a father to "his daughter, Martha J. Adams, and her children in their exclusive right;" this was held to vest in the daughter a life estate, with remainder to the children.

In *McFarland v. Hatchett*, 26 Ky. Law Rep., 276, the conveyance was from a stranger to a mother and her children, with covenant of general warranty. It was held that the mother, under this deed, took a life estate, with remainder to the children.

As said in *Hall v. Wright*, *supra*, there are many cases in which the husband made provision for the wife and children, the deed or will containing, in many instances, language very similar to that employed in the deed under consideration, and in practically all of them the wife was held to have been vested with a life estate in the realty, with remainder to the children. (*Jarvis v. Quigly*, 10 Ben Monroe, 104; *Smith v. Upton*, 12 Ky. Law Rep., 28; *Davis v. Hardin*, 80 Ky., 673; *Frank v. Unz*, 91 Ky., 621; *Kaenig v. Kraft*, 87 Ky., 25; *Wright v. Forrester*, 1 Bush, 278.)

We are of opinion that the deed from Burgess and wife to Caroline Bowe and her children by A. J. Bowe, under consideration, conveyed the mother a life estate in the land therein described, with remainder to her children by A. J. Bowe, including such of the children as were born after the execution of the deed.

As the interest of Lucinda Bowe, one of the children and remaindermen, living when the deed was made, had vested before her death, upon the happening of that event such interest descended to her only child and heir at law, the infant Dewey Bowe. It follows, therefore, that the conveyances under which the appellees, Richmond, Jones, trustee, and others, claim the land in question, only divested Caroline Bowe of her life estate therein. While the remaindermen can not have possession of the land until the death of Caroline Bowe, in view of the adverse claims set up by the appellees, now in possession of the land, they had the right to maintain this action to obtain an adjudication of their rights, and have determined what interest they have in the land.

Wherefore, the judgment is reversed, and cause remanded, that the circuit court may set it aside, and enter another, overruling the demurrers to the petition and cross-petition, and defining the interests of the parties in such manner as will conform to this opinion.

CLARKE v. McDOWELL'S ADM'R.

(Filed April 24, 1908—Not to be reported.)

Question of Fact—Rule in Such Cases—The questions involved in this case are purely of fact, and it is the uniform practice of the Court of Appeals, in cases of this character, to follow the judgment of the chancellor, if, after a consideration of the evidence, the mind is left in doubt. The judgment here must, therefore, be affirmed.

A. W. Baker and Wm. Lewis for appellant.

J. R. Llewellyn for appellee.

Appeal from Jackson Circuit Court.

Opinion of the court by Judge Carroll, affirming.

In September, 1905, J. E. Holcomb conveyed to appellant, Clarke, a stock of general merchandise in a store in Jackson county, and also a large body of land. In 1906, Holcomb became the surety of one Lunsford in a note executed to McDowell for \$175.00. A judgment was obtained on this note against Lunsford and Holcomb, and, after an execution had been returned "no property found," this action was brought, attacking the conveyance made by Holcomb to Clarke as fraudulent. The petition proceeded upon the theory that the conveyance assailed, although purporting to be an absolute deed, was, in fact, a mortgage to secure Clarke in the payment of \$1200 that he had advanced to Holcomb.

The lower court, upon a consideration of the facts, adjudged that the conveyance was intended to operate as a mortgage to secure Clarke in the payment of \$1200, advanced to Holcomb, and also such other amounts of money as Clarke may have advanced before the execution of the deed. He adjudged that Clarke had a prior lien upon the land and the stock of goods to secure the debts due him by Holcomb, and ordered the land subjected to the payment of the Clarke debt as well as the debt of appellee. From that judgment this appeal is prosecuted.

The evidence is very conflicting. Sometime previous to September, 1905, A. J. Smith recovered a judgment against Holcomb in the Jackson Circuit Court for the sum of \$2,000, execution issued upon this judgment and had been levied upon the stock of goods and land at the time the conveyance was made to Clarke. It is conceded that Clarke paid in satisfaction of this judgment \$1,200 and obtained an assignment of the judgment and execution. Shortly after this, the conveyance was made, which contained the following recital as to the consideration:

"Witnesseth: That whereas, A. J. Smith recovered a judgment against J. E. Holcomb, &c., in the Jackson Circuit Court for the sum of \$2,000 and \$197 costs; and, whereas, the said Smith issued an execution on said judgment; and, whereas, the sheriff of said Jackson county levied said execution on the hereinafter described stock of goods and three tracts of land; and, whereas, said W. H. Clarke paid off said execution and obtained an assignment of said judgment from

Smith; now in consideration of the premises, and for the further consideration that said W. H. Clarke is to have said execution returned satisfied in full, the parties of the first part hereby sell and convey." * * *

Clarke testified that the recited consideration is not correct; that in addition to the \$1,200 paid in settlement of the Smith judgment, Holcomb owed him \$1,000, and he also assumed the payment of all the debts due by Holcomb to wholesale merchants, which amounted to about \$1,200, making the consideration, according to his statement, \$3,400. In this he is supported by the evidence of Holcomb and other witnesses. He was called on to explain in detail the facts connected with the indebtedness of Holcomb in the sum of \$1,000 for money advanced previous to the conveyance, but could not furnish any written evidences of the indebtedness. It also appears that the store, after the conveyance, was conducted by the wife of Holcomb, his son-in-law, and other relatives; and that the money, or a large part of it, taken in at the store was placed in a Winchester bank to the credit of Holcomb, who had an account there, and a good portion of it applied to the payment of the debts due to wholesale merchants by Holcomb, and some of it went to discharge the individual debts of Holcomb. In short, the preponderance of the evidence tends to show that no particular change was made in the conduct or management of the store after the conveyance. It continued to be operated substantially the same as it had been. It also appears that Clarke, after the conveyance, signed and swore to an affidavit, in which he said that he was the owner of one-half of the stock of goods. These circumstances, tending to show that Clarke was not the purchaser or real owner, but only had a lien thereon, are attempted to be explained away by Clarke and the witnesses in his behalf; and their statements are entitled to serious consideration. There was also evidence tending to show that the land or stock of goods was worth \$5,000, while Clarke testifies that it was not worth what he paid for it, that is, \$3,400, and that he would sell it for \$200 less than that sum.

It is also in evidence that Holcomb, after the conveyance, offered to sell the land, and that his family lived on it as they had always done. The weight of the direct evidence favors the contention of Clarke, but there are many circumstances, some of which we have pointed out, tending to show that the conveyance was only intended by the parties to operate as a mortgage to secure Clarke in the payment of \$1,200, and other sums that he may have previously advanced to or for the benefit of Holcomb.

In view of the fact that the conveyance was made previous to the creation of appellee's debt, and before it was contemplated that said debt would be made, it can not fairly be said that there is evidence of the actual fraud, that is essential to set aside a conveyance in the interest of and for the benefit of a subsequent creditor. Nor is it necessary that we should hold that the transaction between Clarke and Holcomb was tainted by actual fraud. The lower court held that the conveyance was only intended to operate as a mortgage, and this view we are disposed to accept as correct. The questions involved in this case are ones purely of fact, and it is the uniform practice of this court in cases of this character to follow the judgment of the chancellor, if after a consideration of the entire evidence the mind is left in doubt.

We can not say that the judgment of the chancellor is contrary to the weight of the evidence, giving due consideration to all the facts and circumstances shown by the record, and it must be affirmed.

LOUISVILLE & INTERURBAN R. R. CO. v. BAILEY, &c.

(Filed April 24, 1908—Not to be reported.)

Roads and Passways—Use of—Permissive—Mistake in Erecting Poles on Road—The roadway in question is a private one, the use of the public in it is permissive, and appellant failing to show any right to have its poles erected upon it, its suit to enjoin appellees from cutting down and removing its poles was properly dismissed by the lower court.

Clarence Dallam for appellant.

R. C. Kinkead for appellees.

Appeal from Jefferson Circuit Court, Chancery Branch, Second Division.

Opinion of the court by Judge Lassing, affirming.

The purpose of this appeal is to test the correctness of the ruling and judgment of the Jefferson Circuit Court, Chancery Branch, Second Division, in dismissing the petition of the Louisville & Interurban R. R. Company, wherein it sought to enjoin appellees from cutting down a line of poles which appellant had erected through their property.

Appellant insists that the poles were erected upon a public road, while appellees contend that they were erected along and upon their private passway, so that, the case was tried out below upon the question as to whether or not the road was a public or private road. A determination of this question necessarily disposes of the case, so far as appellant is concerned, if the finding is adverse to it, for it is admitted that the poles were erected without the consent of appellees.

The roadway in dispute extends from the Preston Street Turnpike Road to the Ash Bottom Road. Originally different members of the Phillips family owned the land extending practically from the Preston Street Road to the Ash Bottom Road. At that time there was a roadway or passway extending from one road to the other, which was used in common by the members of the Phillips family. These Phillips' farms were, many years ago, acquired by Dr. Standiford, who caused gates to be erected across this roadway, one at Preston street, one at Ash Bottom Road, and, at points between them. These gates were part of the time kept locked, and the keys in control of those occupying the land. The gates were kept across the passway until a few years ago, when one was destroyed and the others were removed; and none have since been replaced.

A great deal of testimony has been taken to show that this passway was in general use by the traveling public since before the farms passed into the hands of Dr. Standiford. There is also testimony tending to show that while it was used by the traveling public more or less, it was altogether a permissive use. It is not shown that it was used by any one as a matter of right, or that the claim was ever made by any one that it was a public way, or that any complaint was ever made by any one desiring to use it because the gates across the entrance thereto were locked; and the very fact that these gates were maintained and were kept locked and the keys placed in the possession of occupying owners or tenants of the land, is a circumstance tending strongly to show that the roadway in question was a private passway and not a public road. In an unbroken line of decisions this court has held that an unexplained and uninterrupted use by the public of a passway for a long period of time carries with it the presumption of a grant or dedication of the roadway on the part of the owner to

the public, but this presumption of a dedication is overcome by the introduction of evidence tending to show that the use by the public has not been free and uninterrupted, or that it has been merely permissive, hence, each case is made to turn upon the peculiar facts and circumstances surrounding it.

The evidence introduced to the effect that many years ago this passway between the two roads was used by any one who desired to travel it, when considered in connection with the other testimony to the effect that the owners of the land, as much as thirty years ago, erected gates across this roadway and locked them, thereby denying to the public the right to pass through except with the permission of those having the keys to the gate locks in charge, can not be said to support appellant's contention that the public has had for many years the free and uninterrupted use of this roadway; but, taken as a whole, the testimony shows that the use which the public had of this road has, for the last thirty years, at least, been a permissive use.

Sometime before the poles were erected along this roadway the Louisville Railway Company obtained the permission of the fiscal court of Jefferson county to erect a line of poles along the "Phillips Lane," and appellant's employes, at the time they erected the poles in question mistook the passway through appellees' lands for the "Phillips Lane," and erected the poles thereon, believing that they were operating along and upon the "Phillips Lane," where the fiscal court had given the Louisville Railway Company the right to operate. It was clearly through a mistake on the part of the employes of appellant that the poles were erected upon the passway of appellees rather than upon the "Phillips Lane." This is plain from the record, and no doubt so appeared to the trial judge. The decided weight of the testimony in this case supports the contention of appellees that the roadway in question is a private passway and not a public road. This being true and appellant having failed to show that it had any right to erect its poles thereon, the trial court was warranted in dismissing its petition.

For the reasons indicated the judgment is affirmed.

LOUISVILLE COOPERAGE CO. v. FARMER, BY, &c.

(Filed April 24, 1908—Not to be reported.)

1. Master and Servant—Duty of Master in Case of Infant Employee—When an infant of tender years is put to work at a hazardous business, the master must, at his peril, see that he is made to comprehend its dangers.

2. Same—Instructions—Pleading—The petition setting up the tender age and lack of experience of appellee and that he did not know the dangerous character of the work, an instruction submitting the question as to whether plaintiff's age and intelligence were such as to induce a man of ordinary prudence to believe that he was qualified and fit for the labor at which he was put, was authorized.

3. Verdicts—Excessive Character of—Rule as to Interfering With—The rule is well settled that it is only where verdicts are palpably against the evidence, or obviously the result of passion or prejudice that courts are permitted to interfere on the ground that they are excessive.

James S. Wortham and Belcher & Sparks for appellant.

R. Y. Thomas, Jr., and W. J. Rose for appellees.

Appeal from Muhlenberg Circuit Court.

Opinion of the court by Wm. Rogers Clay, Commissioner, affirming.

Ellis Farmer, an infant, brought this action by his next friend, J. J. Farmer, against the Louisville Cooperage Company, to recover damages for an injury to his hand. The trial resulted in a verdict in favor of plaintiff in the sum of \$3,500, and the defendant complains.

The injury occurred under the following circumstances: Appellant hired the appellee, with the permission of his father, to work at its mills in a place known as the stave-pit. On the next day appellant's superintendent directed the boy to quit work at the stave-pit and go to work at a place in the mill where there were two small saws running, called edging saws.

The only direction given to the boy was to go and clean up the wood, trash and litter that accumulated about the saws. At the time of the accident appellee was only 11 years old. Neither appellant's superintendent nor any one else warned him of the dangerous character of the machinery about which he was told to work. While the boy was at work about these edging saws, which are so small and revolve so fast that they can hardly be seen, the engine of the mill stopped and the steam was shut off. The boy, observing that the engine was stopped and the steam had been shut off, supposed that the saws had also stopped. He had not been directed in what manner or how he should get the wood and litter away from the saws, and, using his best judgment as to how he was to do this work, he reached under a table upon which the saws ran, in order to get the debris from around them. While under the table and with one arm full of wood, he laid his right hand upon the top of the table for the purpose of pulling himself up. This hand came in contact with one of the saws and was cut clear across, and the tendons thereof partially severed.

According to appellant's evidence the boy was standing up, and, while the saw was in plain view, placed his hand upon it. There was also evidence to the effect that the boy's duties did not require him to work in such close proximity to the saw as to render his work at all dangerous. It does not appear, however, as said before, that any such directions were given to the boy. So far as the record shows, he was not told how far or how close to the saws he should work. He was merely told to go there and go to work carrying out the wood and throwing it back.

For appellant it is insisted that a peremptory instruction should have gone in its favor. The rule applicable to such cases is stated in the recent case of Beckwith Organ Co. v. Malone, By, &c., 32 Ky. Law Rep., 596, wherein the court said:

"But, when an infant of tender years is put to work at a hazardous business, the master must, at his peril, see that he is made to comprehend its dangers. It is not enough that he is merely informed of them. Children are thoughtless and heedless by nature. They should be made to understand the danger to themselves of such employment, as well as understand the means provided for protection. If they are not made to do so, then they will be treated as if they did not know it, and the master's duty to furnish them reasonably safe places to work, and reasonably safe tools with which to work, will not be affected by the mere obviousness of the dangers or defects. No one has a right to put children in such perilous places and fasten upon them the consequences of the employer's inattention upon the ground that his neglect was to be seen by experienced and thoughtful persons."

The child was only 11 years of age, and the place where he was put to work was necessarily dangerous. He was not warned of the dan-

ger, nor was he even told not to go near the saws. Instead of appellant's being entitled to a peremptory instruction, we are of the opinion that the facts of this case were almost if not quite, sufficient to justify the trial court in peremptorily instructing the jury to find for appellee.

The court gave to the jury three instructions. The first submitted the question, whether or not plaintiff's age and intelligence were such as to induce a man of ordinary prudence and care to believe that he was qualified and fit for the labor at which he was put to work. By instruction No. 2 the court submitted the question of the duty of defendant to warn plaintiff. This instruction is not complained of. Instruction No. 3 submitted the question of the contributory negligence of plaintiff. Counsel for appellant, while admitting that the law embraced in instruction No. 1 is proper under certain circumstances, contend that it should not have been given in this case, for the reason that plaintiff's petition complains only of the failure of appellant to warn plaintiff, and that this was the only question of negligence that should have been submitted to the jury. The petition, however, states that plaintiff was only 11 years old, was inexperienced and had never worked around or about machinery of the character in question, and, on account of his tender age and having had no experience, was unable to realize the danger of working around and in stave and saw mills. The petition further states that plaintiff did not know the dangerous character of the work, and could not have known it by the exercise of ordinary care. We think from these averments the court was authorized to give the instruction complained of; at any rate, the giving of the instruction was not prejudicial error under the facts of this case.

But appellant complains most earnestly of the excessive damages that were awarded. It is true that appellant's witnesses testified that appellee's injury was not a permanent one, but two or three physicians did testify as to the permanency of the injury received—one of them stating that the use of the hand injured was impaired to the extent of one-half. The rule is well settled, that it is only where verdicts are palpably against the evidence, or obviously the result of passion or prejudice, that courts are permitted to interfere upon the ground that they are excessive or unauthorized by the evidence. (Danville, Lancaster and Nicholasville Turnpike Road Co. v. Stewart, 2 Met., 119.) In this case the members of the jury saw the boy; they also saw his hand. They heard the statements of the physicians pro and con. The boy was only 11 years of age. He had a natural expectancy of life of about 40 years. Several physicians testified that the boy's injury was permanent; one was of the opinion that the injury received would diminish the use of his right hand to the extent of, at least, fifty per cent. Under these circumstances, we are unable to say that a verdict of \$3,500 is so excessive as to justify the conclusion that it was the result of passion or prejudice on the part of the jury.

Appellant next contends that the court erred, either in refusing to grant a continuance upon the filing of its affidavit on the ground of the absence of two witnesses, or in permitting the affidavit to be read as the depositions of the witnesses. It appears from the affidavit that subpoenas were placed in the hands of the sheriff for the two witnesses referred to, and returned endorsed "not found." The affidavit does not show that the witnesses were within the jurisdiction of the court, or that there were reasonable grounds to believe that their presence could be had if a continuance were granted. The action of the court, therefore, was proper; otherwise, it would be possible for a party who could only get the evidence of witnesses not within the jurisdiction of the court by taking their depositions to file an affidavit

showing their absence, and thus secure their testimony without taking their depositions. (Benge v. Commonwealth, 13 Ky. Law Rep., 308.) For the foregoing reasons, the judgment is affirmed.

SOUTHERN RY. IN KENTUCKY v. GRADDY.

(Filed April 24, 1908—Not to be reported.)

1. Railroad—Shipment of Stock—Measure of Damages—Instructions—In this suit by appellee to recover of appellant damages occasioned by the injury to his stock on account of appellant's negligence in transporting it, it was error in instructing the jury to fix the measure of damages as the difference between the value of the stock if they had been transported within a reasonable time and without unusual delay and the amount they sold for at public sale. Appellee was entitled to recover the difference, if any, between the fair market value of the stock in the condition they would have been in if they had been transported with ordinary care, and the condition they were in when delivered in Louisville.

2. Evidence—Opinion of Witnesses—Pedigree of Colt—The pedigree of a thoroughbred colt is a material thing in fixing its value, and it was important to plaintiff that he should produce to the jury the evidence of persons acquainted with the value of pedigrees and who could inform the jury touching this feature of the question they were called upon to determine.

Field McLeod, Chas. M. Harris and Humphrey & Humphrey for appellant.

D. T. Edwards for appellee.

Appeal from Woodford Circuit Court.

Opinion of the court by Judge Carroll, reversing.

The appellee, on September 5, 1906, shipped from Versailles, Kentucky, to Louisville, Kentucky, over the appellant railway, six yearling thoroughbreds. The colts were shipped to be sold at a public sale in Louisville on September 8th. They were loaded at Versailles on the morning of September 5th, and in the usual course of transportation should have reached their destination on the afternoon of the day they were shipped. They were not delivered at Louisville until the afternoon of September 6th.

Alleging that the stock were injured, and their marketable value at the sale greatly reduced by reason of the negligence of appellant in failing to transport them within a reasonable time, appellee brought this suit to recover damages for the loss sustained. A jury assessed the damage at one thousand dollars, and from the judgment on the verdict this appeal is prosecuted.

In view of the fact that there must be a re-trial of the case, we will only state so much of the evidence as is necessary to an understanding of the errors relied on for reversal.

The proof is conflicting as to the time the stock were received and when they should have been delivered in Louisville, and also as to their condition, and the loss in their marketable value sustained by the delay in their shipment. There was, however, sufficient evidence to warrant a submission of the case to the jury, and to authorize a verdict for appellee.

Serious and just complaint is made of instruction number two, which reads as follows:

"If the jury believe from the evidence that the defendant company negligently and carelessly failed to transport said six yearlings to the Central Stock Yards in Louisville, Ky., within a reasonable time, and without unusual delay, and by reason of the negligence and carelessness of the defendant company, if any proven, the said six yearlings or any of them became sick or ill or feverish or contracted a disease, and were reduced in health or strength, quality or value, they should find in damages for the plaintiff the difference, if any proven, between the fair vendable market value of said yearlings or any of them on September 8, 1906, at Douglass Park, Louisville, Ky., if the said six head of yearlings were transported to the place of their destination named in the contract of shipment in the ordinary and usual condition had they arrived there within a reasonable time and without unusual delay, and the amount said yearlings sold for in the condition they were in on the 8th day of September, 1906, not exceeding in all five thousand dollars. Unless the jury so believe, they will find for the defendant."

The radical error in this instruction is that it fixed the measure of damage as the difference between the value of the stock if they had been transported within a reasonable time and without unusual delay, and the amount they sold for at the public sale. It was competent to prove what the stock sold for at the public sale, as a circumstance tending to show their value, and to show that the fair market value was not realized for them. But, what they brought at the sale was not the test of the depreciation in their market value that should have been submitted to the jury. If the stock had been in first class condition and had been transported within a reasonable time, and with the usual care, they might not have brought at the sale one-half of their real or market value. On the other hand, they might have sold for more than their real or market value. The sale may have been poorly attended, not well advertised, held at an inopportune time or an unfavorable place, the day may not have been suitable, the persons conducting the sale may not have had the confidence of buyers. We merely mention these as a few of the many illustrations that might be given for the purpose of showing that what the colts brought at the sale was not a fair test of the depreciation in their market value caused by the delay in shipment. Appellee was entitled to recover the difference, if any, between the fair market value of the stock in the condition they would have been if they had been transported with ordinary care, reasonable diligence and within a reasonable time, and the condition they were in when delivered at Louisville. (C., N. O. & T. P. Ry. Co. v. Pendleton & Hudson, 29 Ky. Law Rep., 721; Newport News & Mississippi Valley R. Co. v. Mercer, 16 Ky. Law Rep., 555; Hutchinson on Carriers, section 1366.)

It may be conceded that this rule by which to measure the loss sustained is not by any means accurate or entirely satisfactory, but it is the best available under the circumstances. In cases like this all that the shipper is entitled to is compensation for his loss resulting from the delay of the carrier in the shipment. It will be readily agreed that the amount lost is in most instances the depreciation in the fair market value of the stock resulting from the delay, but it is often troublesome to ascertain with reasonable certainty the amount of this loss. Generally speaking, what property brings at a public sale is a fair test of its value, and in some instances it may be the only available test. For this reason it is considered competent for persons shipping live stock for sale to introduce as evidence the price they brought on the market, but this is not the only nor is it a conclusive test. It is only one of the means by which the value of the

property and the loss may be ascertained. The opinion of witnesses who saw the stock, or who knew its condition, or the injury it received, or the depreciation in its market value, is also competent evidence, but neither is it conclusive. All these facts, and any others that throw light upon the condition of the stock, the injury they received, and the depreciation in the market value, the jury have the right to consider in making up their verdict. But, it is not proper to single out in an instruction by which the jury must be controlled any particular standard of value or loss other than the depreciation in the market value. The jury should be allowed, after hearing the evidence, to fix for themselves from the evidence the depreciation in the fair market value, and not be confined by the court to what the property sold for or to the opinion of witnesses as to its value.

It is further complained by appellant that the trial court permitted incompetent evidence to go to the jury. The evidence objected to was made by witnesses who had never seen the colts shipped by appellee and who were not present at the sale when they were offered. These witnesses were gentlemen engaged in the purchase, sale and breeding of race horses, and were familiar with the pedigrees and breeding of appellee's colts. After the colts had been described to them, they were asked in substance to examine the catalogue containing the description and pedigree and state what would be the fair market value of each of them on the 8th day of September, 1906, at Douglass Park, Louisville, Ky., if they had been shipped from Versailles on the morning of the 5th, and had arrived at Louisville in the usual time and in the usual condition. Their estimate of the value of the colts was based largely on the knowledge of the witnesses touching their pedigree and breeding. It is argued that this evidence was too speculative to be admissible and it is said that a witness who has never seen a colt that he is asked to fix a value on would be venturing an opinion not based on sufficient knowledge to make it competent. In this opinion we do not concur. The pedigree of a thoroughbred colt is a material factor in fixing its value, and, in the estimation of many persons, it is more important than the individuality of the animal, its style, bearing and movement, the shape of its body and limbs and general conformation. It is also true that a horse may have a fine pedigree and yet be deficient or defective in some important particulars that could only be discovered by inspection, and that the picture of a horse, whether it be a pen picture, a photograph or a word picture, might convey an inadequate idea of its value and furnish an erroneous impression as to its qualities. But these facts go more to the weight of the evidence than to its competency. There is a wide difference between the weight that a court or jury may and ordinarily will attach to evidence, but if the offered evidence is competent the question of its probative value is for the jury trying the case. Expert and opinion evidence is allowable in many cases, although the expert may have no personal knowledge of the particular thing he is called on to express an opinion concerning and may never have seen it. We do not deem it appropriate, within the proper scope of this opinion, to elaborate upon the class of character of cases in which expert and opinion evidence is allowable. It embraces a wide field and covers a variety of subjects concerning which jurors may be unable to come to a correct conclusion without the aid of the testimony of persons who have made the subject a study. But, confining our remarks to the matter particularly in hand, we may say that a trader or dealer in stock, or a person who is qualified by experience, may give evidence as to the value of cattle, hogs and other animals that have a market value although he may never have seen them. If these colts had not been thoroughbreds, it would have been admissible to prove their value by persons who had experience in the

breeding or purchase and selling of colts; but, as they were thoroughbreds, and their pedigree and breeding alone were material elements in fixing their value, it was especially pertinent to allow witnesses who knew the value of the pedigree as well as the value of colts generally to testify. The breeding and care of thoroughbreds has been made a special study by many persons. It has become a business of wide importance. Registers are kept, books are written, and papers, almost daily, published devoted to explaining and exploiting the performance of sires and dams, and the value of certain strains of blood. Thoroughbreds have a market value, and it is regulated in a large measure by the pedigree, although the value is not controlled by standards as reliable or accurate as is the market value of cattle or hogs or sheep or other animals that are daily sold in the open and established markets of the country. A jury composed of persons not acquainted with the value of pedigree might be disposed to attach little importance to this well recognized factor in fixing the value of a horse. It was therefore important to plaintiff that he should produce to the jury the evidence of persons acquainted with the value of pedigrees, and who could inform the jury touching this feature of the question they were called upon to determine. (*Fleming v. McClaffin*, 1 Indiana Appellate Reports, 537; *Miller v. Smith*, 112 Mass., 470; *Brown v. Hoberger*, 52 N. Y., 15; *Bourne v. Moore*, 32 Mich., 254; *Cantling v. Hannibal & St. Joseph R. Co.*, 54 Mo., 385, 14 Am. Rep., 476; *Bowers v. Horen*, 93 Mich., 420, 32 Am. Rep., 513; *St. Louis Ry. Co. v. Edwards*, 78 Fed. Rep., 745.)

For the error mentioned in the instruction, the judgment must be reversed with directions for a new trial consistent with this opinion.

UNITED STATES FIDELITY & GUARANTY CO. v. MILSTEAD.

(Filed April 24, 1908—Not to be reported.)

1. Principal and Surety—Action Against Bonding Company for Injuries Inflicted by Police Officer—Bonds—Extent of Liability—In this action by appellee against appellant for injuries received by the reckless shot of a policeman whose bond was made by appellant, the rule announced in *Growbarger, &c. v. U. S. F. & G. Co.* is followed, in holding that section 3752, Kentucky Statutes, must be read into the policeman's bond in order to determine the extent to which the surety may be held liable. In view of this, the amount that may be recovered is not limited to the \$1,000 named in the bond.

2. Punitive Damages—Recovery of as to Whom—In such a case punitive damages may be recovered of the officer, but only compensatory damages of the surety in the bond.

3. Excessive Damages—Extent of Injury—In view of the serious character of her injuries and their permanency, it can not be said that the verdict is excessive.

L. F. Zerfoss for appellant.

R. S. Dinkle and Watt M. Pritchard for appellee.

Appeal from Boyd Circuit Court.

Opinion of the court by Wm. Rogers Clay, Commissioner, affirming.

On Sunday, March 25th, 1906, while appellee, Emma Milstead, was standing in the rear of the kitchen of the dwelling-house of Mrs. Tierman, in Ashland, Kentucky, a shot was fired by a man by the name of Sol Wood, the ball passing through the window of the kitch-

en and striking appellee in the breast. At the time he fired the shot, Wood was a policeman of the city of Ashland, and, as such, was attempting to arrest one Charlie Bryant, whom he had pursued from the city lockup from which said Bryant had escaped while incarcerated therein on a charge of drunkenness. This action was instituted in the Boyd Circuit Court by appellee against Sol Wood and his surety, the United States Fidelity and Guaranty Company, to recover damages for the injury received. The trial resulted in a verdict and judgment against the defendants below for \$3,000 damages. From this judgment the United States Fidelity and Guaranty Company prosecutes this appeal.

Appellant first contends that the court erred in refusing to instruct the jury limiting the liability of appellant to \$1,000, its covenant in the contract sued on. The bond executed by appellant was in the sum of \$1,000. The Kentucky Statutes, section 3497, provides:

Every policeman, before he enters upon the duties of his office, shall give bond, with approved surety, before the mayor, to the Commonwealth of Kentucky, in the sum of one thousand dollars, for the faithful performance of the duties of his office; and for any unlawful arrest, or unnecessary or cruel beating or assault in making an arrest, he and his bondsmen shall be liable to the person so injured on said bond."

Section 3752 provides: * * * "And the recovery against principal and surety shall not be limited by the amount of the penalty named in such bond."

Counsel for appellant contends that these two statutes are of equal dignity and should be construed so as to give effect to both; that in order to do this, it should be held that the latter provision does not apply to municipal corporations where the Legislature has provided a different rule. This question, however, has been decided adversely to the contention of counsel in the case of *Growbarger, &c. v. United States Fidelity & Guaranty Co. &c.*, 31 Ky. Law Rep., 555, 102 S. W., 873. In that case, Stevens, marshal of the town of McHenry, after arresting W. L. Growbarger and while having him in custody for a misdemeanor, shot and killed him. His widow and administrator instituted an action against Stevens and his surety on his official bond, to recover of them \$20,000 damages. The bond executed by Stevens and his surety was similar to the bond sued on in this action, the penalty therein named being \$1,000. The surety contended, as does appellant in this case, that it was liable on said bond only to the extent of \$1,000. In passing upon the question this court said:

"The question is, we think, settled by section 3752 of the statutes, *supra*, which allows actions on such a bond as that here sued on by appellant, and in addition contains the following provision: 'And the recovery against the principal and surety shall not be limited by the amount of the penalty named in such bond.' The bond, being controlled by the section *supra*, must be considered in connection with it. In other words, the provisions of the statute must be read into the bond in order to determine the extent to which appellee may be held liable, in the event appellant on the trial shows herself entitled to recover at all. (*Moss v. Rowlett*, 112 Ky., 121, 65 S. W., 153, 358.) Treating the provisions of the section *supra*, as a part of the bond, we conclude that the amount that may be recovered is not limited to the \$1,000 named therein, but, while this is true if appellant shows herself entitled to recover, the jury can not properly award her punitive damages as against appellee. Punitive damages may be recovered of the marshal, Stevens, but only compensatory damages can be recovered of the surety in his official bond."

The next ground relied upon by appellant is that the damages are excessive. The evidence shows that the wound was inflicted by a ball

from a 38-calibre pistol. This ball penetrated the breast-bone. Appellee was chloroformed, and the physician used an auger and chisel and drilled into the breast-bone, finally extracting the ball. After the ball was removed appellee lay in bed for about two weeks. Thereafter she got up and walked around the house. Subsequently she took employment, but was compelled to quit and have another operation performed. The second operation was performed in June. The wound was cauterized, but it did not heal until the latter part of August. This trial was had in February, 1907, almost a year after the injury. The record shows that appellee could not then do heavy housework, such as sweeping and lifting or washing, and could not press her shoulders back. When it was damp weather she could not lift anything. Had pains from the injury, and could not lie on her left side. Dr. B. S. Rice, a graduate of a medical college, testified that the injury to appellee was permanent; that the operation, which consisted of drilling into the breast-bone in order to extract the bullet, necessarily weakened the breast-bone to such an extent that she could not lift anything heavy or do work that required strength, such as sweeping, washing, or any house-work; that this weakness would continue as long as she lived. It is a well-settled rule of this court not to reverse a case on the ground of excessive damages except where the verdict is so flagrantly excessive as appears at first blush to have resulted from passion and prejudice. (Louisville & Nashville Railroad Co. v. Mitchell, 87 Ky., 327.) Appellee in this case is 28 years of age. She must have suffered intensely, both physically and mentally. Before her lies a long life. Her strength and power to work will necessarily be impaired by the large hole which was made in her breast-bone in order to extract the bullet. Under these circumstances, we are unable to say that the verdict for \$3,000 is excessive.

It is next insisted that the court erred in permitting Dr. B. S. Rice to be asked and to answer certain questions. It does not appear, however, that appellant relied upon this alleged error as ground for a new trial; that being the case, it will not now be considered by the court.

The instructions given by the trial court are not seriously complained of. We have carefully examined them, and are of the opinion that they fairly presented the law of the case.

Perceiving no prejudicial error in the record, the judgment is affirmed.

L. & N. R. R. CO. v. GORMLEY.

(Filed April 24, 1908—Not to be reported.)

1. Railroads—Shipment of Stock—Pleadings, Proof, Instructions—In this action by appellee against appellant for injury to a horse in shipment, the only issue made by the pleadings, outside of the extent of the injury, was as to whether it was received by the horse in being removed from the car, or in being caused to jump from the platform to the ground, and the trial judge refused to instruct upon this point, and made the case turn upon an issue which was not raised by either pleadings or proof. This was error.

2. Same—Appellee was entitled to recover, if at all, for an injury which was the direct cause of the accident, and in order to ascertain the extent of the injury, it would be competent to show the condition of the horse immediately after the accident and following it down to the date of the trial.

Benjamin D. Warfield, J. A. Sullivan and John T. Shelby for appellant.

Smith & Smith for appellee.

Appeal from Madison Circuit Court.

Opinion of the court by Judge Lassing, reversing.

In September, 1906, the appellee W. C. Gormley shipped a horse from Richmond, Kentucky, to Harriman, Tennessee. The point of destination was beyond the lines of the appellant company and upon the Southern Railway. The car containing the horse was carried by the appellant company to a point called "Coal Creek," on its line, where the appellant company connects with the Southern Railway Company, but, for some reason unexplained in the record, the Southern Railway refused to receive the car containing the horse and appellee had either to unload the horse and re-ship it in a car of the Southern Railway Company, or, else have the car shipped back to Jellico on the appellant company's line, a distance of some thirty or forty miles, where the car itself could be transferred to and would be received by the Southern Railway Company for transportation on to its destination, Harriman, Tennessee. There were no cattle pens at Coal Creek, and no chute or other facility for the loading or unloading of stock from cars. The platform at the depot was about the same height as the floor of the car, but was some four or five feet from the edge of the car, so that, if the horse was to be unloaded from the car at that point, it could only be done by bridging this distance, and then by improvising some means to get the horse from the platform to the ground.

There is no difference or dispute between appellant and appellee as to the facts connected with this case about the shipment until the Southern Railway refused to receive the car containing the horse from the L. & N. R. R. Co. Appellant insists that it thereupon notified the man in charge of the horse that the Southern Railway Company would not receive the car and that they would have to carry it back to Jellico, at which point the Southern Railway would receive it, as they had no facility for unloading the horse there. Whereas, appellee contends that when the car reached Coal Creek his agent and servant in charge of the horse was directed to unload or remove said horse from the car as the Southern Railway would not receive the shipment, and that in compliance with the orders of and under the direction and supervision of its station agent, the horse was unloaded from the car, and, while being so unloaded was injured.

Appellant alleges that when it offered to take the horse back to Jellico, the man in charge thereof objected on the ground that this would occasion a considerable delay and proceeded to make arrangements to unload the horse so that it could be re-shipped over the Southern Railway. That he improvised a bridge from the car to the depot platform, and forced the horse out over same and then caused the horse to jump from the platform to the ground, a distance of four or five feet, thereby causing the injury, if any, complained of.

It is not charged that the horse was injured in any wise during the trip from Richmond to Coal Creek, so that any injury which resulted to him must have occurred while he was being unloaded from the car to the platform or jumped from the platform to the ground. The answer charges that it was the duty of the appellee to load and unload the horse. That the only duty that appellant had to perform in connection therewith was to furnish the necessary hands or assistants. The reply admits that it was the duty of appellee to unload

the horse and it is not denied that appellant furnished all the help that was needed to properly do so.

The whole case, so far as the question of appellant's negligence is concerned turns upon the point as to whether or not appellee voluntarily undertook to take the horse from the car at Coal Creek, or whether he did so under the order and direction of appellant. It is admitted that appellant company had no suitable means at Coal Creek for loading or unloading stock, in fact it had no means at all for doing so. The only way that it could be done was the way in which it was attempted to be done, to-wit: by taking some scantling and improvising a bridge from the car-door to the platform and from the platform to the ground. It seems that with the aid and assistance of two or three helpers the distance between the car and the platform was bridged, but that no effort was made to provide a means for taking the horse from the platform to the ground, and that the man in charge thereof caused him to jump to the ground. Whether the injury, if any, was received by the horse in being removed from the car to the platform or in being caused to jump to the ground is not clear.

The only issue made by the pleadings, outside of the extent of the injury, was that above indicated. All of the proof taken was directed along this line, but the trial judge refused to instruct the jury upon this point, although requested to do so, and made the case turn upon a question which was not put in issue by either the pleadings or the proof, and of this ruling the appellant complains.

Under its contract and agreement to transport this horse from Richmond, over its line and the line of its connecting carrier, to Harriman, Tennessee, it was the duty of appellant, to provide a suitable car in which to ship the horse, and, after having received it, to transport it to its destination safely and without unreasonable delay. For any failure on its part to do so it would be liable to appellee for such damages as he sustained thereby. If, in the course of such shipment, it carried the horse out of the way so as to cause an unusual and unnecessary delay in the shipment, and, by reason thereof appellee's horse was injured, or appellee was prevented from keeping his horse's engagements in the trots or races in which he was entered, if the purposes for which he was being shipped were known to appellant, then appellant would be liable to appellee for such damage as he sustained thereby. But, the fact that the horse was carried out of the usual way or course of shipment and his delivery at the point or destination was materially and unnecessarily delayed would not warrant or authorize appellee in removing him from the car at a place where no suitable means was provided for such removal and run the risk of injuring him. And if appellee or those in charge of the horse, representing him, did so without the consent of appellant then appellant should not be held liable for any injury which the horse may have received while being thus removed from the car. The company pleaded that it stood ready, willing and able to perform its contract, and that had it been permitted to do so it would have safely delivered the horse at its destination. That while the horse was in its care and custody and it was permitted to exercise control over it, it was uninjured, but that the man in charge thereof and without its consent and over its objection, insisted on taking the horse from the car at Coal Creek, although he knew and understood that the company was provided with no suitable means for unloading it at that point, and that while appellee's agent was so unloading the horse, it was injured.

Appellant insists that for this injury it is in no wise liable, but that it was due solely to the act of appellee's agent, the man in charge of the horse. We are of opinion that appellant is correct in its con-

tention that this issue should have been presented to the jury by appropriate instruction. We are further of opinion that the pleadings in this case warranted the presentation of no other issue than this, outside of the question of the extent of the injury, if any, which the horse received. The question of the suitability or unsuitability of the means provided for unloading live stock at Coal Creek was not in issue, and should not have been presented to the jury at all, for it was expressly admitted that the company had, at that point, no facilities whatever for the loading or unloading of live stock, and the company expressly denied that it attempted to or authorized the said horse to be unloaded at that point.

Appellant also complains of instruction number one, as given by the court because it did not clearly instruct the jury on the measure of appellee's damage, if any. The objection being to the use of the word "immediately" before he was injured and "immediately" after he was injured. Technically construed this instruction is, perhaps, objectionable, but it was more favorable to appellant than otherwise, for strictly construed it limited the damages to such injury as was ascertainable immediately after the accident, whereas appellee was entitled to recover, if at all, for all injury which was the immediate or direct result of the accident, and, in order to properly ascertain the extent of this injury it would be competent to show the horse's condition, not only immediately after the accident, but following same down to the date of the trial.

For the reasons given the judgment of the lower court is reversed and cause remanded, for further proceedings consistent with this opinion.

TAYLOR & CRATE v. BURT & BRABB LUMBER CO.

(Filed April 24, 1908—Not to be reported.)

1. Lands—Boundary of—Rule—In this State a claimant entering upon land under a deed describing a boundary intending to take possession of the entire tract, no part of which is at the time of his entry actually possessed by any other claimant holding adversely to him, is by construction and intendment of law in the actual possession of all the land included within the boundary of his deed.

2. Title—Property—Having alleged and proved title by prescription, the trees were plaintiff's property, and it was entitled to maintain either detinue or trespass, and owning the land, it was immaterial whether it was actually in possession of it or not at the time the timber was cut.

O. H. Pollard, W. B. Dixon and E. R. Bosley for appellants.

J. J. C. Bach for appellee.

Appeal from Breathitt Circuit Court.

Opinion of the court by Judge Barker, reversing.

The plaintiff (appellant) alleges in its petition that it is a corporation, and that it owns and is in possession of a large tract of land in Breathitt county, Kentucky, which is described by metes and bounds and is alleged to contain three thousand six hundred acres; that the defendant trespassed upon its land, and wrongfully and unlawfully and with force and arms and against its will and consent cut down thirty-five valuable poplar trees, which were then standing on it.

and cut these trees into saw-logs, numbering one hundred and five in all, which it hauled off and wrongfully detained from the plaintiff. The logs are alleged to have been reasonably worth the sum of three hundred and fifteen dollars, and the plaintiff has sustained damages in the sum of two hundred dollars for their detention. The petition contains a prayer to be placed in possession of the logs, and defendant trespassed upon its land, and wrongfully and unlawfully detained of the property.

The answer places in issue all of the material allegations of the petition, and, in the second paragraph, sets out a tract of one hundred acres of land within the boundary contained in plaintiff's petition; and this one hundred acres, it alleges, belongs to and is owned by one Samuel Richie, from whom it purchased all of the growing timber thereon. The answer further alleges that the logs in question were cut from the Richie tract.

Plaintiff admits that it does not own the one hundred acres described in the answer, and alleges that the logs were not cut therefrom, but from the plaintiff's land outside of the boundary of the Richie tract, called the James Bradley patent.

The issue was a very simple one, and turned upon the sole question as to whether the logs were cut from the Richie tract of one hundred acres (Bradley patent) lying within plaintiff's boundary of three thousand six hundred acres, or whether they were cut from plaintiff's land outside of the Richie boundary.

Upon the trial of the case before a jury, after the evidence was all in, the court gave the following instructions:

"1st. If the jury believe from the evidence that the logs in controversy were cut by defendant, from the boundary of land described in the petition, and outside the boundary lines of the James Bradley patent, and that the plaintiff was in the possession of said land, at the time they were cut, they will find for the plaintiff said logs, if to be had, and if not to be had, the value of said logs, not to exceed \$315.00. Unless they so believe they will find for defendant.

"2nd. The possession of the son of Sam Richie of the 100 acres conveyed to him by James Bradley does not give possession to said Sam Richie, or his son, of any land lying outside of said 100-acre boundary."

Whereupon the jury returned a verdict in favor of the defendant, and the court entered a judgment dismissing the petition. Its motion and grounds for a new trial having been overruled, the plaintiff questions the correctness of the judgment against it by this appeal.

We do not consider it necessary to set out the evidence in this case with minute particularity. We deem it sufficient to say that, after a careful consideration of it, we think the verdict of the jury was flagrantly against its weight, and the court should have sustained plaintiff's motion for a new trial. The plaintiff showed, practically without contradiction, that its vendors entered into possession of the tract set up in the petition under a deed, and that these vendors and the plaintiff had been in the continuous, adverse possession of the tract for twenty-five to thirty years, claiming to own it to a well-defined boundary. It made no claim to the one hundred acres embraced in the Bradley patent, only claiming all of the tract outside of this patent; and it further showed, beyond a question, that the logs were cut from the land outside of the Bradley patent. It was clearly entitled, upon the evidence, to a verdict at the hands of the jury.

The rule of law in this State is well settled, that a claimant entering upon land under a deed describing a boundary intending to take possession of the entire tract, no part of which is at the time of his entry actually possessed by any other claimant holding adversely to him, is by construction and intendment of law in the actual posses-

sion of all the land included within the boundary of his deed. (Harrison v. McDaniel, 2 Dana, 349; Moss, &c. v. Currie, &c., 1 Dana, 267; Thomas v. Harrow, 4 Bibb, 563; Brauth v. Hahn, 23 Ky. Law Rep., 1261; Ellicott v. Pearl, 10 Peters (U. S.) 412, 442, 445; Scott v. Mineral Development Co., 130 Fed. Rep., 497.)

The plaintiff established an actual possession of the land described in its petition outside of the Bradley patent, which had fully ripened by lapse of time into a valid title prior to the trespass complained of; and this being true, it was the owner of the logs cut by the defendant. And, therefore, the technical question raised by the defendant, that the action was in detinue and not trespass, is entirely immaterial here. Having alleged and proved a title by prescription, the trees were plaintiff's property, and it was entitled to maintain either detinue or trespass, as it saw proper.

The conclusion we have reached will necessitate a reversal of the case, and upon another trial the court will give substantially the same instructions as were given before, except the sentence "and that the plaintiff was in the possession of said land at the time they were cut" should be omitted. If the plaintiff owned the land, as we think it did, it was immaterial whether it was actually in possession of it at the time the logs were cut.

Judgment reversed for proceedings consistent herewith.

MAY v. MAY, &c.

(Filed April 24, 1908.)

Conveyances—Fraud—Purpose to Cheat Wife—The evidence in this action examined and held that the facts authorize the belief that the sale of the land in controversy was a fraudulent device entered into to cheat the wife of her marital right to a support out of the property of her husband, therefore it was error for the lower court to adjudge the conveyance valid.

D. D. Sublett for appellant.

R. H. Cooper for appellees.

Appeal from Magoffin Circuit Court.

Opinion of the court by Judge Barker, reversing.

The appellant, Julia May, instituted this action against her husband, Smith May, for a divorce on the ground of abandonment. In her petition, she set out by metes and bounds two tracts of land which had belonged to her husband just prior to the abandonment complained of, and which she alleged he had fraudulently conveyed to his brother, the defendant, W. X. May, for the purpose of cheating and defrauding her, his wife. She obtained an attachment under section 2124 of the Kentucky Statutes, which she caused to be levied upon the land in question, and prayed that the deed from her husband to his brother, W. X. May, be vacated and set aside as fraudulent and void. All of the allegations of the petition with regard to the land were placed in issue by the defendant, W. X. May, and, after the evidence was taken, the case was submitted to the chancellor, who dismissed the petition as to W. X. May, holding that the deed from Smith May to his brother was valid, and awarded the brother a judgment for his costs against the abandoned wife.

Ordinarilly, this court is exceedingly loath to differ with the chancellor as to his conclusion on the facts of a case submitted to him;

but we think that the judgment in the case at bar, holding the deed from Smith May to his brother to be legal and valid, was clearly erroneous. The facts in the case are few and practically without contrariety. Some six months before he abandoned his wife, Smith May executed and delivered to his brother a mortgage on the property in question to secure the payment of a note of four hundred dollars. W. X. May is exceedingly vague in his testimony as to when and where he loaned his brother the various sums which went to make up the aggregate of four hundred dollars which he claims the mortgage was executed to secure. But, inasmuch as Mrs. May joined in, and acknowledged this mortgage, we have concluded, though with some doubt, that she ought not now to be permitted to question it. Afterwards, and on the very day the husband abandoned his wife, W. X. May claims to have paid him two hundred dollars in addition, and then took a deed of absolute conveyance of the whole property upon the recited consideration of six hundred dollars. Mrs. May did not join in this deed, and knew nothing of its execution. On the night of this day, W. X. May assisted his brother to move out the furniture from the home, and abetted him in abandoning his wife and little babe, leaving her without a penny in the world, so far as this record discloses. W. X. May also admits that his brother, who went to Ohio, has since sent him money with which to defend this action.

Taking these admitted facts as a whole, we have no doubt that the sale of the property by the husband to his brother was a fraudulent device entered into to cheat the wife of her marital right to a support out of the property of her husband. If this conclusion be deemed harsh, the answer is that the man who admits aiding and abetting a husband in abandoning an invalid wife with a helpless babe, leaving them dependent upon the world's cold charity, has no just ground to complain that the court views all of his actions with suspicion, and awards to his testimony but little weight in the establishment of any disputed question of fact.

For these reasons the judgment is reversed, with directions to enter a judgment setting aside the deed from Smith May to W. X. May, and holding the latter responsible to appellant for any rents or profits he has received from the land since the conveyance to him was made.

BORDERS, &c. v. ALLEN.

(Filed April 28, 1908—Not to be reported.)

Deeds—Mortgages—Action to Adjudge Mortgage—Evidence—In this action to adjudge a mortgage what appears to be an absolute deed, the testimony and circumstances detailed examined, and held that the weight of it shows that the trial court should have held the writing to be a mortgage and not a deed.

O'Neal & Carter and G. W. Castle for appellants.

M. S. Burns and R. T. Burns for appellee.

Appeal from Lawrence Circuit Court.

Opinion of the court by Judge Lassing, reversing.

Appellants filed suit in the Lawrence Circuit Court to have a deed, absolute on its face, adjudged a mortgage. Issue was joined on this question and proof taken; upon final hearing the trial judge dismissed the petition, hence this appeal.

The land involved in this controversy originally belonged to J. F. D. Borders. It was sold at decretal sale and appellee became the purchaser. Borders alleges that the purchase was made for his benefit, this appellee denies, but be that as it may, thereafter appellee and Borders entered into the following agreement:

"Article of Agreement by and between J. F. D. Borders, and Frank Allen, in which said Allen agrees if on or before January 1, 1904, said Borders pays said Allen \$100. I Frank Allen agrees to make a deed to said Border of a tract of land formerly owned by him being now in possession, but if said \$100 is not paid on January 1, 1904, then I J. F. D. Borders will give said Allen possession of house and lands and all appertenance thereunto.

"FRANK ALLEN,
"J. F. D. BORDERS."

At the date when the \$100, provided for in this agreement, should have been paid, they entered into a new agreement, which is as follows:

"Article of Agreement made and entered into this January 4, 1904, between Frank Allen and J. F. D. Borders, the said Borders agrees to pay the said Allen one hundred and five dollars on or before the 10th day of February, 1904, for which the said Allen is to make a deed to the lot just below the said Allen store which was previously owned by the said Borders. If the said Borders fails to pay the above named sum of money, the said Borders is to give up possession at once with all the appertenances thereunto belonging.

"FRANK ALLEN,
"J. F. D. BORDERS."

"It is further understood that said Borders is not to sell said lot to any one until the said Allen gets the above sum of money.

"Attest: I. H. BORDERS."

The new agreement called for the payment of \$105 for the land on or before the 10th day of February, 1904. Appellee alleges that when the \$100 was paid him in January he was requested to convey the land to William Borders, another brother of appellants, but that inasmuch as the contract with J. F. D. Borders stated that the deed should be made to him, he declined to make the deed to William Borders, although he was assured by Ira Borders, another brother, that it would be all right, but that, as the second contract did not say to whom the deed should be made, when the \$105 was paid to him he made the deed to M. F. Borders, appellant, although at the same time he signed a receipt stating that he had received of Anderson, Borders, for J. F. D. Borders, \$105 for the lot.

On August 9 following the deed in question was executed by M. F. Borders and wife to appellee, Frank Allen, for the alleged consideration of \$52.50. This deed was lost, and on December 15, 1904, M. F. Borders and his wife executed to appellee another deed in lieu thereof, and it is alleged and not denied that before they would do so they required appellee to pay the further sum of \$10. While these transactions above enumerated were going on appellant J. F. D. Borders was occupying and in posesion of at least a portion of the property involved in this litigation, except such time as he was temporarily in another county, engaged in the lumber or logging business. It has been frequently held, and is now the well settled rule, not only in this court, but in courts generally, that a deed, absolute on its face, will be construed to be a mortgage, if, at the time it was executed, the parties intended it to operate as such, the aim of the court, in each instance, is to arrive at the intention of the parties.

Directing our attention to that end in this case, we find that appellant M. F. Borders testified emphatically that he never received but \$50 at the time of the execution of the original deed. That the recitation in the deed of the payment of \$52.50 is not correct. That this represents the amount of money, in fact, which he had to repay to appellee at the end of sixty days, the \$2.50 being the amount of the agreed interest which he should pay for the accommodation of the loan. Appellee admits that he was approached by M. F. Borders on as many as two different occasions between the time that the deed was executed to M. F. Borders in February and the time the trade was consummated and the transaction closed in August, and was requested to make a loan; he says that he declined to do so, but offered to purchase. He had sold this property the 10th of February for \$105, and says that in August, or six months thereafter, he bought it outright for less than one-half of what he considered its value in February. If he had paid to M. F. Borders something like the real value of the property, his claim would present more of merit; but when we consider the fact that he knew this property had been paid for by J. F. D. Borders, and that he and his brother were financially involved, and were liable to have subjected to the satisfaction of their existing debts any property the title to which might be in their name, the testimony, not only of M. F. Borders, but of J. F. D. Borders as well, is most plausible as to these transactions. Appellee admits that he only paid \$50, \$25 in cash and \$25 in trade at his store, and his explanation of the entry of the \$2.50 additional is not satisfactory. Weighing his testimony against that of M. F. Borders, and considering the facts and circumstances surrounding the transaction, as detailed by appellee himself, we are of opinion that the weight of the testimony is with appellants, and the trial court should have held the writing in question to be a mortgage and not a deed. It is not contended that the deed made later, in December, constituted a purchase of the property, for appellee himself testifies that this conveyance was made to supply the deed which was lost, hence, the deed made in August being but a mortgage, the deed made in December was likewise a mortgage, although appellee paid to appellants \$10 to secure the execution thereof.

For the reasons indicated the judgment is reversed and the cause remanded, with instructions to the trial court to enter a judgment in conformity with this opinion, giving to the appellee a judgment for his debt of \$50, with 6 per cent. interest thereon from August 10, 1904, until paid, and the further sum of \$10, with 6 per cent. interest thereon from December 10, 1904, until paid; and ordering and directing the property described in the pleadings, or enough thereof for that purpose, to be sold to satisfy the debt, interest and cost. He will give to appellants a reasonable time, not exceeding thirty days from the date of the entry of the judgment herein, to satisfy said judgment debt before advertising the property for sale.

BANKERS FRATERNAL UNION, &c. v. DONAHUE.

(Filed April 28, 1908—Not to be reported.)

1. Burden of Proof—Bill of Exceptions—Motion for new trial—The alleged error in allowing appellee the burden of proof was not made a ground for a new trial, and because this court will not now consider this question, it is unnecessary to determine who had the burden of proof.

2. Evidence—Submission of Case to Jury—The evidence with reference to the sanity of the deceased was conflicting, and was properly submitted to the jury.

3. Insurance—Fraternal Order—By-laws—Attached to Certificate—Suicide—Section 679, Kentucky Statutes, is held by the uniform decisions of this court to apply to such fraternal orders as appellant.

4: Instructions—The giving of instruction 2, which authorized a greater sum to be recovered than provided for in the contract if the jury believed that deceased was sane when he suicided, was not prejudicial in view of the fact that the verdict was based upon the fact that he was insane at the time he took his life.

Lieber & Lincoln for appellants.

Edward F. W. Kaiser for appellee.

Appeal from Jefferson Circuit Court, Common Pleas Branch, First Division.

Opinion of the court by Wm. Rogers Clay, Commissioner, affirming.

In October, 1903, John J. Donahue made application to the Bankers Fraternal Union, a fraternal society, for membership, and thereafter, during the same month, his application was accepted. On the 31st day of October, 1903, Donahue was elected a member of Falls City Lodge, No. 91, a subordinate lodge of the Bankers Fraternal Union, and was then obligated as a member, and obtained a certificate from the society, by the terms of which it agreed and promised to pay out of its mortuary funds to appellee (his wife) the sum of \$1,000 upon satisfactory proof of the death of said John J. Donahue. Donahue continued a member of the order in good standing to the day of his death, which occurred on February 23, 1905, on which day he committed suicide by hanging himself in his stable. Thereafter appellee instituted this action on the certificate of membership, to recover of appellants the sum of \$1,000. The laws of the order provided that, in case of the death of a member by suicide while sane or insane during the first ten years of membership, his beneficiary should only be entitled to receive one-tenth of the face of the policy for each full year of membership, but with no deduction should death occur by suicide after more than ten years admission to the order. This provision was a part of the laws of the order at the time of Donahue's admission thereto, and continued to be a part of the laws at the time of Donahue's death, except that in 1905 the period of ten years was reduced to five years; and as Donahue was not a member of the order as much as five years at the time of his death, the change did not affect his contract in any manner whatsoever. When the proofs of the death of Donahue were submitted, showing that the member died as the result of his own suicidal act, appellants tendered and offered to pay the sum which they claimed Donahue's beneficiary was entitled to receive under the laws of the order. Appellants pleaded, by way of answer to the petition of appellee, that John J. Donahue committed suicide in the city of Louisville within less than two years after he first became a member of the order, and that by reason of the laws governing the order the beneficiary in said certificate was entitled to receive upon the same only one-tenth of the amount named therein, to-wit: \$100, which appellants tendered and offered to pay, together with the costs of the action, in full of its liability under said certificate. The original reply was a traverse, and joined issue on the matters of avoidance set up in the answer. An amended reply was subsequently filed, pleading that Donahue committed suicide while insane, and also that the laws of the order were not attached to the certificate in accordance with the provisions of section 679, of the Kentucky Statutes. The affirmative matters in the amended reply were controverted of record. The jury awarded appellee the sum of \$1,000, the full amount mentioned in the cer-

tificate. From that judgment the defendants below prosecute this appeal.

Counsel for appellants first insist that the trial court erred in holding that the burden of proof was upon appellee. Although appellants first filed motion and grounds for a new trial, and thereafter filed additional grounds therefor, the error complained of was not made a ground for a new trial in their original or supplemental grounds. Not having relied upon the error in question as a ground for a new trial, this court will not now consider the alleged error, and it will, therefore, be unnecessary to determine the question of who had the burden of proof. (Slater and Wife v. Sherman, 5 Bush, 211; Louisville, Cincinnati & Lexington Railroad Co. v. Mahoney's Adm'x, 7 Bush, 235; Harper v. Harper, 10 Bush, 447.)

The record shows that Donahue's death was produced by strangulation, caused by his hanging himself in his stable with a wire. Upon the question of insanity, the evidence for appellee was to the effect that Donahue was struck on the head with a milk pitcher several years prior to his death, and that the injury was a severe one. For a few days before he died, he was low-spirited and complained of his head. He corrected his children for nothing, and, when his attention was called to the fact, denied doing so. His actions were otherwise peculiar. At one time, when an insurance agent was present, he introduced the agent to his wife three times within a short period of time. Three of his cousins had been confined in the asylum. On the other hand, several witnesses testified that they knew Donahue, and saw him one or more times just prior to his death, and that there was nothing in his conversation or conduct to indicate that he was mentally unbalanced. Upon this evidence the court did not err in submitting the question of insanity to the jury, nor can we say that the verdict was flagrantly against the weight of the evidence.

But appellants complain of error on the part of the trial court in admitting certain evidence given by appellee, who was the wife of the deceased. From the rulings of the court, however, it appears that the court admitted such answers only as bore upon matters of fact that came to the knowledge of the wife outside of and in spite of the marital relations. The facts testified to were in no sense communications from or through her husband, but only matters that she observed as a rational being, just as any other person would have observed them who did not sustain such a relationship. Under the rule laid down in Metropolitan Life Insurance Co. v. Thomas, 32 Ky. Law Rep., 770, this evidence was properly admitted.

Appellants further complain of errors in the instructions, which are as follows:

"A. The court instructs the jury that if they believe from the evidence that deceased was insane at the time he committed suicide, that is, if he at said time did not have sufficient reason to know right from wrong, or did not have sufficient will power to govern his actions by reason of some insane impulse, the result of mental unsoundness, which he could not resist or control, then the law is for the plaintiff, and so the jury should find for her in the sum of \$1,000 named in policy sued on and in their discretion they may also give interest thereon from the 14th day of October, 1905, till paid.

"B. But if the jury shall believe from the evidence that when John J. Donahue killed himself he had sufficient mind to know that his act would probably result in his death, and that he performed it with that intention then the jury should find for the plaintiff in the sum of \$200 only, with or without interest, in their discretion."

It is the contention of appellants that, by the laws of the order, appellee was entitled to recover only one-tenth of the amount named in the certificate, as the death of her husband was due to suicide. It appears, however, that the laws of the order were not attached to the certificate, or made a part thereof, as provided by section 679,

of the Kentucky Statutes. Counsel for appellant insist, however, that, as the laws of the order were actually delivered to Donahue at the time of the delivery of the certificate, this was sufficient under the opinion of this court in the case of *Supreme Lodge v. Hunziker*, 27 Ky. Law Rep., 1201. In that case, however, the court simply held that, where there was a change in the by-laws, a service of a copy thereof by offering to deliver and attach it to the policy was sufficient. The court did not hold that the statute in question had no application to a case like this, where the by-laws were delivered at the time the certificate was delivered, although not attached thereto; and the case is not defended upon the ground of any change in the by-laws since that time. The statute in question has been held, by the uniform decisions of this court, to apply to such fraternal orders as appellant's in this case on contracts issued prior to the amendment thereof by the acts of 1906. (*Mooney v. Ancient Order of United Workmen, &c.*, 24 Ky. Law Rep., 1787; *Supreme Lodge v. Hunziker*, 27 Ky. Law Rep., 1201; *American Guild v. Wyatt*, 30 Ky. Law Rep., 623.) But it is further contended that the certificate in question was either controlled by the laws of the order, or it was not so controlled; that if controlled by the laws of the order, the first instruction was erroneous because it permitted a recovery of \$1,000; that if not controlled by the laws of the order, the second instruction was erroneous because it permitted a recovery of \$200, whereas appellee could not, under the laws of this State, recover anything if her husband committed suicide while sane. The jury found for appellee in the full amount of the certificate. The only theory upon which they could do this was that he was insane at the time he committed suicide. They found, then, that appellee's husband was insane. Had they found that Donahue was sane when he committed suicide and awarded appellee judgment under instruction No. 2, there would be merit in appellant's contention; but, as the jury found, as a matter of fact, that appellee's husband was insane at the time he committed suicide and based their verdict for \$1,000 upon this fact, we do not think the giving of instruction No. 2 was error for which the case should be reversed for the substantial rights of appellants were not prejudiced thereby.

Judgment affirmed.

LOUISVILLE & NASHVILLE R. R. CO. v. LAMBERT.

(Filed April 28, 1908—To be reported.)

1. Railroads—Constructing Elevated Wall in Street—Damages to Abutting Property—Subsequent Sale of Property—Effect on Recovery—The owner of a lot fronting on a street through which a railroad company constructed an elevated stone wall on which its cars were run, was entitled to maintain an action for damages for its depreciation in value caused thereby, and such right is not affected by reason of his subsequent sale of the lot before suit.

2. Same—Measure of Damages Recoverable—In an action for damages to property fronting on a street of a city by reason of the construction by a railroad company of an elevated stone wall in the street on which its cars were run, the measure of damages as to the lots sold after the completion of the wall, was the difference in the market value thereof just before it became generally known that the work would be done, and its market value just after the work was done, and as to the lot sold during the construction of the wall the measure of damages was the difference in the market value before it became generally known that the work would be done and the market value at the date of the sale of the property.

3. Same—Accrual of Cause of Action—Where an injury to real estate results from the construction of a permanent structure the cause of action accrues upon the completion of the structure.

Yeaman & Yeaman and Benjamin D. Warfield for appellant.

Clay & Clay for appellee.

Appeal from Henderson Circuit Court.

Opinion of the court by Wm. Rogers Clay, Commissioner, affirming.

Prior to March, 1901, appellant Louisville & Nashville Railroad Co. had constructed and was maintaining its tracks on Fourth street, in Henderson, Kentucky, on a level with the surface of the ground. In March, 1901, appellant was granted by the general council of the city of Henderson the right to elevate its tracks. Acting under this authority it constructed a solid stone wall through the center of the street, which, at the place where appellee's property was situated, was about 15 feet wide and over 15 feet high. At the time the authority was granted and the work commenced, appellee was the owner of two lots of ground abutting on the south line of Fourth street. One lot ran with Fourth street 200 feet, and back with Green street 238 feet. This lot was vacant property and could be said to front either on Fourth or Green streets according to the use that might be made of it. The other lot, one block distant, lay on the corner of Elm and Fourth streets, and fronted 92 feet on Elm street and 190 feet on Fourth street. After the right to build the wall and operate trains thereon had been given to appellant, and after it had commenced work on the improvement, the appellee, on June 17, 1901, sold off the first-mentioned lot, 50 feet fronting on Green street. On November 8, 1901, at which time the work had progressed to such an extent that the wall was from one-half to two-thirds built, appellee sold the remainder of the lot on the corner of Fourth and Green streets. On the 19th of September, 1902, appellee sold the lot on the corner of Fourth and Elm streets. At this date the wall had been completed and trains were being operated thereon. On the 25th day of April, 1906, appellee instituted this action to recover of appellant such damages as his property sustained by reason of the construction of said wall. A demurrer to the petition was overruled, and appellant thereupon filed an answer in which it denied any damages to appellee's property, and also pleaded the five years' statute of limitations. Upon a trial, appellee obtained a judgment for \$760. A new trial was refused, and the railroad company is here on appeal.

Appellant first contends that the court erred in overruling its demurrer to the petition. While a motion to make more specific might have been properly sustained, the petition, in effect, alleges that appellee was the owner of the lots in question; that appellant constructed the wall; that this wall interfered with the ingress and egress to and from said lots, and with the circulation of the air thereat; that the wall was so constructed as to render the grade much steeper than the grade of the tracks as they originally existed, which resulted in increased noise in the operation of the train, and caused cinders to be thrown upon appellee's property in much larger quantities; that by reason thereof appellee's property was materially damaged, in the sum of \$1,500. We are of the opinion that these averments sufficiently state a cause of action, and that the demurrer to the petition was properly overruled.

Appellant further contends that the evidence offered by appellee was inadmissible for the reason that the witnesses were permitted to testify as to the depreciation in the market value of the lot without showing that such depreciation was caused by the construction of the wall. This contention, however, is not borne out by the evi-

dence, for the record discloses the fact that each of the witnesses was asked what caused the depreciation, and each answered that it was the construction of the wall in question.

But appellant vigorously contends that, as appellee sold two of the lots before the wall was completed, he had no cause of action as to them against appellant; and that the purchaser alone, who owned the lots at the time of the completion of the wall, had the right to sue. It is well settled in this State, that the party owning the lots at the time the damage was done, has the right to sue. This right is not affected by his subsequent parting with the title. (*Stickley v. Chesapeake & Ohio Railway Co., &c.*, 93 Ky., 323.) In this case, if the property in question was damaged by the construction of the wall, some one had a right of action. If the purchaser of the property had brought suit to recover, the conclusive answer would have been that the property had been permanently damaged in its market value—if damaged at all—at the time of the purchase. He bought the property at a reduced price. He was not damaged, because he got the advantage of the reduction in the price. Who, then, suffered the damage? Manifestly the appellee, who sold the property, for, on account of the construction of the wall, he sold it for less than he could have got for it before it was generally known that the wall would be constructed.

Nor is this a case of recovery of damages for mere threatened injury. The right of action in this character of cases arises under section 242, of the Constitution, which provides for compensation for property taken, injured or destroyed by municipal and other corporations and individuals invested with the privilege of taking private property. The effect is the same as if the owner of the property consented to the taking or injury, and risked the recovery in damages for compensation. As the injury results from the construction of a permanent structure, separate suits can not be maintained for damages. The compensation to which the party whose property rights are invaded is not a sum which will compensate merely for the damage inflicted in the past, leaving the parties who may own the property in the future to recover for future damage, but is a sum which will compensate the owner for the damage which his property has sustained in the past, and which it is reasonably certain it will sustain in the future as the result of the permanent injury. (*Stickley v. Chesapeake & Ohio Railway Co., &c.*, 93 Ky., 323; *Hay v. City of Lexington*, 114 Ky., 665.)

In this case appellant not only had the right to construct the wall, but was actually engaged in its construction at the time a portion of the property was sold. The work had progressed to such an extent as to make the construction of the wall reasonably certain. While the injury to the two lots first sold was not complete, the effect was practically the same, for every person desiring to purchase the lot in question had the right to assume, and would assume, that the wall would be completed, and as a matter of fact it was completed. The appellee being the owner of the lots when thus injured, we think he was entitled to recover such damages as his property sustained.

Appellant next complains of the instructions given by the court. In order to find for appellee, the jury were told in effect that they must believe that the lots were damaged or impaired in their market value by the construction of said wall or the operation of trains thereon, by reason of obstructions to the view or to the ingress and egress to and from the same; that as to the lot that was sold after the completion of the wall the measure of damage was the difference in the market value of the property just before it became generally known that the work would be done and its market value just after the work was done; while in the case of the lots that were sold during the construction of the wall the measure of damage was the difference in the market value before it became generally known

that the work would be done and the market value at the date of the sale of the property. This instruction, we think, is in accord with the rule laid down in *Louisville & Nashville Railroad Co. v. Cum-nock, &c.*, 25 Ky. Law Rep., 1330, and *City of Henderson v. Crowder*, 28 Ky. Law Rep., 1255; the only difference being that the instruction was changed so as to conform to the facts of this case.

The next question is: When did the statute of limitations begin to run? The work was begun in April, 1901. A portion of it had been finished at the time of the sale of the first two lots. The wall was completed at the time of the sale of the third lot. The law is well settled, that, where an injury to real estate results from the construction of a permanent structure, the cause of action, accrues upon the completion of the structure. (*Louisville & Nashville Railroad Co. v. Orr.*, 91 Ky., 109; *Hay v. City of Lexington*, 114 Ky., 665; *Johnson v. Owensboro & Nashville Railroad Co.*, 18 Ky. Law Rep., 276; *Oliver v. Illinois Central Railroad Co.*, 25 Ky. Law Rep., 235.) It may be contended, however, that, as the cause of action does not accrue until after the completion of the permanent structure, and that as appellee sold two lots before the structure was complete, he thereby parted with his right of action. But this is not the case, for the purchaser did not purchase the right of action unless he paid what the land was worth before it became generally known that the structure would be erected. By buying the property at a reduced price because of the permanent injury, he left the right of action in him who owned the property when the injury to all intents and purposes was done. To hold otherwise would be to deprive the seller of a right of action for damages which he alone sustained, and to transfer the right of action to another who in fact suffered no damage. Of this rule the party causing the damage can not complain, for he responds but once for all the damages resulting from the construction of the elevated tracks and the lawful operation of the trains thereon.

In this case less than five years had elapsed after the completion of the structure before the filing of this action, and the court properly refused to submit the question of limitation as set forth in the instructions offered by appellant.

For the reasons given, the judgment is affirmed.

FIDELITY TRUST CO., &c. v. SHELBYVILLE WATER AND LIGHT COMPANY.

(Filed April 28, 1908—Not to be reported.)

1. Nuisance—Dam Across a Stream—Overflowing Land—Measure of Damages Recoverable—Character of Structure—Where, by the building of a dam across a stream the water is diverted on the land of another, the measure of damages recoverable depends on whether the structure is permanent or temporary. If it is permanent the party injured is entitled to the diminution of the value of the property injured, but if it is temporary, such as that it may be easily removed or abated, the damage is the depreciation of the rental value of the property injured.

2. Same—Limitation of Action—Extent of Recovery—In an action for damages to one's land, caused by the building of a dam across a stream and backing water thereon, where the injury is permanent, limitation begins to run from the completion of the structure, whatever it may be, that causes the injury, and the action is barred in five years, and all damages for past, present or future injury must be recovered in one action. But if the structure is temporary, successive actions may be brought for damages caused by a continuance of the injury.

William Carroll for appellants.

Willis & Todd for appellee.

Appeal from Shelby Circuit Court.

Opinion of the court by Judge Carroll, reversing.

The appellant, as trustee for Mrs. Ross, brought this action in 1906 against the appellee company to recover damages to her land alleged to have been produced by a dam erected by it across Clear Creek, that impeded the flow of the water, and caused it to overflow the land, and for injury to a private road on the land, alleged to have been caused by water that was negligently permitted to escape from a standpipe erected by the company. The petition sought a recovery for injury to the land, not its rental value. Previous to the institution of this action, there had been disagreements and controversies between the parties hereto growing out of the overflow of her lands, and in 1902 she brought a suit against appellee company, in substance the same as this, asking for damages. This action was settled under an agreement, by which Mrs. Ross conveyed to appellee company a small tract of land adjacent to the land it had previously bought of her for the purpose of building its reservoir. In 1905, the water company increased the height and length of its dam, and it is to recover damages for the overflow caused by these additions that this action was really brought.

We do not deem it necessary to state in detail the evidence. It is sufficient to say that there was evidence introduced by appellant conducing to show that the value of a few acres of her land was seriously injured by the overflows, and that they were caused by the additions to the dam, and there was evidence on behalf of appellee tending to establish that the overflows were due, not to the dam, but to extraordinary rains; and that the damage sustained by appellant was trifling.

Upon a trial of the case before a jury, appellant was awarded one cent in damages. The only question upon which a reversal is asked is for error in instructing the jury upon the measure of damages to the land caused by the overflow from the dam.

Appellant's contention is that the criterion of damage was the depreciation in the market value of the land; while appellee insists that it is the diminution in its rental value. The trial court accepted appellee's view of the law of the case, and instructed the jury that if they believed, from the evidence, "that the defendant so constructed and maintained its dam across Clear Creek by adding to the height, length or breadth thereof, so as to thereby obstruct, impede or divert the water in said creek from its natural flow or channel, so as to overflow and flood plaintiff's lands near to and adjacent to defendant's property, you should find for plaintiff therefor, in such sum as you may believe, from the evidence, will fairly compensate the plaintiff for the d'minution in the rental value of the land so flooded, from September, 1903, to the present time, not exceeding \$5,000, the amount claimed in the petition. Unless you so believe, you should find for the defendant."

It is not denied or questioned that the dam, as well as the additions made to it in 1905, are permanent. They were, and are, intended to be permanent.

The rule established by this court is that, where the improvement that produces the injury or nuisance complained of is permanent, the measure of damage is the depreciation in the market value of the property. In this class of cases, limitation begins to run from the completion of the improvement or structure, whatever it may be, that causes the injury, and the action is barred in five years from that time, and all damages for past, present or future injury must be

recovered in one action. If, however, the improvement is temporary in its character and such a one as that it may be readily remedied, removed or abated, the measure of damage is the depreciation in the rental value of the property, if it be rented out, or, if it is occupied by the owner, the damage to its use and occupation. And, in this class of cases, successive actions may be brought for damages caused by a continuance of the injury or nuisance. (City of Madisonville v. Hardman, 29 Ky. Law Rep., 253; Hay v. City of Lexington, 24 Ky. Law Rep., 1495; City of Paducah v. Allen, 23 Ky. Law Rep., 701; Pickerill v. City of Louisville, 30 Ky. Law Rep., 1239; Central Consumers Co. v. Pinkert, 29 Ky. Law Rep., 274; L. & N. R. Co. v. Whitsell, 31 Ky. Law Rep., 76; Hutchison v. City of Maysville, 30 Ky. Law Rep., 1173.)

Applying to the facts of this case the well settled principles of law applicable to it, our conclusion is that the court erred in defining the measure of damages. The question is not whether the injury is a continuing one, but whether the improvement or structure that causes the injury is permanent. If the improvement is permanent, the party seeking to recover damages is entitled to the diminution in the market value of the property injured, although the overflow or flooding as in the case before us, is not continuous, but only happens occasionally. On the other hand, if the improvement or structure that causes the injury is a temporary one, or of such a character that it might be easily removed, or abated, although the injury flowing from it may be practically continuous, the measure of damage to which the party complaining is entitled is the diminution in the rental value of the property, or in its use and occupation, as the case may be. To illustrate, if a railroad company should construct an embankment across a drain, and put into it, at the proper place, a culvert sufficiently large to carry off the water, but allow the culvert to become obstructed by debris, causing water that, except for the obstruction, would flow through, to back upon the lands, this nuisance would be treated as only temporary, although the water might remain on the flooded land for a year or more, because the thing that caused the nuisance might be readily removed or corrected. But, if there was no opening or culvert in the embankment to permit the water to go through, and consequently, in rainfalls, the adjacent lands would overflow, the injury would be deemed permanent and not temporary, although the land was only occasionally flooded—because the thing that produced the injury was permanent and so intended to be, and the structure of such a character that it could not be easily altered or the defect causing the nuisance readily remedied or removed.

It often happens that it is difficult for the trial court to determine from the facts of a particular case, whether the improvement or structure is permanent or merely temporary; and, when a state of case like this arises, it is proper to submit to the jury the question whether the improvement or structure is permanent or temporary; and, when this is done, the jury should be required to say, in their verdict, whether the damage allowed was for a permanent or temporary injury. (L. & N. R. Co. v. Whitsell, *supra*.)

Wherefore, the judgment is reversed, with directions for a new trial, in conformity with this opinion.

ADKISSON'S ADM'R v. LOUISVILLE, HENDERSON & ST. LOUIS
R'Y COMPANY.

(Filed April 28, 1908—Not to be reported.)

Railroads — Dangerous Crossings — Care Required — Question for Jury—In an action against a railroad company for killing one traveling on a public highway at a dangerous crossing the central idea

in every case is that the company must use such care and take such precautions for the safety of travelers as the character of the crossing makes reasonably necessary for their safety and protection, and the degree of care in each particular case is governed by the facts, and is a question for the jury.

C. M. Finn and Sweeney, Ellis & Sweeney for appellant.

Helm & Helm and R. A. Miller for appellee.

Appeal from Daviess Circuit Court.

Opinion of the court by Judge Lassing, reversing.

Estill Adkisson, a boy about eleven years old, while riding with his grandfather on a jolt wagon, was run over and killed by one of appellee's trains at a crossing on the public highway known as the "Cox Road," just west of the city of Owensboro. His administrator sued to recover for his killing, alleging that the crossing where he was killed was located on a much traveled thoroughfare just outside of the city limits of the city of Owensboro. That the county road, as it approached the railroad crossing, was elevated, narrow and flanked on either side by a deep ditch, and that the crossing itself was permitted, by the company, to become and remain out of repair, so that, all things considered, it was a dangerous crossing. That the train which killed deceased was running at a high rate of speed and failed to give the proper and necessary signals to warn the traveling public, and especially the deceased, of its approach, and that it was not equipped with the proper and necessary brakes and appliances to enable those in charge of it to avoid accidents and injury while being operated at a high rate of speed. That by reason of these negligent acts on the part of the company and its servants his intestate was run over and killed. The company denied liability and pleaded contributory negligence. Upon a trial before a jury a judgment was had in favor of the defendant company, and the administrator appeals.

Many reasons are assigned why the judgment should be reversed, but the only errors complained of which we deem prejudicial are those in regard to the instructions. Much proof was introduced tending to show that the road known as the "Cox Road" is a much-traveled thoroughfare, just outside of the city limits of the city of Owensboro, and the crossing where the accident occurred is an unusually dangerous one, and appellant insists that the court should have submitted to the jury the question as to whether or not the company should have provided some means other than the statutory signals to avoid injury to persons using the highway at that point.

It is further insisted by appellant that the court erred in defining the degree of care which the deceased was required to exercise for his own safety. In the recent case of the C., N. O. & T. P. Railway Co. v. Champ this court considered at length the duties which a railroad owes to the traveling public in passing through populous communities, and over roads or crossings near cities or large towns, where large numbers of people are known to pass daily, and where the company might reasonably expect persons to be frequently upon or near the crossing. It was there held that while the ringing of the bell and the sounding of the whistle, as required by the statute, might, and would relieve the company from liability in sparsely settled communities, where it was not shown that those in charge of the train saw, or by the exercise of ordinary care could have seen, the danger of the injured one in time to have avoided the accident, but in populous communities and on dangerous crossings near such, a different rule obtains and a higher degree of care is required to be exercised by the company before it can escape liability. As said in the

Champ case, *supra*, the central idea in every case is that the company must use such care and take such precautions for the safety of travelers as the character of the crossing makes reasonably necessary for their safety and protection, and that this degree of care in each particular case is governed by the facts, and is a question for the jury.

Under the evidence offered in this case appellant was entitled to an instruction embodying this idea; the refusal of the trial court to give it was a reversible error, as such an instruction was offered by appellant.

On the question of contributory negligence the court instructed the jury that it was the duty of plaintiff's intestate, in approaching the crossing mentioned in the pleadings and evidence in this case, to exercise ordinary care to avoid being injured by an approaching train, and if the jury believed from the evidence that the deceased either knew, or by the exercise of ordinary care could have known, of the train's approach, and, notwithstanding this, went upon the crossing and in consequence was killed, and but for such conduct on his part the accident would not have happened, he was guilty of contributory negligence, and the defendant was not liable, even though the jury believed from the evidence that the servants of the defendant in charge of the train failed to give sufficient warning of the train's approach. Appellant objected to this instruction, and offered instructions "E" and "G" as substitutes. Instruction "E" is substantially the same as the instruction given, and instruction "G" authorized the jury in passing upon the question of deceased's contributory negligence, if any, to take into consideration his age and experience and the condition under which he was placed at the time of the injury, and if from the evidence it appeared that he used such care and prudence for his own safety as a person of ordinary prudence and of his age and experience, under similar or like conditions would have used, then he was not guilty of contributory negligence.

In the case of the Paducah & Memphis Railroad Co. v. Hoehl, 75 Ky., 41, a similar question was before this court, and it was there held that a child is not expected or required to exercise that judgment in avoiding danger or held to the same responsibility for its conduct that would be measured out to an adult or one of more mature years. In that case the child injured was twelve years of age. And, again, in the case of the Kentucky Central Railway Co. v. Smith, 93 Ky., 449, this court, in passing upon the degree of care that was required of a child thirteen years of age, said: "This boy was only required to exercise that degree of care that an ordinarily prudent child of his age would have exercised, and if he exposed himself to danger in such a manner as that the injury could not be avoided by the defendant by the exercise of the proper care to prevent it, no recovery should be had; but if the child was on the street or crossing where it had the right to be, and was injured by reason of the gross negligence of the defendant, although guilty himself of ordinary neglect looking to one of his age and inexperience, a recovery must necessarily follow."

Under the authority of the two cases above cited appellant was entitled to have presented to the jury the idea embodied in instruction "G," and it was error for the court to refuse so to do.

Ordinarily those in charge of a railway train approaching a crossing of the character of that at which the deceased was killed would be required to keep a lookout that they might discover the presence of persons upon the track and, if possible, thereby avoid injuring them, but, inasmuch as it is shown in this case that on account of the presence of buildings on the west side of the Cox Road, and also along the railroad track at that point, the view of the railroad from the road was so obstructed that travelers could not be seen until they had come within forty feet of the road, the strictest exercise

of this duty would have been of no avail, as the train would then have been too close to the crossing, when traveling at the usual rate of speed, to have stopped until the crossing would have been passed. Hence, under the particular facts in this case it was not necessary for the court to instruct the jury that it was the duty of those in charge of the train, when approaching this crossing, to keep a lookout for persons who might be upon it.

Upon a re-trial of the case if the evidence is substantially that which was offered on the last trial, the court will give to the jury the following instructions:

"1st. It was the duty of the employes of the defendant company in charge of the train that struck and killed Edward Adkisson to sound the whistle or ring the bell at a point not less than fifty rods west of the crossing at which he was struck and killed, and to sound the whistle or ring the bell continuously or alternately from that point to the crossing, and if the jury believe from the evidence that this crossing was in a populous community and on a much-traveled thoroughfare, and, because of its location and surroundings unusually dangerous to travelers, and that the sounding of the whistle and ringing of the bell, as directed, was not sufficient to give reasonable notice of the approach of trains at said crossing, and that this fact was known to the defendant, or by the exercise of ordinary care could have been known by it, then it was the further duty of the defendant and its servants in charge of the train to use such other means to prevent injury to travelers at said crossing as in the exercise of a reasonable judgment might be considered necessary by ordinarily prudent persons operating a train. And if you believe from the evidence that the defendant and its employes, in charge of the train that killed deceased, failed to so ring the bell or sound the whistle as herein set out, or to provide other means or methods to warn the traveling public of its approach to said crossing, if the facts in this case required the defendant and its employes to employ other means, and by reason of such negligence and carelessness, if any, on the part of the defendant and its employes, deceased lost his life, then you should find for the plaintiff, unless you shall believe that his death was due to his own neglect, as defined in instruction No. 3.

"2d. If you find for plaintiff you should assess the damage at such sum, not exceeding \$20,000, as will reasonably compensate the estate of Edward Adkisson for the destruction of his power to earn money.

"3d. It was the duty of Edward Adkisson in crossing the tracks of the defendant at the place he was killed to take such care for his own safety as a reasonably prudent child of his age and experience would ordinarily have exercised under like or similar circumstances to those proven in this case, and if the said Edward Adkisson failed to exercise that degree of care for his own safety and but for such neglect and failure on his part so to do he would not have lost his life, then you should find for the defendant.

"4th. Ordinary care, as used in these instructions, means such care as an ordinarily prudent person would exercise under like or similar circumstances. Negligence is the failure to use or exercise ordinary care."

Because of the errors in the instructions above enumerated, this case is reversed and remanded, for further proceedings consistent with this opinion.

ROBERTS v. ADAMS & SON CO.

(Filed April 29, 1908—Not to be reported.)

Partnership—Facts Showing—Finding of Chancellor Approved—This action is affirmed on the evidence, which, though conflicting, much of it biased and some of it false, we have little hesitation in reaching

the same conclusion upon the disputed facts as was done by the chancellor below who had the advantage of an acquaintance with the witnesses so as to give their testimony its due weight and from which he adjudged certain parties to the controversy to be partners.

J. R. Fears,, H. K. Bourne and W. S. Pryor for appellant.

Moody .& Barbour for appellee.

Appeal from Henry Circuit Court.

Opinion of the court by Chief Justice O'Rear, affirming.

This is an equitable action by appellee suing as a creditor of the alleged mercantile firm of J. S. Hundley and Fred Roberts, seeking to compel the payment of its debt by appellant, Sam Roberts, because the latter as an heir-at-law of Fred Roberts, now deceased, had inherited from his father, and was then possessed of certain lands, which were of greater value than the plaintiff's debt; also because appellant, Sam Roberts, had purchased the shares of his brothers and sisters in the same tract of land, and as part of the consideration had agreed to pay off all the indebtedness of their deceased ancestor, Fred Roberts. Appellant denied that Fred Roberts was a partner in the mercantile venture, and denied too, that he had agreed to pay off all the indebtedness of the decedent as part of the consideration for the conveyances to him. The principal question, indeed the controlling question, is whether Fred Roberts was a partner of J. S. Hundley in that matter. The circuit court decided that he was, and adjudged a sale of the land to pay appellee's debt. Appellant, by this appeal, asks that the chancellor's finding of the fact be reversed upon the evidence in the record.

The testimony of the witnesses is sharply conflicting, and utterly irreconcilable. Our effort has been to sift the truth from the mass of contradictory testimony, much of it plainly biased, and some of it false.

Fred Roberts, the decedent, was a farmer living in the country in Henry county. He had reared a family of seven children, all, or most, of whom were married. He had accumulataed an estate of some \$4,000, consisting mainly of about 225 acres of land. One of his daughters had married J. S. Hundley. The latter had been engaged in a small way in conducting a country store of general merchandise. His stock had burned out. He then bought out another little stock of goods for \$250 or \$300. He had not enough means to pay for it. Fred Roberts furnished \$150 of the money, paying it direct to the vendor. This much is conceded, and besides is well established by the proof. About that time Fred Roberts' wife died, and he went to live with the Hundleys, at least most of his time with them for several months during which the store was conducted, when he married again. The mercantile venture proved a failure, and about the time of Fred Roberts' last marriage J. S. Hundley (in whose name alone the store was carried on) went into voluntary bankruptcy. He scheduled all the merchandise accounts as his debts, and took all the remnant of his stock as exempt property, moving it from his store over to his dwelling, a short distance away, where Fred Roberts was then living with him. The merchandise was then divided between Fred Roberts and J. S. Hundley. Appellant and other children of Fred Roberts were present at the division. Shortly afterwards Fred Roberts died. There was a suit to settle his estate. A number of debts were proved up against the estate—something like \$1,500 in amount. His personal estate seems to have been inconsiderable. Then it was that appellant agreed to buy out the other heirs, paying them each \$150 for their shares, except he paid two of them \$175

each, and agreed to pay their father's indebtedness. Appellant claims that the indebtedness assumed was that proven up in the settlement suit—none of which was on account of the Hundley mercantile venture—while appellee claims the agreement was to assume all indebtedness. Appellee and one of his brothers, Newt. Roberts, fell out on account of a tombstone, when Newt. informed the creditors of J. S. Hundley, merchant, that Fred Roberts had been a partner in that business, whereupon this suit, and others, were brought to compel Sam Roberts to pay these debts.

Appellee's evidence to establish the fact of partnership aside from the writing hereinafter discussed, consists in J. S. Hundley's testimony that he and Fred Roberts were partners, each putting in \$150 of capital, with the agreement to share profits equally; and that upon the dissolution of the partnership they divided the stock equally between them. Newt. Roberts testified that he had heard his father say he was interested as a partner in the store, and saw him in there selling goods and exercising acts of proprietorship. He also testified to the division. Newt.'s wife testified to the same facts. After the case had progressed in preparation and the parties had become worked up more in feeling, J. S. Hundley again testified, this time for the other side, in which he said his former testimony was false. When he first testified he said the agreement between him and Fred Roberts was in writing, signed by Fred Roberts and by the witness; that the paper was in the possession of the appellant, who thereupon produced a paper, which J. S. Hundley identified and testified to as the original contract. It is as follows:

"March 15, 1902, Noe, Ky.

"This 15th day of March, 1902, I, Fred Roberts, do hereby agree to furnish J. S. Hundley one hundred fifty dollars (\$150), to be invested in merchandise at Noe, Ky., for which Fred Roberts am to receive one-half of the profits from said business; the said J. S. Hundley is to attend to all of the business; J. S. Hundley is to be responsible for all debts he makes; said Fred Roberts' name is not to be used in the business; said Fred Roberts is not to be responsible for any debts that said J. S. Hundley makes.

"J. S. HUNDLEY,
"FRED ROBERTS."

On his last examination Hundley says that he himself wrote the whole of that paper, including the signature of Fred Roberts, after the latter's death, and indeed after this suit was brought.

Several other witnesses, apparently without interest or other bias, testify that Fred Roberts told them that he was interested in the store, and that they saw him there selling goods. On the other hand, J. S. Hundley's wife, the daughter of Fred Roberts, testified on behalf of her brother, the appellant, that the paper copied above was written by her husband in the presence of Sam Roberts and Louis Roberts (another brother) after the death of Fred Roberts; that it was written by J. S. Hundley, at the request of Sam Roberts (appellant), after this suit was brought in order to get a statement from J. S. Hundley concerning the real relation between him and Fred Roberts, ostensibly for use in the preparation of the defense in this suit. Sam Roberts corroborates Mrs. Hundley in this testimony, as does Louis Roberts, though the latter weakly.

As to the division of the goods, these three witnesses say Fred Roberts bought \$25 or \$30 worth of them from J. S. Hundley after the bankruptcy, but they do not agree as to the manner of payment, some saying they were paid for at the time in money and property, and others that they were credited upon the \$150 loan, as it is called, made by Fred Roberts to Hundley when the latter began the busi-

ness. A number of notes executed by Fred Roberts, and proved up in the settlement case, were introduced for purposes of comparison with the handwriting of Fred Roberts' signature to the contract relied on in this case. Two very intelligent, disinterested witnesses of considerable experience in examining handwritings, testified that in their opinion the signature of Fred Roberts to the contract was genuine, although they noted a variance between his signatures to two certain bank notes and the signature to the contract which seemed to mystify them somewhat; still it was at that time assumed that the signatures to the bank notes were genuine. There were other notes introduced, the genuineness of which is admitted. In comparing these and the contract the expert witnesses were without doubt as to the genuineness of the signature to the contract. One expert witness, shown to be equally qualified we think, and equally disinterested and intelligent, testified for appellant. He said the two bank notes and the contract were not signed by the same person. It was developed in the case that he was correct in his opinion. The bank notes were signed by Fred Roberts' daughter, Mrs. Hundley, at his instance (she says), he having a sore hand at the time. But appellant's expert witness also testified that there was a dissimilarity in the signatures to certain other notes (admittedly genuine) and the signature to the contract. He pointed out in particular—the crossing of the t in Roberts. We have before us the original documents mentioned above, except the bank notes. The t in the name to the contract seems to have been tampered with. The signature was with lead pencil, and seems to have been re-traced at this place. Whether that was so when this witness was testifying is not made to appear. But taking all the testimony of these expert witnesses, together with the documents themselves, we think the weight of the evidence is in favor of the genuineness of Fred Roberts' signature to the contract.

In addition to the foregoing there are other circumstances which we think shed light on the fact. The contract is claimed by appellant to have been written by J. S. Hundley (who it will be remembered at one time swore he did not write it, and another that he did). Hundley is very illiterate. So was Fred Roberts, though he could write and spell somewhat better than Hundley. Their handwritings show that they were by no means expert in the use of the pen. Hundley, while testifying the last time, was required to write the contract from dictation. His spelling and writing both remove all possibility of belief that he could have written the contract in evidence. He was, when under this examination, trying to help out his brother-in-law, Sam Roberts. He showed a willingness to do, or say anything that could help his case. Therefore, if it had been possible for him to have simulated the writing in the contract he would have done so. He did not do it because he could not. We are bound, upon the physical facts before us, and which leave no doubt in our minds, to reject the testimony that J. S. Hundley wrote either the body of that contract or the signature of Fred Roberts. We are equally satisfied that Fred Roberts did not write the body of it, but did write his own signature. In a rural neighborhood like that, where everybody knows, in a general way, everybody's business (as is pretty abundantly shown by the mass of hearsay and incompetent evidence in this record), the draughtsman of such a contract ought to have been discovered. It was written on a sheet of note paper, with lead pencil, evidencing that it was written where pen, ink and legal cap were not accessible. Its composition is crude, showing it was written by some one not familiar with legal forms. A natural inquiry would be, who wrote it? For that witness could throw much light on the truth, if he would. It is quite likely that it was written by Mrs. J. S. Hundley. She shows she had been in the

habit of doing some writing for her father; he at the time lived with her. She was a better scholar than either he or her husband, and so far as this record shows, the best scholar of the family. She was asked to, and did write, a copy of the contract on her examination as a witness. Its spelling is strikingly similar to the original, the same words being misspelled alike in each document. Fred Roberts' purpose evidently was to become a secret or silent partner in the business, therefore he would naturally have had the document written, if not by himself, by some one in whom he had confidence. The record shows he had as much in Mrs. Hundley, if not more, than in any one else in the neighborhood. His statements to others that he was interested in the store would, at first glance, seem to be inconsistent with this purpose to conceal his interest from the public. But the persons to whom he made these statements were either his children, a daughter-in-law, or others bearing the name of Roberts, who testified that they were regarded as "being in the family"—just what their relationship was, not being shown. The motive of his secrecy was to avoid liability for the debts of the business if it failed. Publicity of his connection was, therefore, to be avoided; yet he might, with a feeling of safety, confide to favorite and select relatives the mild boast of his interest in the only store in the village.

In none of the deeds to appellant, except that of Newt. Roberts, was the whole consideration stated; in his deed, doubtless because he then knew enough as to the partnership and the failure of Hundley to cause him uneasiness on account of the firm's unpaid debts, he insisted on an express statement as to the assumption of all the liabilities of Fred Roberts by appellant. And appellant evidently knew enough of that situation to enable him to base a safe calculation upon in buying out these shares. The clause reads: "In consideration of \$175 cash in hand paid, the receipt of which is hereby acknowledged, and the further consideration that the second party assumes the payment of attorney fees and other costs in the settlement of the estate of Fred Roberts, deceased, of which first parties are liable, or may become liable in the settlement of said estate; and second party is to assume the payment of all debts and liabilities of the deceased Fred Roberts, of which his estate is charged, of which said first parties interest in said estate is liable, or may become liable."

The lands conveyed to appellant are shown to have been worth about \$4,000. He paid in cash, according to the recitals in the deed, not exceeding \$1,100 (estimating his own share at \$150). There were debts asserted in the settlement case of about \$1,500, leaving a margin of about \$1,400. This excess in value was not given to appellant, certainly, but something else was estimated as likely to consume it.

As to the motives: Appellant contends that Newt. Roberts was actuated by spite, and intimates he was to be paid something for his services by the wholesale merchants for establishing these claims. It is true, wicked people do invent stories, and swear to them, too, to punish those against whom they have a spite. But it is also true, that if their motive is punishment, they can use the truth as well where it will serve, and it would be more natural for them to do so. The whole question of bias is one of qualification. It may go so far as to cause the rejection of the testimony altogether. But the genius of the institution of a trial in court is its capacity and privilege of weighing positive statements in the balance of probabilities, arriving at the truth most frequently in spite of express testimony where the act at the time was recorded without thought of falsification, and with reference alone to a natural consequence; where the mendacious tongue, however anxious to serve its pur-

pose, can not speak "Shibboleth" so as to deceive the judicial ear. There is bias upon each side of this case. The court might well doubt any conclusion at which it might arrive, if words alone were considered. But, upon all the facts and circumstances, including that which is believable in the testimony, we have little hesitation in reaching the same conclusion upon the disputed fact as was done by the chancellor below. Then this conclusion is fortified by the fact that it is that of the judge below, who had the advantage of an acquaintance, possibly, with the witnesses so as to give their testimony its due weight as might be justified by their local standing and reputation.

The contract, together with Fred Roberts' conduct, show that his relation to his son-in-law in this enterprise was not that of a lender of money, taking a share of profits in lieu of interest, but as joint owner. Although he endeavored to shield himself from liability for the debts of the firm by an agreement with his partner that the latter alone should be responsible for them, the law makes him liable for them. One may loan money to another to be embarked in the latter's business, taking a share of profits in lieu of interest, without becoming a partner. It is often difficult to determine whether such an arrangement constitutes a partnership or a loan. It must be determined upon a careful study of the agreement and of the circumstances showing whether the silent or secret member was intended to be given an interest in the business itself. Such an advance with an agreement to share in the profits, alone raises a presumption of partnership, and if the money is to be risked in the business it is a strong circumstance tending to show that a partnership was formed. If, upon a dissolution, what is left—there being no profits (which is this case)—was divided between the two in proportion to the money advanced by each there can be no doubt left that a partnership was effected, although neither at the time intended to form a partnership, and each believed the silent one was not liable for the debts of the venture. In addition to the contract, which we find they entered into, the following facts appear: They each participated in the conduct of the business; each claimed an interest in it; there was not a note or other evidence of indebtedness from Hundley to Roberts for the \$150 put in by the latter; and upon a dissolution they divided equally what was left, although it represented a loss.

We conclude that there was a partnership, as well as that appellant agreed to pay as part consideration for the land sought to be subjected, all the liabilities of Fred Roberts, which includes the debt sued on.

The judgment is affirmed.

HOWES v. WELLS.

(Filed April 29, 1908—Not to be reported.)

Patents—Proper Location of Land—Question of Fact—The only question in this case is the proper location of a fifty-acre patent. There was no such occupancy of the land as to make the champerty statute apply and the older and better title was with the appellee.

Vaughn, Howes & Howes and Ben G. Wellman for appellant.

C. B. Wheeler for appellee.

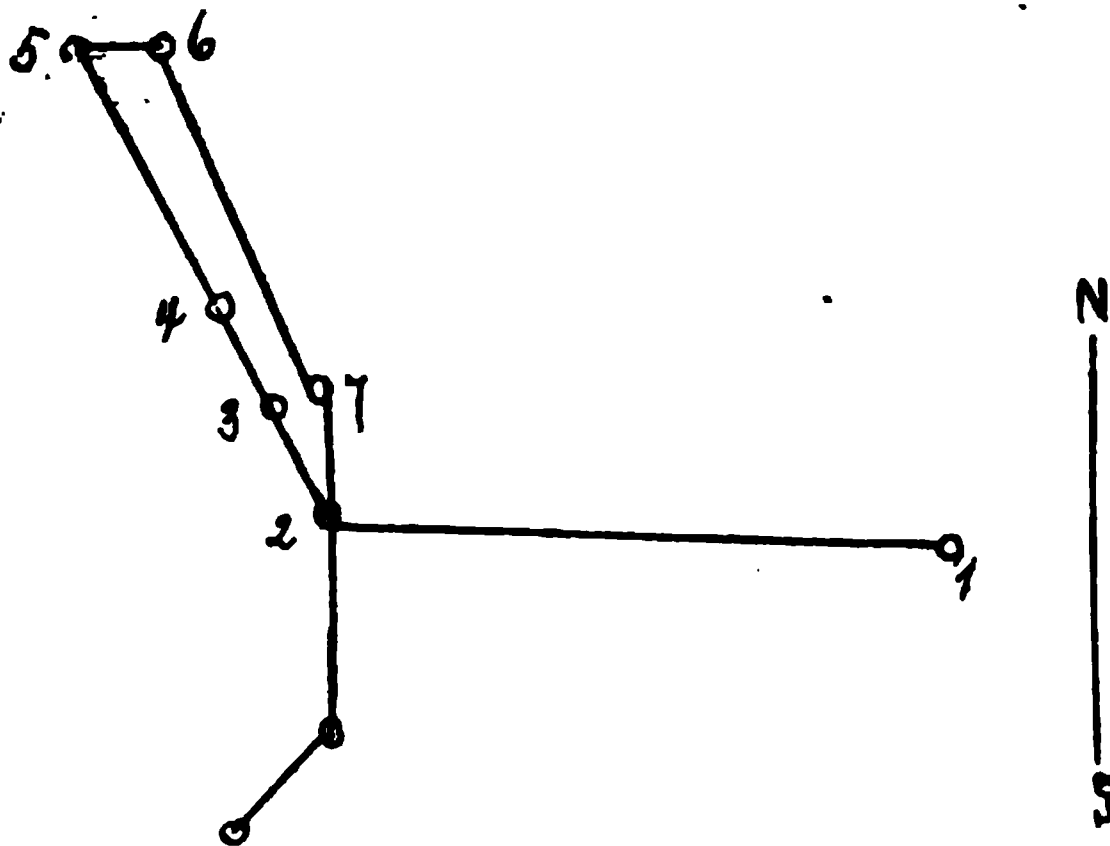
Appeal from Johnson Circuit Court.

Opinion of the court by Judge Hobson, affirming.

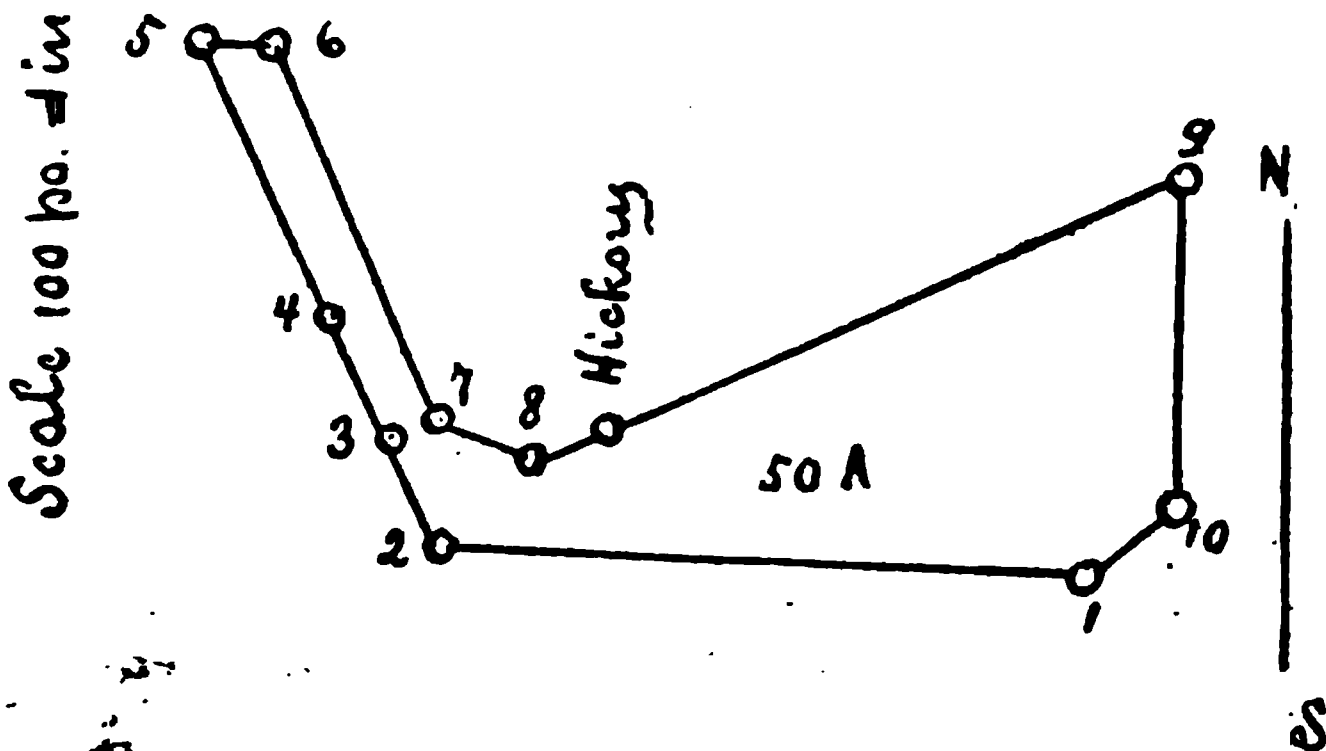
The only question to be determined in this case is the proper location of a patent for 50 acres of land issued to Bracken R. Van-Hoose upon a survey made November 28, 1848. The calls of the survey are in these words:

"Beginning at three red oaks and a hickory on top of the ridge, supposed to be on the Fleming line; thence west 160 poles to two beeches and gum, standing near the road on the Muddy Branch; thence up the same N. 21 W. 36 poles to a maple and a sourwood, N. 32 W. 28 poles beech and elm; N. 22 W. 96 poles, hickory corner to Israel Castle and Eliphes Preston; thence with their lines S. 49 E. 16 poles, beech and a sourwood; S. 4 $\frac{3}{4}$ E. 73 poles S. 50 W. 30 poles to the beginning."

Accompanying the survey is the following plat:



The survey begins at the point 1 in the plot and the calls run with the lines of the plot to the points 2, 3, 4, and 5. At 5 we strike the hickory corner of Israel Castle and Eliphes Preston, a survey made on the same day and by the same surveyor. If we run on from 5, following the calls of the patent, the lines run out the following figure:



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As thus run out the patent would not close and the lines would include only about five acres of land. If now we go back to the beginning and reverse the calls of the patent, we run out the lines 1, 10, 9, and at 9 we strike against the corner of the Isreal Castle and Eliphes Preston patent; and if we follow the lines of this patent from 9 back to 7, we have a body of land precisely the shape of the plot accompanying the original survey. The lines from 5 to 6 and from 6 to 7 follow the survey of Isreal Castle and Eliphes Preston. When the two patents are read together it is evident that the VanHoose patent adjoins on the south the patent of Israel Castle and Eliphes Preston, and that it corners upon it at the point 5 and in a patent at the point 9. a patent is entitled to as much dignity as another. If it begin at 1 and run out the VanHoose patent, reversing the calls, we reach the point, 9, the corner in the Castle and Preston survey, and as we have to run with the survey until we reach the point 5, all we have to do to properly lay out the VanHoose survey as to disregard the calls in that patent and run with the calls of the Castle and Preston patent around to 5. What manifestly happened was, that the surveyor, when he came to write out his report of survey of the VanHoose entry, after he had made the Castle and Preston entry, by mistake omitted the lines between 7 and 9; but these lines are distinctly shown on the plot and these marked lines must be followed and the survey must be closed. Isreal Castle and Eliphes Preston conveyed their survey to Thomas Davis on Jan. 13, 1851. Bracken VanHoose conveyed his survey to Thomas Davis on March 25 1854. Davis held both surveys until March 25, 1858, when he conveyed them as one boundary to Nathan and Moses Preston, who held the tract until Moses Preston died. After his death, Feb. 27th, 1877, it was divided between his five children. In this division the land was run out as we have indicated.

The circuit court also so located the patents. In this there was no error as upon all the facts it is very clear that there was simply an omission in the VanHoose patent of some of the lines of the Castle and Preston patent, where the VanHoose survey followed the lines of the Castle and Preston survey.

The plot is a part of the report of survey and may be looked to correct an error in the calls. The court may also consider the subsequent actions of the parties and the actual location of the lines by them after so many years is evidence of the true location. (Hogg v. Lusk, 86 S. W. 1128; McCoy v. Cassaday, 86 S. W. 1130; Kerr v. Delany, 91 S. W. 286.)

There was no such occupancy of the land as to make the champerty statute apply to any of the conveyances. The older and better title was with the appellee and the circuit court properly so held.

Judgment affirmed.

HIGHLAND LAND AND BUILDING COMPANY OF DAYTON, KY. v. AUDAS.

(Filed April 28, 1908—Not to be reported.)

1. Non-residents—Judgments Against—Action to Vacate—Limitation—The law is well settled in this State that a non-resident can not show cause against a judgment for errors therein, after the lapse of five years from the rendition of the judgment.

2. Same—Warning Orders—Courts of Continuous Sessions—Time Required—By section 1004, Kentucky Statutes, relating to courts of continuous sessions, providing that "every warning order shall warn the defendants to appear and defend the action within sixty days after the making of such warning order, and the defendant shall be considered as constructively summoned in thirty days after the making of such warning order," a warning order made in compliance with

said statute is sufficient to authorize such court in this State to render a judgment against the non-resident defendant for the sale of real estate.

3. Same—Erroneous Personal Judgment—Effect on Sale of Land—In an action to sell real estate in this State in which a non-resident defendant was proceeded against by a warning order, the fact that a personal judgment rendered therein against such non-resident, was void, does not render so much of the judgment void, as orders a sale of the land in which such non-resident had an interest.

4. Same—Sale of Whole Tract—No Necessity to Pay Debt—Effect—Where a judgment directs the sale, as a whole, of property susceptible of division, instead of so much thereof as is necessary to pay the lien debt, sued on, and costs, while it may be such error as will authorize a reversal, it does not render the judgment void.

H. M. Healy, Jr., and E. W. Hawkins, Jr., for appellant.

Hazelrigg, Chenault & Hazelrigg and Arthur C. Hall for appellee.

Appeal from Campbell Circuit Court.

Wm. Rogers Clay, Commissioner, delivered the opinion of the court, granting a re-hearing; former opinion withdrawn and judgment reversed.

On the 29th day of August, 1893, Thomas Audas and wife, the appellee herein, borrowed \$2,500 from one John W. Kearney, and as security therefor gave him a mortgage on a certain tract of land in Campbell county, Kentucky. On April 28th, 1900, John W. Kearney instituted proceedings against Thomas Audus and wife, who were then non-residents of this State, to enforce his mortgage lien, and on December 22, 1900, obtained a judgment and sale of the land to pay the same. Thereafter, on March 6, 1901, at a sale by the master commissioner, Kearney bought said tract of land for the sum of \$2,200. This sale was reported to the court and confirmed on March 16, 1901. On December 10, 1903, Kearney sold the land in question to appellant, the Highland Land and Building Co., of Dayton, Kentucky. On the 16th day of August, 1904, Thomas Audas died, leaving a will making appellee, Cynthia Audas, his sole devisee. On the 12th day of May, 1906, Cynthia Audas brought this action in the Campbell Circuit Court for the purpose of setting aside the judgment and order of sale and all proceedings thereunder, in the action of John W. Kearney v. Thomas Audas, as well as the conveyance from John W. Kearney to appellant, and asked that this be done on the payment by her into court of a sum sufficient to pay the original note of \$2,500, with interest and costs of the action in Kearney v. Audas.

To appellee's petition the defendant, John W. Kearney, filed answer asking that, if the court held that the judgment in the case of Kearney v. Audas was void, and that appellee, upon the payment by her into court of \$2,500, with interest from August 29, 1896, and the costs in said case, was entitled to a re-conveyance of the property to her, that of this money so paid into court his co-defendant, the Highland Land and Building Co., of Dayton, Kentucky, be adjudged entitled to \$2,200, with interest from March 6, 1901, and that he be entitled to remainder.

On February 23, 1907, the court entered an order directing appellee, on or before March 9, 1907, to pay into court the amount of money she offered to pay.

Appellant demurred to appellee's petition. The court overruled the demurrer, and, the appellant declining to plead further, entered a judgment directing that the judgment and order of sale, the sale and the confirmation thereof, in the case of Kearney v. Audas, and all conveyances of said real estate to appellant, or from appellant to the other defendants, be set aside and declared null and void. The order

further directed that an account be taken of the sums of money paid upon said void sale, with interest thereon, and of the costs in the original action, and that this cause be referred to the master commissioner for the purpose of taking said account; that until the coming in of the report of the master commissioner, the apportionment of the sums of money so found, to have been paid upon said invalid sale be deferred for the further action and order of the court. From this order, the Highland Land and Building Co. prosecutes this appeal.

Section 414, of the Civil Code of Practice, provides; "A defendant against whom a judgment may have been rendered upon constructive service of a summons, and who did not appear, may, at any time within five years after the rendition of the judgment, move to have the action retried." * * * From the above statement of facts contained in appellee's petition, it will be seen that the judgment complained of was rendered on December 22, 1900, and the sale under that judgment confirmed on March 16, 1901. This action was instituted in May, 1906, more than five years after the confirmation of the sale made thereunder. The law is well-settled in this State, that a non-resident can not show cause against the judgment for errors therein after five years have elapsed. (*Barbee v. Fox, &c.*, 79 Ky., 588; *Burchett, &c. v. Burchett*, 5 Ky. Law Rep., 314.) As this action was not brought within five years, as provided by section 414, of the Code, and, as it was not brought in pursuance to section 518, of the Code, the only ground upon which it can be maintained is, that the judgment in the case of *Kearney v. Audas* was void. Appellee's petition alleges that the judgment and all proceedings thereunder were void upon the following grounds:

(1.) Appellee, Cynthia Audas and her husband, at the time of the institution of the action of *Kearney v. Audas*, were non-residents of Kentucky, and were absent therefrom, and the plaintiff in that action, *Kearney*, caused a warning order to be issued, warning appellee and her husband to appear in the Campbell Circuit Court within 60 days after the 28th day of April, 1900, and answer plaintiff's petition. Neither the appellee nor her husband ever entered their appearance to the action, and after the filing of the reply of the corresponding attorney the prayer of the petition, which had formerly asked judgment only for the interest on plaintiff's debt, and that the land be sold to satisfy said judgment and for all proper and equitable relief, was changed so as to include both the interest and the debt.

(2.) A personal judgment was rendered against appellee and her husband when no summons had been served on either of them, and neither had entered their appearance.

(3.) No bond was executed before judgment, as required by section 410, of the Code; nor did the court, in pursuance of section 411, retain control over, nor preserve the property or proceeds thereof.

(4.) The property was composed of a number of building lots; no proof was taken showing that it was indivisible, and it was sold as a whole instead of being sold in lots.

1st. While the petition alleges that appellee and her husband were not before the court, this allegation is simply a conclusion of law: and whether or not they were properly before the court must be determined from the further allegation that the warning order cited them to appear in court within 60 days after the 28th day of April, 1900. It has been held, as maintained by appellee, that, under section 59, of the Code, a judgment rendered against a non-resident, proceeded against by warning order citing the defendant to appear in court on the first day of a term commencing within 60 days of the making of the order, is absolutely void (*Payne's Adm'r v. Hardesty, &c.*, 12 Ky. Law Rep., 336); but section 59 has no application to this case. The Campbell Circuit Court is one of continuous session and is, therefore, controlled by the acts of December 20-30, 1892, relating to courts having continuous sessions. By section 1004, of the Ken-

tucky Statutes, which is a part of those acts, it is provided that "every warning order shall warn the defendant to appear and defend the action within 60 days after the making of the warning order, and the defendant shall be considered as constructively summoned in thirty days after the making of such warning order." The warning order complained of complied with this provision of the statutes, and appellee and her husband were, therefore, properly before the court.

Nor do we think there is any merit in appellant's contention that the filing of an amended petition in the case of Kearney v. Audas necessitated the issuance of a new warning order. In the original petition the amount of plaintiff's debt was set out, but the prayer asked judgment only for the interest thereon and costs, and that the land be sold to satisfy said judgment, and for all proper and equitable relief. By an amended petition plaintiff asked the enforcement of his lien to secure both his debt and interest. In his original petition he had set forth a complete cause of action for the recovery of his debt and interest, but by an oversight the word "interest" was used instead of "debt and interest." The prayer, however, did ask for all proper and equitable relief. The amended petition did not then state a new cause of action, but simply corrected the prayer to conform to the relief to which the original petition showed plaintiff was entitled. In the case of Durrett v. Stewart, &c., 88 Ky., 665, this court held that an amendment of the prayer of the petition so as to make it conform to the cause of action set forth in the petition, was not a new and distinct cause of action. That being the case, a new warning order was not necessary, and the judgment was not void for the reasons claimed.

Second. It is true that a personal judgment rendered against a defendant constructively summoned, or summoned out of this State as provided in section 56 of the Code, and who has not appeared in the action, is void. (Civil Code of Practice, section 419; Harris v. Adams, 2 Duvall, 141; Berry v. Berry's Ex'or, 6 Bush, 594.) For appellant it is contended that, by the judgment and order of sale of the land in question, it was sold to satisfy the personal judgment; that, as the latter judgment was void, the sale of the land to satisfy this void judgment was also void. With this conclusion we can not agree. It is true the amount due on the debt was fixed, and a sale ordered to pay this amount. Where the defendants are properly before the court, such a sale can be made. The effect of the judgment is to order a sale of the land to secure the plaintiff in the payment of his debt, interest and costs. The fact that a personal judgment for plaintiff's debt, interest and costs had been improperly rendered could in nowise affect the power of the court to order a sale of the land in question. That part of the order awarding a personal judgment is not so inseparably connected with that part directing a sale of the land as to require that both shall stand or fall together. Plaintiff was seeking to enforce a mortgage lien, and have the land sold for the purpose of paying his debt secured by lien. The result of the judgment was practically the same as if it had been sold for this purpose.

Third. The next question is: Did the failure of the plaintiff in the action in question to give the bond required by section 410, of the Civil Code, and the failure of the trial court to retain control over, and preserve the property or the proceeds thereof, render the judgment void? In discussing this question this court, in the case of Allen v. Brown, 2 Met., 342, said: "In an action against a non-resident defendant, not summoned, and who does not appear, if the bond, required by section 440 (now 410), of the Civil Code, is not executed, the judgment against him is erroneous." Again, in the case of Atcheson v. Smith, 3 B. Mon., 502, this court said: "Upon the writ of error, as thus amended, several of the errors assigned, though they

would be ground of reversal as to Graham's heirs, are not thus available to Atcheson; because they neither show that the decree was void as against said heirs, nor that it was improper to render it, so far as Atcheson is concerned, and can not, therefore, be deemed prejudicial to him. Among the errors of this character may be ranked the omission to appoint an attorney for the unknown heirs, and the failure to require bond to be executed for restoring the attached effects to them in case it should be so decreed hereafter, &c." Thus it will be seen that, while the court held, in the case last cited, that the failure to give bond to the Graham heirs might be reversible error as to them, the judgment against them by reason of said failure, was not void. And in the case of *Thomas v. Mahone*, 9 Bush, 111, this court also said: "The jurisdiction is acquired thirty days after the order of warning is made. It is at that time that the defendant is deemed to be constructively summoned. The local jurisdiction of the court over the thing sought to be sold, and the jurisdiction acquired over the person of the defendant by the constructive service of process provided by law, authorizes the court to proceed, and although the failure to appoint the attorney or to take the bond required by section 440 (now 410) are reversible errors, the jurisdiction being complete, the judgment will not be void." While this court has held in a number of cases, that the failure to give the bond required by section 410, of the Civil Code, is reversible error, we have been unable to find any case holding that the judgment is void where the sole question involved is the failure to give such bond.

Fourth. The last question to be considered is, whether or not the judgment was void because the land was sold as an entirety, and not so much thereof as was necessary to pay plaintiff's debt, interest and costs. In the case of *Kearney v. Audas*, it appears from the record that the property did not sell for enough to pay plaintiff's debt, interest and costs. In such a state of case this court has even gone to the extent of holding that the owner may be presumed to have lost nothing by the error in not directing the commissioner to sell only so much as would satisfy the judgment, and for that reason has refused to reverse the case. (*Doughty v. Moss, &c.*, 1 Bush, 101; *Fowler v. Kallam's Ex'or*, 4 Ky. Law Rep., 988.) In other cases this court has held that the sale of two or more city lots together to secure a lien indebtedness is reversible. (*Ficener v. Bott, &c.*, 16 Ky. Law Rep., 519.) It has also been held that the decree of sale, wherein it adjudges that a tract of land of 200 acres is indivisible, is erroneous. The court must know that the said land is not indivisible. (*Holland, &c. v. Holman*, 21 Ky. Law Rep., 105.)

We, therefore, conclude that, where the judgment directs the sale as a whole of property susceptible of sub-division, instead of so much thereof as is necessary to pay the lien debt and costs, it may be such error as will authorize the court to reverse the judgment and set aside the order of sale, but does not render the judgment void.

As appellee did not institute this action within five years after the judgment and order of sale in the action of *Kearney v. Audas*, and, as the defects in the proceedings in that action were only such as rendered the judgment erroneous and not void, we are of opinion that the trial court erred in overruling the demurrer to the petition.

When our former opinion was written, our attention had not been called to the fact, and we failed to notice, that more than five years had elapsed after the judgment in the case of *Kearney v. Audas* had been rendered before appellee instituted this action. That opinion was based upon the assumption that this action was instituted within the required period of five years.

For the reasons given, the re-hearing is granted, the former opinion withdrawn, the judgment reversed and cause remanded, for proceedings consistent herewith.

COMBS, MAYOR, &c. v. BONNELL.

(Filed April 29, 1908—Not to be reported.)

Mayors—Members of Police and Fire Departments—Removal of—
Prior to the act complained of for which the Board of Police and Fire Commissioners of the city of Lexington, removed appellee, they adopted a rule, yet in force, providing in substance that when a member of the police or fire department is suspended by the Mayor, he shall report the fact to the police and fire commissioners, prepare written charges to be served on the officer and notify him of the time and place when the charges will be investigated. * * * Appellee was not cited to appear for trial, nor was he accused of dereliction, nor removed for cause, and the rule referred to above was a complete protection to him against such arbitrary discharge.

Wm. Rogers Clay and J. D. & G. R. Hunt for appellants.

Morton, Webb & Wilson for appellee.

Appeal from Fayette Circuit Court.

Opinion of the court by Chief Justice O'Rear, affirming.

Appellants Combs, Bronson and Bateman, as the Board of Police and Fire Commissioners for the city of Lexington, a city of the second class, attempted on February 23, 1904, to remove appellee, who was a member of the Lexington Fire Department, and appointed appellant Richmond in his place. This suit was brought for an injunction against Richmond's taking the place, as well as to have appellee restored. The circuit court held that the attempted removal was invalid, and ordered appellee restored to his position. Appellee attacked the action of the Police and Fire Commissioners upon several grounds, all of which are elaborately presented in argument. But we find it unnecessary to notice but one of them.

Among the enumerated powers of cities of the second class is that set out in section 3138, Kentucky Statutes, as follows: "The said commissioners (meaning the Board of Police and Fire Commissioners) shall have full control over the police and fire departments of the city, together with all the property and paraphernalia thereof or belonging thereto, and may make or ordain and put into execution such by-laws, rules and regulations for the government of said departments as may be deemed expedient, and may prescribe the qualifications of the firemen and officers and members of the police and fire departments respectively."

It will be conceded, we think, that although it were true that the matter of regulating such internal local affairs as partook of the nature of the employment of firemen and other mere city employes, inhered in a municipal corporation as an incident of its character as a private corporation, and was beyond the power of the Legislature to control without reference to the wishes or participation of the local government, still it was competent for the State in creating such corporation to provide by what body of the local magistracy that function was to be exercised. The State always says, or may say, by what officers of a strictly private corporation certain of its corporate functions must be discharged, although it would be clearly incompetent for the Legislature to directly regulate and control such affairs of the corporation. If then it be conceded that a municipal corporation possesses a private character, as to matters pertaining thereto it may regulate and control them within the scope of the powers granted to it, as any other private corporation might do.

Certain public officers, such as police and members of council, and all who by the nature of their positions serve the whole State in so far as

their jurisdiction extends, in dealing with matters with which the State as a whole is concerned, and which might have been required of any other body of magistrates with as much legal propriety, are confessedly subject to direct control by the State through its Legislature. But mere employes, firemen, street-cleaners, hostlers, janitors and the like, it has been held by the court in *Thompson v. City of Lexington*, 113 Ky., 540, are not the subject of legislative control.

The power has been expressly given to second class cities to maintain for themselves fire departments. Section 3138, Kentucky Statutes, *supra*, provides what officials of the city shall have control of that department of the city's affairs. They are given the power of regulating such employes as they may select, a power which probably would have been inferred even though not expressed. The Board of Police and Fire Commissioners must act as a body, and speak by their records. They adopted, prior to the act complained of in this suit, the following rule which is yet in force, so far as the record discloses: "Whenever a member of the police and fire department is suspended by the Mayor, he shall report the case to the Police and Fire Commissioners at their first meeting, regular or called, thereafter, and it shall be his duty to prepare written charges against the party suspended, and cause a copy of said charges to be served on the offending officer, and notify him to be present at said meeting of the commissioners when said charges will be investigated. Said suspended officer shall have the right to be represented by counsel and shall have witnesses in his behalf. The proceeding of the commissioners in investigating all charges against members of the departments, and in all cases of suspension or removal shall be governed by the customary rules of evidence and the Kentucky Statutes regulating the control and management of the police and fire department."

This regulation was a clear and proper exercise of the powers conferred upon the Police and Fire Commissioners, and until repealed or changed by them in an official meeting, and by proceedings of record duly adopted, it was alike binding upon the commissioners and a protection to the members of the two departments. It inaugurated a kind of civil service in these departments, and is a wise regulation that should be sustained and encouraged, rather than ignored or violated. Its observance will stimulate the police and firemen to a better discharge of their duties by removing from over their heads the constant danger of capricious discharge by their superiors. Policemen and firemen are servants of the city, not of the commissioners. The latter should not have it in their power to punish the police and firemen if they refused to serve the personal ends of the commissioners, or to reward them if they did. They ought to be discouraged from political activity, rather than rewarded for zealous partisanship. All these desirable ends, insuring the greatest conscientious service to the public, while detracting from the power of the political boss, are brought about by an observance of a civil service regulation. Appellee was not cited to appear for trial by the board, nor was he accused of dereliction, or removed for cause. The above regulation alone was a complete protection to him against such arbitrary discharge.

The whole force of the fire department was discharged in the same order. Immediately all were re-appointed save appellee and such others as were intended to be dropped, whose places were filled by substitutes. We think this was but an indirect way of doing that which the commissioners could not do directly, which will not be allowed to prevail.

Other points raised and discussed are not decided. The action of the circuit court in granting the injunction and requiring that ap-

pellee be restored to his place, was right, and the judgment is, therefore, affirmed.

The whole court sitting.

Judges Barker, Settle and Hobson concur in the result, but not in the ground upon which it is rested.

RAILEY v. ROBERTS.

(Filed April 29, 1908—Not to be reported.)

1. Lands—Mistake as to Quantity Sold—Action to Recover for Deficiency—Pleading—In an action to recover for shortage in a survey of land, it was error in the lower court to strike from defendant's answer a denial of any fraudulent purpose to cheat or defraud the buyer.

2. Same—Rescission—Where the purchaser desires a rescission on the ground that enough land was not conveyed, and the seller so desires rather than receive a less price than that agreed upon, there appearing to be no fraud in the transaction, the purchaser should be permitted to re-convey the land upon the payment of the purchase price.

Ira Julian for appellant.

B. G. Williams and John B. Lindsey for appellee.

Appeal from Franklin Circuit Court.

Opinion of the court by Judge Nunn, reversing.

Appellant purchased of appellee, in the month of September, 1906, a farm on the Owenton turnpike, near Frankfort, Kentucky, at the agreed price of \$9,000, payable one-third in cash and the balance in two equal payments of one and two years. She accepted a deed for the land, made the cash payment and executed negotiable notes for the deferred payments. She afterwards ascertained that there were only seventy acres in the survey, and that it was sold to her as containing eighty-five acres. The notes were negotiated by appellee before they matured. Appellant instituted this action to recover about \$1,500 in damages for the shortage in the survey, and the lower court dismissed it.

It appears from the record that appellee placed this land with the real estate firm of Morris & Shelton for sale, and they alone negotiated the trade with appellant. It is conceded that this firm represented to appellant that the survey contained eighty-five acres. They executed a writing witnessing the trade and signed the name of appellee to it in which it was stated that the survey contained eighty-five acres. The agents, Morris & Shelton, stated in their testimony that their recollection was that appellee stated to them that there were eighty-five acres in the survey. It appears from the record that these agents intended no wrong; they believed that the survey contained eighty-five acres, and that appellee had so represented it. Appellee testified that he did not make any statement to them as to the number of acres in the survey; that he knew at the time that it contained only sixty-eight or seventy acres; that he directed them to sell the survey for \$9,000, that the land was worth that much and more, and that he had no intention of parting with it for a less sum.

The proof for appellee showed that the land was worth that amount. He denied any fraudulent purpose to cheat or defraud appellant; and alleged his willingness to rescind the trade if she did not desire to keep the land at the price fixed by him. The court, on motion, struck

this allegation from his pleadings. We are of opinion that the court erred in this. We are convinced by the evidence that there was no fraudulent intent or purpose on the part of appellee or his agents to obtain any advantage in the trade; that there was a misunderstanding between the parties, their minds having never met. Appellant thought she was buying eighty-five acres of land for \$9,000. Appellee believed that he was selling a survey consisting of sixty-eight or seventy acres for that sum, and did not know, at the time of the sale, that appellant was laboring under a false impression as to the number of acres in the survey. Under these circumstances, it would not be equitable to hold appellant to the trade and make her pay the whole of the \$9,000 for the survey of land, for it contained fifteen acres less than she was lead to believe it contained at the time she purchased it. It would also be inequitable to force appellee to lose the price of fifteen acres, for he did not intend to part with his land for less than \$9,000, nor did he knowingly or intentionally commit any fraud in obtaining the contract of sale.

Under these facts the court erred in dismissing her petition. It is true she prayed in her petition for \$1,500 in damages for the deficiency, but she also prayed for all proper and general relief. The court correctly dismissed her claim for damages, but it should have allowed her to rescind, if she desired to do so on equitable principles, and on the return of the case to the lower court it should grant her this relief, allowing her to re-convey the land to appellee upon the payment to her of the purchase price, that is the cash she has paid with its interest, and the return to her of the two notes she executed and the value of any permanent improvements made upon the land, if any, to be credited by the reasonable rental value of the land during the time she has held it, giving her the option to rescind upon the principle stated or to keep the land and confirm the trade as made and pay the notes which she executed.

For these reasons the judgment of the lower court is reversed and remanded, for further proceedings consistent herewith.

ASHER v. FORD LUMBER AND MANUFACTURING CO.

(Filed April 29, 1908—Not to be reported.)

Timber—Trees—Sale of—Evidence—In this controversy, involving the sale of 200 timber trees, the evidence conduces to show that appellant was represented by several persons at the time of the conveyance to H, prior to his purchase of them, and that they knew the trees were marked as sold.

Hazelrigg, Chenault & Hazelrigg for appellant.

T. E. Moore, Jr., and D. B. Logan for appellee.

Appeal from Leslie Circuit Court.

Opinion of the court by Judge Nunn, affirming.

This litigation is with reference to about two hundred poplar trees which grew upon the land of Ephraim Brock, in Leslie county, Kentucky. Appellee claims that it purchased these trees from Brock in the early part of 1902, and paid him the purchase price, and then marked the trees with its cross mark; that Brock, at the time, executed to it a conveyance of the trees, which was recorded in the county court clerk's office of that county. Appellant does not deny the fact of the purchase of the trees by appellee, but says he had no knowledge of the fact at the time he purchased the same in 1903; that the

description of these trees and the land upon which they were situated was so vague and indefinite in the deed referred to that it could not be ascertained that the trees were upon the land which he purchased.

In our opinion, it is unnecessary to consider the question of description of the trees and land given in the deed from Brock and others to appellee. For the reason, after considering all the evidence in the case, we are convinced that appellant, through its agents, had notice of the sale of these trees by Brock before he purchased the land from Brock in 1903. Brock testified to this fact, and Jonas Helton, who made the purchase, in effect, admits it, or at least explains the matter in such a way as leads us to believe that the lower court did not err in its judgment. Helton stated that he first took a bond for the title from Brock to only a part of this land, and in this bond the timber was reserved, as having been previously sold by Brock; that afterwards he took another bond for the title, covering the whole of Brock's land, and in which no reservation of timber was made. He does not explain why there was no reservation of timber in the last bond he claims to have taken, nor does he produce the first one, which he says he took, although he was asked to do so, nor does he explain why he took a bond for a part of the land at one time and the balance at another.

It is shown by the proof that appellant was represented by three or four persons, at the time the conveyance was made to Helton by Brock; that they all knew that Brock had sold this timber previous to that time, and knew that the trees were marked as sold.

For these reasons, the judgment of the lower court is affirmed.

LANDY v. MORITZ.

(Filed April 29, 1908—Not to be reported.)

1. Attachments—Funds in Hands of Trustee of Jury Fund—The prosecutions being terminated, a fund in the hands of the trustee of the jury fund placed as bail, is subject to garnishment, under section 439, of the Code.

2. Evidence—Competency of Witnesses—It was error upon the trial of this case to permit witnesses to testify to statements that were not made in appellant's presence as to the amount of money that she had put up as bail and the amount that her husband had put up.

3. Witnesses—Evidence of Guilt of Misdemeanor—It is not proper to discredit a witness by proof that he has been guilty of a misdemeanor.

J. W. Rawlings, Rawlings & Voris, Robert Harding and Greene & VanWinkle for appellant.

S. A. Russell and W. J. Price for appellee.

Appeal from Marion Circuit Court.

Opinion of the court by Judge Hobson, reversing.

On February 14, 1905, Herman Moritz recovered a judgment against Samuel Landy in the Marion Circuit Court for the sum of \$2,500. Execution was issued upon the judgment, and returned no property found, and on February 23, 1905, Moritz instituted this action in equity to enforce satisfaction of his judgment. He took out an attachment, which was served upon John C. Voris, as trustee of the jury fund of the Boyle Circuit Court, attaching in his hands a fund for \$1,350 deposited in lieu of bail, by Annie Landy, the wife of Samuel

Landy. She filed an answer to the petition, in which she set up that the money referred to was hers. The circuit court ordered the case to be heard before a jury on the question of the ownership of the fund. The jury found in favor of the plaintiff, Moritz, and Annie Landy appeals.

It was shown, on the trial, that, on October 22, 1904, Annie Landy was arrested by the sheriff of Boyle county under bench warrants issued upon indictments found against her by the grand jury in the Boyle Circuit Court, and was placed in jail. Her bail in the cases was fixed at \$700. That afternoon, on obtaining counsel, she wrote a check to the trustee of the jury fund for \$700, in lieu of bail, and was discharged from custody. The check was drawn by her on the Citizens National Bank of Danville, in her own name, and was paid by the bank. About the time that she was released from custody, her husband was arrested by the sheriff and brought into the clerk's office. At the suggestion of her attorney, she then drew another similar check for \$650, the amount of bail required of her husband under the indictments against him. He was then released from custody, the trustee of the jury fund executing to her a receipt for the sum of \$1,350, in lieu of bail on 11 indictments against her and 10 indictments against her husband. This was before Moritz had brought any suit against her husband, as we understand the record; but was after his cause of action had accrued, and he had threatened to bring suit. The proof for Annie Landy also showed that she had opened her account in the Citizens National Bank on September 28, 1901, and had continued the account with the bank from that time on, depositing in the bank from time to time, money, and checking on it, the balance in her favor varying from \$1,000 to \$3,000. She showed that she had received from her father money on which she had traded and which she had kept separate from her husband. On the other hand, the proof for the plaintiff was to the effect that Samuel Landy had said that the plaintiff should never collect his judgment; that, previous to the recovery of his judgment, Samuel Landy had been engaged in business for a number of years, buying and selling poultry, groceries and old iron, doing a considerable business and handling a good deal of money; that he had died not long after the judgment, and that, at his death, no estate of his could be found. On the trial of the case, Moritz was allowed to testify to declarations made to him by Samuel Landy, not in the presence of Annie Landy, as to what he had and what he was going to do with it. S. O. Jeffreys was allowed to state that Samuel Landy had told him that he and his wife had put up the \$1,350, that he had put up \$1,000 and his wife \$350; and also to testify to other statements of Samuel Landy not made in the presence of Annie Landy, as to what he had. Sam Jeffreys was allowed to give similar testimony. This evidence was very prejudicial to Annie Landy and it was incompetent against her. Anything that Samuel Landy said, not in her presence, as to what he had or had done, was incompetent against her. It is insisted that she was not prejudiced, because Jeffreys stated that he also talked with them both when they were both present. Anything that was said when they were both present may be shown, but what Samuel Landy said when she was not present can not be given in evidence to strengthen or piece out what was said in her presence. An examination of the record shows that the statements as to what was said in her presence are very different from those as to what was said when she was not present. What was said when she was not present by Samuel Landy should not have been admitted at all. The testimony of the witnesses should have been confined to what was said in her presence. A witness may not be discredited by proof of the fact that he has been indicted for a misdemeanor. The court, on another trial, will not allow any evidence to be given as to what the indictments against Annie Landy were for.

The prosecutions in the Boyle Circuit Court being terminated, the fund remaining in the hands of the trustee of the jury fund, is subject to an attachment proceeding under section 439, of the Code, upon a return of no property found; as, by the terms of the statute, any money, chose in action, equitable or legal interest, or other property to which the defendant is entitled, may be subjected under that section. (*Bright v. Commonwealth*, 79 Ky., 537; *Farmers Bank v. Morris*, 19 Ky., 157; *Merriweather v. Bell*, 22 Ky. Law Rep., 814.) It is said that the property was in the custody of the law, and, therefore, not subject to attachment, but anything which the defendant owns may be attached in a proceeding on a return of no property found, under section 439. Section 207, of the Civil Code, provides how an attachment may be levied on a fund in court. Under this section, the court has recognized that attachments before judgment may be levied on a fund in court. (*Battorn v. McFerran*, 19 Ky. Law Rep., 1266; *Price v. Taylor*, 110 Ky., 589; *Sanders v. Henderson*, 93 S. W., 14.) Money deposited in lieu of bail is a fund in court within the meaning of the section. If the money deposited with the trustee of the jury fund was the property of Samuel Landy, it may be subjected, but if it was the property of Annie Landy, it can not be subjected.

Upon the whole record, we think that a new trial should be granted for the reasons indicated.

Judgment reversed, and cause remanded, for a new trial.

COMMONWEALTH v. LOUISVILLE PROPERTY CO., &c.

(Filed April 29, 1908—To be reported.)

1. **Escheated Property—Action to Recover—Suit by Attorney Appointed by Auditor—Written Contract Approved by Governor—**Under section 1622, of chapter 44, Kentucky Statutes, providing that "an attorney may be employed by the Auditor with the approval of the Attorney General, to attend to claims of the Commonwealth for recovery of escheated property. The compensation of such attorney shall always be fixed by written contract endorsed "Approved by the Governor," the Auditor is authorized to employ an attorney for the purpose of recovering any escheated property the State may be entitled to, whether under chapter 44 or other provisions of the Kentucky Statutes.

2. **Same—Property Held by Corporation—Not Necessary for its Use—Dismissal of Action of Lower Court—**Where an action was brought by an attorney employed by the Auditor upon an agreed compensation, approved by the Governor, to institute an action against two corporations, alleging that it was held by one for the benefit of the other, and had been so held for more than five years, and that during said time it was not used by either company in its legitimate business or that it was necessary for use in its business, for which reason it had escheated to the Commonwealth under Constitution, section 192, and Kentucky Statutes, section 567, it was error in the circuit court to dismiss the action on the ground that the action could not be maintained by the attorney and his associates under employment by the Auditor.

C. G. Barrickman, Beard & Marshall, A. G. Patterson and Pickett & Barrickman for appellant.

Benjamin D. Warfield and C. W. Metcalf for appellees.

Appeal from Bell Circuit Court.

Opinion of the court by Judge Settle, reversing.

By this action in equity instituted in the court below, the appellant, Commonwealth of Kentucky, sought to recover of the appellees, Louisville Property Company and the Louisville and Nashville Railroad Company, certain lands situated in Bell county and particularly described in the petition, the title to which it is alleged, is held by the Louisville Property Company for the use and benefit of the Louisville and Nashville Railroad Company, under some sort of arrangement between them, the nature and object of which is to enable the railroad company to engage in mining coal upon and from such lands, of which it is alleged to contain large quantities.

The petition contains the averments, in substance, that the lands in question were held by the Louisville Property Company for more than five years before the institution of the action, and that none of it during that time was used by that company in its legitimate business, or was necessary for use in its business, for which reason it had escheated to the Commonwealth of Kentucky; and that the Commonwealth was and is, therefore, entitled to recover the property. It appears from the petition, and the articles of incorporation of the Louisville Property Company, filed herewith as an exhibit, that "its business shall be that of purchasing, holding, leasing, selling, conveying and otherwise using, managing and disposing of all kinds of property, whether real, personal or mixed, wherever situated in the United States of America."

It further appears from the averments of the petition that the Louisville and Nashville Railroad Company is a corporation, chartered under the laws of this State, and that it owns and operates a system of railroads in this and other States.

At the appearance term, the circuit court, upon appellees' motion, issued against the attorneys whose names are signed to the petition, a rule requiring them to appear on a named date and show by what authority they had instituted and were maintaining the action. To this rule the attorneys in question filed a response containing the statement that one of them, G. S. Pickett, had been employed by the State Auditor, with the approval of the Attorney General and Governor, to bring and prosecute the action, and that he (Pickett) had at his own expense employed and associated with him in the case, the other attorneys whose names also appear to the petition. Accompanying the response and filed as a part thereof, was the writing the former claimed to have been employed and authorized to bring and maintain the action. The writing reads as follows:

"This agreement, made this 27th day of April, 1907, by and between S. W. Hager, Auditor of the State of Kentucky, party of the first part, and George L. Pickett, attorney at law of Shelbyville, Shelby county, Kentucky, party of the second part.

"Witnesseth: That the said party of the first part has this day employed said party of the second part, pursuant to section 1622 of the Kentucky Statutes, to institute such suit or proceedings as may be necessary to recover for the Commonwealth of Kentucky, any property which is escheated to the Commonwealth of Kentucky.

"Said second party agrees to prosecute and attend to all of such claims in a careful, diligent and skillful manner, and in consideration for full compensation for all services rendered by him to the Commonwealth in this employment, he shall receive a sum equal to thirty per cent. of whatever may be recovered by him and paid into the treasury of the State, and he shall receive nothing for any service he may render to the Commonwealth in the prosecution of any such claim unless the recovery is had.

"In testimony whereof witness the hand of S. W. Hager, this the 27th day of April, 1907.

(Signed)

"S. W. HAGER, Auditor.

"I, N. B. Hays, Attorney General of the State of Kentucky, approve the employment of George L. Pickett, as set out in the above contract upon the terms and conditions thereof.

(Signed)

"N. B. HAYS, Attorney General."

"Approved,

(Signed)

"J. C. W. BECKHAM, Governor."

Upon the hearing the circuit court held the response insufficient; adjudged that the contract between the Auditor and Pickett did not confer upon the latter or his associate counsel, authority to bring or maintain the action; made the rule absolute and dismissed the action at the cost of the attorneys. From that judgment this appeal is prosecuted.

The lands sought to be recovered for the State are claimed as escheated property under section 192, Constitution, and section 567, Kentucky Statutes. Section 192 Constitution provides:

"No corporation shall engage in business other than that expressly authorized by its charter, or the law under which it may have been or hereafter may be organized, nor shall it hold any real estate, except such as may be proper and necessary for carrying on its legitimate business for a longer period than five years, under penalty of escheat."

Section 567, Kentucky Statutes, is as follows:

"No corporation shall engage in business other than that expressly authorized by its articles of incorporation or amendments thereto, nor shall any corporation, directly or indirectly, engage in or carry on in any way the business of banking or insurance of any kind, unless it has become organized under the laws relating to banking and insurance; nor shall any corporation hold or own any real estate except such as may be necessary and proper for carrying on its legitimate business, for a longer period than five years under penalty of escheat."

Chapter 44 (section 1606 to 1623, inclusive), Kentucky Statutes, relating to "Escheats and Escheators," provides for the recovery by the Commonwealth of such lands and other property as it is therein declared shall escheat to it; actions for which must as provided by section 1611, be brought by an escheator, to be appointed by the Auditor as provided in section 1610. Such actions or proceedings, as may be brought by the escheator, section 1611, declares, shall be instituted and the recovery had in the name of the Commonwealth.

In *Commonwealth v. Wisconsin Chair Company*, 27 Ky. Law Rep., 170, and *Farmers Bank v. Commonwealth*, 27 Ky. Law Rep., 153, this court held that the provisions of chapter 44, Kentucky Statutes, did not apply to lands made the subject of escheat by section 192, Constitution, and that an escheator, appointed under that statute (chapter 44), could only sue to recover lands or other property escheated thereunder. In other words lands which, under section 192, of the Constitution, and section 567 Kentucky Statutes, may be recovered by the Commonwealth under penalty of escheat, can not be sued for and recovered by an escheator appointed under section 1610, of chapter 44.

Who, therefore, is authorized to recover the lands subject to escheat under section 192, Constitution, and section 567, Kentucky Statutes

It is not to be presumed that the framers of the Constitution in adopting section 192 of that instrument, or that the Legislature in enacting section 567, Kentucky Statutes, intended that the State should be left without the means of enforcing the penalty of escheat as to lands held by a corporation contrary to their provisions. The

escheat being provided for and the right to enforce it being in the sovereign, the State, the failure of the statute to indicate the character of proceedings by which the property is to be recovered by it, does not destroy the right or leave the State without a remedy. As the common law form of proceeding in such a state of case has been abolished, and the statute does not designate an agent of the State to enforce the right it confers, the State may itself enforce it by a suit in equity. This being true the question of whether the attorney representing the State has been legally employed to act, while not unimportant, becomes a secondary matter.

On this point, however, the writing filed with the response, clearly shows the employment of Pickett, and the response shows he in turn employed the other counsel associated with him in the case.

In providing for the appointment of an escheator and defining his powers and duties, the several sections of chapter 44, Kentucky Statutes, in express terms, confine their exercise and performance to the recovery of property escheated under the provisions of that chapter. For instance, section 1611 provides:

"The escheator shall institute proceedings in the name of the Commonwealth in the circuit court of the county in which land lies that has vested in the Commonwealth, under the provisions of this chapter, for the recovery of the same." * * * Again it is declared by section 1616: "Any escheator failing to comply with any of the requisitions of this chapter shall be fined \$100, upon indictment in the Franklin Circuit Court." But section 1622 of chapter 44, which allows the employment of an attorney at law by the Auditor to attend to claims of the Commonwealth for the recovery of escheated property, contains no such limitation. That section reads as follows:

"An attorney at law may be employed by the Auditor, with the approval of the Attorney General, to attend to claims of the Commonwealth for the recovery of escheated property. The compensation of such attorney shall always be fixed by written contract, endorsed 'approved' by the Governor."

The language of this section is broad and comprehensive. It permits the Auditor to employ an attorney for the purpose of recovering any escheated property the State may be entitled to, whether under chapter 44 or other provisions of the Kentucky Statutes. If it had been the intention of the Legislature to confine the duties of such attorney to the recovery of such property as may escheat to the State under chapter 44, we take it that the section would have said so as in the matter of restricting the duties of the escheator to chapter 44. We are of opinion, therefore, that the employment of Pickett by the Auditor, to institute this action against the appellees, was authorized by section 1622, and the contract evidencing his employment conforms to the requirements of that section as it shows that the employment was made with the approval of the Attorney General; the object of the employment, and that the compensation of the attorney was fixed thereby with the approval of the Governor.

It would, perhaps, be in accord with the law, as well as the policy of the State to say, that the employment of Pickett was also authorized by sections 114 and 115, Kentucky Statutes. The first giving to the Auditor authority to employ attorneys in the various counties if necessary, to aid the Attorney General in investigating and recovering for the State such unsatisfied claims or other demands as may be due it; the second, empowering the Governor to employ counsel to represent the Commonwealth in actions or proceedings for the collection or enforcement of claims or demands of the Commonwealth in such actions or proceedings as it may have an interest in or be a party to.

If right in the above conclusion it follows that the circuit court erred in sustaining the rule against appellant's attorneys, and in dismissing the action; and this being true, it is unnecessary to decide

whether the attorneys were liable for costs, had the dismissal of the action been proper.

It is insisted by counsel for appellees that the petition is fatally defective and, therefore, fails to state a cause of action against either of the appellees. That question is not before us for review, and we, therefore, decline to pass upon it. It will, however, arise upon the return of the case to the lower court, and that court will first decide whether the petition states a cause of action, and if so, whether the grounds exist for the escheat of the lands sought to be recovered, as specified in section 192, of the Constitution, and section 567, Kentucky Statutes; the burden being upon the Commonwealth to prove the conditions authorizing such escheat.

For the reasons indicated the judgment is reversed and cause remanded, for further proceedings consistent with the opinion.

PAYNE v. COMMONWEALTH.

(Filed April 29, 1908—Not to be reported.)

1. Rape—Assault to Commit—An attempt at rape includes every ingredient of rape except its accomplishment; that is, if the assault is made under such circumstances as that the act of sexual intercourse, if it had been actually accompanied, would have been rape, it would constitute the crime of an attempt to commit rape.

2. Same—Acts of Accused—Purpose Shown—Preparation, Ability and Intention—Where the acts of the accused were such as to show a purpose on his part to have carnal knowledge of a female by force, or by her consent where she was under twelve years of age, and that he was prepared and able to carry such intention into effect and would have done so, but for the flight of his victim, he is guilty of attempted rape.

3. Same—Overt Act—While it is true that in order to make out a case of attempt to commit rape, there must, in addition to the intent, be some overt act in pursuance of such intent, but the overt act need not be such as amounts to a technical assault.

Geo. S. & John A. Fulton for appellant.

James Breathitt, Tom B. McGregor and N. W. Halstead for appellee.

Appeal from Nelson Circuit Court. ,

Opinion of the court by Judge Settle, affirming.

Appellant, a negro youth of fifteen years, complains that he was illegally convicted in the court below under an indictment charging him with the crime of attempting to commit a rape upon Epsy Hall, a white girl under twelve years of age. His punishment was fixed by the jury at confinement in the penitentiary five years.

It appears from the evidence that the parents of Epsy Hall live about a mile from the city of Bardstown, and near the Bardstown and Shepherdsville turnpike, and that Epsy, who is eleven years of age, and her sister, Virginia Lee Hall, whose age is nine years, attend school in Bardstown, to which they walked from their home, traveling the turnpike the greater part of the distance. At a distance of less than half a mile from Bardstown there are two hills in the turnpike and a considerable hollow between them; at this point there is an old, unused graveyard, quite a grove of locust trees on one side of the pike and also a gate opening into a grass field. The topography of the country makes this rather a secluded place by shielding it from the vision of persons approaching the hollow in

the pike from either direction until the top of the hill, on one side or the other of the hollow is reached.

The appellant, Logan Payne, seems to have been employed by several of the residents of Bardstown to daily drive their cows to the pasture adjoining the turnpike entered by the gate in or at the end of the hollow. It further appears from the evidence that, on the morning the attempt at rape was claimed to have been committed, appellant had turned the cows, of which he had charge, through the gate into the pasture when Epsy and Virginia Lee Hall approached and were about to pass him on their way to school; he then faced them, with his pants unbuttoned, and exposed to their view his penis, all the while retaining it in his hand and shaking it at her, "asked her if she knew what that was." The little girl told him that she did not, and she and her sister then hurried on their way to school.

When appellant first accosted Epsy Hall he was not more than ten or fifteen feet from her and was going toward her. When the girls continued on to school he said to Epsy "hold on," and asked her, moving toward her as he did so, if she had ever seen anything like his penis, all the while retaining it in his hand and shaking it at her. Seeing appellant advancing upon them the little girls quickened their pace and finally broke into a run to avoid him. Appellant pursued them for a distance, telling them again to hold on, quickening his gait to overtake them, but soon after they began to run he slackened his speed and finally stopped the pursuit.

Upon reaching home in the afternoon the little girls complained to their father of what appellant had done and the latter procured his arrest, following which he was identified by the girls as the guilty party.

Appellant did not himself testify on the trial, or attempt, by other witnesses, to contradict the little girls. It was, however, contended by appellant's counsel, in asking a new trial in the circuit court, and is now urged, that the foregoing undisputed facts do not sustain the charge of attempted rape made in the indictment, therefore the trial court should have given the peremptory instruction asked by appellant at the conclusion of the evidence. This contention sharply presents the only serious question in the case.

The indictment was found under section 1154, Kentucky Statutes, which provides: "Whoever shall attempt to commit a rape upon the body of an infant under twelve years of age shall be confined in the penitentiary not less than five nor more than twenty years."

There is no statute in this State defining rape, or attempt to commit rape. It is, therefore, necessary to look to the common law to ascertain the elements and meaning of each of these crimes. Rape, at common law, may be defined as the carnal knowledge of a female forcibly and against her consent. Force, actual or constructive, is an essential element of the crime of rape, but any, even the least, force is sufficient. All male persons over the age of fourteen years are presumed to be physically capable of committing the crime of rape unless the contrary appears.

An attempt to commit rape includes every ingredient of rape except its accomplishment; that is to say, if the assault is made under such circumstances as that the act of sexual intercourse, if it had been actually accomplished, would have been rape, it would constitute the crime of an attempt to commit rape.

What we have said as to the necessity of proof of force, actual or constructive, to constitute the crime of rape, or attempted rape, does not apply when the female is under twelve years of age; as a female under that age is, in law, incapable of consenting to an act of sexual intercourse, such intercourse, with her consent, makes the male guilty of rape, without proof of any force.

As said by this court, in *Fensten v. Commonwealth*, 82 Ky., 549: "A female under that age (twelve years) is presumed to be as an idiot, in fact is, without capacity and discretion to comprehend fully the consequences of yielding to the ravisher, or strength of will to resist his influence and importunities. Hence, carnal knowledge of her, even with her nominal consent, is in legal contemplation, forcible and against her will; and though not deemed of as heinous nature, nor punished with the same severity, as when, in fact, forcibly and against her consent, is, nevertheless, within the meaning of the statute, rape, and punished as such." (*White v. Commonwealth*, 96 Ky., 180; 23 Am. & Eng. Ency. of Law, 554-557.)

Were the acts of appellant such as to constitute attempted rape upon an infant under twelve years of age? We find in Roberson's *Criminal Law*, volume 1, page 352, this statement as to the attempt to commit rape: "But actual violence, or touching the person of the one upon whom the attempt is intended, is not essential. If the intent, with the present means of carrying it into effect, exists and preparation therefor has been made, the crime is complete."

We are further told by the same author (1 Roberson *Criminal Law*, section 269): "An ineffectual attempt to carnally know a female under age of consent (twelve years), with or without her consent, is an attempt to commit rape." (*State v. Newton*, 44 Iowa, 45; 1 Wharton *Crim. Law*, 88.)

With what intent did appellant act on the occasion of his meeting with the Hall girls? Why did he, when within ten feet of them, unbutton his pants, expose his private parts and ask the larger and elder of the girls "if she knew what that was" and "if she had ever seen anything like it?" unless his motive was the gratification of his lustful nature? It must be kept in mind that during this brutal and disgusting performance, appellant was advancing toward Espy Hall with his private in his hand and when, after being thus interrupted, she and her sister, in their fright, again started toward the schoolhouse, he began to call to them to hold on, for a time accelerating his pace with the view of overtaking them, but when they broke into a run, which enabled them to get out of the hollow, and on the elevation beyond, where they could be seen from residences along the pike, and perhaps from the schoolhouse, he seeing they had reached a point of safety, gave up the chase.

Appellant daily took the cows to the pasture and must have previously met the girls as they went to school, and if his motive was to have carnal knowledge of the elder girl, he would have selected the hollow of all other places on her way to school for that purpose, as the old graveyard and adjacent trees and shrubbery would have afforded a place of concealment for the deed, had he secured possession of her person, as he evidently tried to do.

He could not have adopted a more certain and conspicuous means of acquainting Espy Hall with his lustful desire and purpose than by indecently exposing his privates as was done, and the brazenness of his conduct seemed to indicate that he would have been sufficiently brutal to have forcibly had sexual intercourse with her in the presence of her little sister, could he have secured possession of her person. So if appellant's acts were such as to show a purpose on his part to have carnal knowledge of Espy Hall by force, or with her consent, and that he was prepared and able to carry such intention into effect, and would have accomplished it, but for the flight of his intended victim, he was guilty of attempted rape as charged in the indictment.

In the case of *Lewis v. State*, 35 Alabama, 380, the defendant was indicted for an attempt to commit rape, the proof being that he tried, by suddenly approaching and accosting her in a secluded place, to stop the prosecutrix as she was riding horseback along the public highway, with the intent to forcibly have carnal knowledge of her.

Instead of obeying the defendant's command to stop, the prosecutrix without waiting for him to get near enough to seize her person or horse, put the animal to his best speed and thereby escaped though closely pursued by the defendant for some distance. In discussing the question of whether these facts were sufficient to authorize the defendant's conviction of the crime of attempted rape, the Supreme Court of Alabama, in its opinion, said: "If the attempt was in fact made and had progressed far enough to put Miss Osler (prosecutrix) in terror and render it necessary for her to save herself from the consummation of the attempted outrage by flight, then the attempt was complete; and an after abandonment by the defendant of his wicked purpose if he had proceeded this far, could not purge the crime."

In *Hays v. The People*, 1 Hill's (N. Y.) Rep., 351, the facts were that the defendant enticed a female ten years of age into the loft of a building for the apparent purpose of ravishing her, and was detected while standing within five feet of her in an indecent state of exposure. There was no evidence that he touched her at any time. Upon these facts the jury were instructed that if they believed from the evidence defendant enticed the girl to the loft for the purpose of ravishing her, she being under ten years of age, they should find him guilty of an assault with intent to commit a rape. The defendant was convicted and upon appeal the judgment was affirmed by the Supreme Court. In the opinion, the court said: "There is no doubt of the prisoner's intent. * * * The assent of such an infant being void as to the principal crime, it is equally so in respect to the incipient advances of the offender. That the infant consented to, or even aided in the prisoner's attempt, can not, therefore, as in the case of an adult, be alleged in his favor, any more than if he had consummated his purpose. The case submitted to the jury, was that of a man having another in his power, and within reach, threatening and exerting the means to accomplish meditated violence upon her person. This is clearly an assault within all the authorities. * * * There need not be even a direct attempt at violence; but any indirect preparation towards it, under the circumstances mentioned * * * would be sufficient."

One of the distinctions between the common law offense of "assault with intent to rape" and that entitled by section 1154, Kentucky Statutes, "Attempt to commit rape," is that the first is merely a misdemeanor and the latter a felony. The law books seem also to make the distinction, that the element of assault which is essential to the first offense need not always exist in the latter, which is certainly true in a case like the one before us, where the intended victim was an infant under twelve years of age, whose consent, if given, would not excuse the crime. While it is true that in order to make out a case of attempt to commit rape, there must, in addition to the intent to commit rape, be some overt act in pursuance of such intent, but the overt act need not be such as amounts to a technical assault. (23 Am. & Eng. Ency. of Law, 867-8.)

There was some evidence in this case of the intent, accompanied by overt acts mentioned on the part of appellant, which the jury evidently regarded sufficient to authorize the verdict declaring appellant guilty of an attempt to commit rape, as charged in the indictment. This court has held repeatedly, that it has no power to reverse a judgment of conviction in a criminal prosecution upon the ground that the evidence is not sufficient to support the verdict, being restricted to the single inquiry, whether there was any evidence before the jury conducing to show the guilt of the accused, and in this case we think there was. Therefore, the trial court did not err in refusing the peremptory instruction asked by appellant.

Although juries, because of their sensitive regard for female virtue, usually impose upon persons guilty of such brutal attacks as that laid at appellant's door the most rigorous punishment known to the law, the record in this case fails to show that they were actuated by either passion or prejudice in arriving at their verdict, for they only inflicted upon him the minimum penalty named in the statute for the crime charged.

The record discloses no error in the admission or rejection of evidence, or in refusing instructions asked by appellant; and the instructions given seem to have fully conformed to the law.

Wherefore, the judgment is affirmed.

BRASHEARS, &c. v. BRASHEARS.

(Filed April 22, 1908—Not to be reported.)

1. Pleadings—Relief Sought—Sufficiency of Allegations—Judgment by Default—Prayer of Petition—Under section 90, of the Civil Code, providing, that "if no defense be made, the plaintiff can not have judgment for any relief not specifically demanded," where it is stated in the body of the petition with sufficient accuracy to enable the court, from an inspection of the pleadings, to determine the amount for which the plaintiff is entitled to judgment, it is not indispensable, to support a judgment by default, that the amount claimed should be repeated in the prayer of the petition.

2. Same—But if the petition is defective and fails to set out with reasonable certainty the amount to which the plaintiff is entitled, or if the court, by an inspection of the pleadings, can not readily adjudge the sum for which judgment should be entered, then the prayer must specifically state the relief demanded or a judgment by default can not be rendered.

3. Action—Damages for Cutting Timber—Averment as to Value—Sufficiency—In a petition by a plaintiff for damages for the cutting and conversion of the timber from a large tract of land an averment that the value of the trees cut and removed did not exceed \$4,944.57 is not sufficient to authorize a judgment by default for that sum.

4. Default Judgment—Relief not Sought—A judgment by default for relief not sought in the petition is a clerical error which may be corrected after the term.

5. Clerical Misprision — How Shown — How Corrected — A clerical misprision must be shown by the record and can only be corrected by the record. But if a plaintiff is given a judgment for more than his pleading shows he is entitled to or for any sum when the petition does not authorize a judgment in any amount, it is a manifest error which the defendant may have corrected on motion after notice.

6. Limitation—In this case the motion was made as soon as the defendant learned of the judgment, or by the exercise of ordinary care could have learned of it, and within ten years of its entry, and hence the right to correct the error was not barred by limitation.

Hazelrigg, Chenault & Hazelrigg, R. O. Brashears and Howard, Howard & Horn for appellant.

J. J. C. Bach and W. H. Miller for appellee.

Appeal from Perry Circuit Court.

Opinion of the court by Judge Carroll, affirming.

In February, 1898, the appellant R. O. Brashears as administrator of R. S. Brashears' estate, brought a suit in ordinary against the Day

Brothers Lumber Company, the Southern Lumber Company, the Asher Lumber Company and appellee, R. H. Brashears. The petition reads as follows:

"The plaintiff states that the defendants, by agents and employes, within the last five years unlawfully, forcibly and against the will and consent of plaintiff, entered upon the following land, belonging to the heirs of R. S. Brashears, situated on the Bear Branch, in Perry county, Kentucky, and described as follows, viz: Beginning on or near the head of Bear Branch on a dogwood, white oak and poplar, S 10 E. 45 poles, continuing with courses and distances to the beginning, containing 450 acres more or less, conveyed by deeds properly signed and acknowledged and transfers properly recorded in Deed Book ——— Perry county court from Dykes Jessie to R. S. Brashears, showing a defined and well-marked boundary by actual survey; and 200 acres surveyed in 1849 and patented in 1850 to R. S. Brashears showing a defined and well-marked boundary by actual survey; and patent of 400 acres of land made in the name of Jessie Dykes, July 1st, 1845, recorded in book 13, page 50, land office, at Frankfort, Ky., and said defendants did thereon unlawfully enter upon plaintiff's rights and titles, and cut down more than 300 poplar and other trees, and sawed into logs valuable timber then growing upon said land, and removed said logs, and have converted them to their own use, said trees so cut down and removed by the said Day Co. were of the value of \$—— and said logs so cut and removed by other parties are worth the sum of \$——. Plaintiff further states that he was duly qualified and appointed administrator of R. S. Brashears' estate by orders entered of record at the August special term, 1892, of the Perry Circuit Court, and gave bond as the law requires, which was accepted and approved by the court, certified copies of same will be filed in due time herein if required by the court. He now waives the tortious acts of the defendant herein before set out, and sues the defendants jointly on the implied contract or promise to pay the plaintiff the value of said trees and logs so cut, removed and converted to their, defendants', own use, not, however, to exceed the sum of \$4,944.57. and plaintiff now alleges that the defendants, jointly and severally, on an implied promise or contract, are indebted and liable to the estate for the value of the aforesaid trees or logs so taken, not exceeding the sum of \$4,944.57, and no part thereof has ever been paid. Plaintiff further alleges that each of said companies are doing business in this State as corporations duly authorized under the existing laws, with power usual to incorporated companies, and that said saw logs and other timber was cut and taken from off of the possession of the plaintiff in Perry county, Kentucky, during the years 1892-3-4 and 5, by defendants' agent, employes wrongfully, and contrary to law. Wherefore, the plaintiff prays judgment for the value of all trees or logs so cut and removed and for 10 per cent. damages thereon for the wrongful seizure and detention thereof, for costs and all proper relief."

At the following March term of the court this judgment was entered:

"This cause having been, on a former day of this term, substituted on a motion of plaintiff to take the petition as true against the defendant, R. H. Brashears, and it now appearing to the satisfaction of the court that said defendant, R. H. Brashears, was on the 21st day of February, 1898, duly served with process and duly summoned to answer herein for a period of more than ten days previous to the first day of this term and failing to answer, the petition as to him taken as true, and confessed for the amount claimed. It is therefore adjudged by the court, that Robt. O. Brashears, personal representative, recover of the defendant the full and just sum of \$4,944.57 with interest thereon at the rate of six per cent. per annum from the 14th

day of February, 1898, until paid, and the cost created by reason of this action."

The record does not show that the appellee, R. H. Brashears, or either of the other defendants entered their appearance to the action or made any motion therein; nor was any other order or step taken in the case, until 1907, when appellee, R. H. Brashears, the judgment defendant, appeared and moved the court to set aside the judgment, "first, because the judgment purports to be in favor of R. O. Brashears, as administrator, when he was not at any time the administrator of R. S. Brashears; second, because the co-tenants, Day Brothers Lumber Co., Southern Lumber Co., Asher Lumber Co., were not before the court when the judgment against R. H. Brashears was rendered, nor was the action dismissed as to them; nor had R. H. Brashears been served with process; third, because there is no description of the land in the petition; fourth, because the action was for the recovery of damages, and the assessment should have been made by a jury; fifth, because the petition contains no prayer for any sum of money, and the court had no authority or power to render any judgment for any specified amount; sixth, because if there was any cause of action for cutting and removing timber to the estate of R. S. Brashears, said action was in his children and heirs at law, and not in his personal representative, and the personal representative could not waive the action in tort and sue in assumpsit.

The lower court, in considering this motion, to which the plaintiff entered his appearance, set aside the judgment, and the plaintiff below appeals.

It is conceded by counsel for appellant that the proceedings leading up to and including the judgment are erroneous, but it is insisted that the judgment was not void and for that reason the court had no power, upon motion nine years after its rendition, to set it aside.

Section 90 of the Civil Code provides in part that: "If no defense be made, the plaintiff can not have judgment for any relief not specifically demanded." When it is stated in the body of the petition with sufficient accuracy to enable the court from an inspection of the pleadings to determine the amount for which the plaintiff is entitled to judgment, it is not indispensable to support a judgment by default that the amount claimed or to which the plaintiff is entitled should be repeated in the prayer of the petition, it will be sufficient if he prays for judgment for the amount of his claim or demand. (*Harris v. Perry*, 2 Bush, 101.) But if the petition is defective and fails to set out with reasonable certainty, the amount to which the plaintiff is entitled, or if the court, by an inspection of the pleadings, can not readily adjudge the sum for which judgment should be entered, then the prayer of the petition must state specifically the relief demanded, or a judgment by default can not be rendered. Tested by these rules, our conclusion is that the amount to which the plaintiff was entitled is not stated with sufficient certainty in the petition to authorize the court to render judgment by default in the absence of a prayer stating accurately the relief desired.

It will be noticed that there is no specific averment of the value of the trees cut, removed and converted by the defendants, the amount being left blank. It is alleged that the defendants, jointly and severally, on the implied promise or contract, are indebted as applicable to the estate for the value of the aforesaid trees, not exceeding the sum of \$4,944.57, but the value of the trees cut, removed or converted is not stated.

It will further be observed that the charge is that the trees cut, removed and converted by the Day Company, were of the value of — dollars. What was the value of the trees, if any, that were cut, removed and converted by the defendants jointly, is not stated. If it should be conceded that the defendants were jointly and severally

liable for the full value of all the trees cut, removed and converted, we can not, by an inspection of the petition say what their value was. The averment that their value did not exceed \$1,944.57 is not sufficient to authorize a judgment by default for that sum. The plaintiff, if entitled to anything, was only entitled to the value of the trees cut, removed and converted, with interest thereon, and the petition should have stated definitely, and specifically the value for which a recovery was sought (*Bowman v. Ray*, 25 Ky. Law Rep., 2131; *Miller v. Allen*, 20 Ky. Law Rep., 463; *Hansford v. Holddam*, 14 Bush, 210) or, failing in this the prayer should have specifically pointed out the relief sought. This it did not do.

It has been often held by this court that a judgment by default, for relief not sought in the petition, is a clerical error which may be corrected on motion after the term. Thus, to render judgment for interest from an earlier date than that from which interest was claimed in the petition (*Manley v. Trustees of LaGrange*, 7 Ky. Law Rep., 825); or to give judgment for a greater sum than under the pleadings should have been adjudged. (*Wilmes v. Thoblin*, 11 Ky. Law Rep., 678; *Reynolds v. Powers*, 17 Ky. Law Rep., 1059; *Dayton v. Gardner*, 19 Ky. Law Rep., 302; *Dills v. Hatcher*, 25 Ky. Law Rep., 891.) In *Binion v. Woolery*, 25 Ky. Law Rep., 1802, the plaintiff asserted a lien on thirteen-fifteenths of the land in his petition. The court entered a judgment, adjudging a lien on the whole tract, and ordering its sale. This was held a clerical misprision, in so far as the judgment granted relief not sought in the pleadings, and for which no foundation was there laid. Upon the same principle, it is the rule in this court that where a judgment for damages is entered; where there is no supersedeas, or where the judgment superseded is not a judgment for the payment of money, the error is a clerical misprision which may be corrected in this court by motion at any time. The same rule is applied where the judgment is a judgment for money, and has been superseded, and no judgment for damages is entered. (*Nelson County v. Bardstown*, 30 Ky. Law Rep., 408; *Bank of Kentucky v. Commonwealth*, 31 Ky. Law Rep., 1087.) A clerical misprision must be shown by the record, and can only be corrected by the record. But, where it appears from the record itself that a clerical error has been made, it may be corrected by the record. (*Smith v. Mullens*, 3 Met., 182; *Seller v. Northern Bank*, 86 Ky., 128; *Bonar v. Gosney*, 17 Ky. Law Rep., 92; *Commonwealth v. Caudill*, 28 Ky. Law Rep., 520.) In this case the motion was made as soon as the defendant learned of the judgment, or by the exercise of ordinary care could have learned of it, and within ten years from its entry and hence the right to correct the error was not barred by limitation.

If it is a clerical misprision to enter a judgment for relief not sought in the pleadings, under the provision of the Code as extended and construed by this court, it must be a clerical misprision to enter judgment by default against the defendant where the prayer of the petition does not warrant the judgment. In such a case, the whole matter contained in the judgment is beyond the prayer of the petition. If a judgment may be corrected where it in part gives relief not authorized by the petition or the prayer, clearly one should be corrected in which all the relief granted is beyond the prayer of the petition. The purpose of the Code is that the defendant shall be apprised, by the petition and prayer, of the nature and extent of the relief the plaintiff seeks against him, so that he may know what steps he should take for his protection. He may not wish to make defense to the petition as it stands and may be willing to let judgment go by default for the recovery if any sought; but, if the plaintiff is given judgment for more than his pleading shows him to be entitled, or for any sum when the petition does not authorize a judgment in any amount, it is manifest that error has been committed to the prejudice

of the defendant, and this error he may have corrected on motion after notice.

We, therefore conclude that the court properly set aside the judgment as a clerical misprision. The parties are now before the court. The plaintiff may amend his petition, and the case may be tried on the merits.

Judgment affirmed.

GUHY, &c. v. NICHOLS & SHEPHERD CO.

(Filed April 29, 1908—Not to be reported.)

Vendor and Purchaser—Sale of Separator—Express Warranty—Action for Price—Plea of Breach of Warranty—Use Without Complaint—Appellant purchased of appellee an engine and separator upon an express warranty "that it was well made, of good material, and, with proper management, capable of doing well the work for which it was intended." In an action on the last note for the purchase price, the defendant, after having used it for four years, pleaded that it was defective. Held—That where there is an express warranty there is no implied warranty, and the purchaser, after using the machine for four years, without offering to return it, or notice to the seller that it was defective, was without defense to the payment of the note.

Shelbourne & Smith and J. P. Wilson for appellants.

Bennett, Robbins & Thomas for appellee.

Appeal from Hickman Circuit Court.

Opinion of the court by Judge Hobson, affirming.

On June 13, 1901, the Nichols & Shepherd Co. sold J. H. Guhy an engine and separator, for which he executed to it his five promissory notes, as follows: The first, for \$96, due October 1, 1901; the second, for \$221, due March 1, 1902; the third, for \$316, due October 1, 1902, the fourth, for \$441, due October 1, 1903, and the fifth, for \$441, due October 1, 1904. Guhy paid off the first three notes. On February 9, 1905, when the other two notes were due, and in part unpaid, he executed to it two notes, each for \$341, due August 1, 1905, and August 1, 1906, for the balance due upon the two original notes. James Harp and W. M. Burgess signed these renewal notes as his surety, and, to further secure the notes, he executed a mortgage on the engine and separator. He paid off the first of these notes, but failed to pay the other, and, on December 25, 1906, the Nichols & Shepherd Co. brought this suit to obtain judgment on the note, and to enforce its mortgage. Guhy defended the action upon the ground that the engine was guaranteed to him, at the time it was sold, to be a first class engine, and to do first class work, and that, if it did not do first class work, the company would make it fill the warranty; that the engine was defective, and that, though notified, the company failed to make it do the work, and that the notes in suit were executed upon a promise then made by the company that it would repair the engine and make it fill the warranty, but that this it had failed to do. The company pleaded, in response to this, that the engine was sold under a written contract, which contained the following warranty:

"This machinery is purchased and sold subject to the following express warranty and agreement, and none other, viz: That said machinery is well made, of good materials, and, with proper management, capable of doing well the work for which the machines respectively are made and sold; conditioned that if, within five days from

its first use, it shall fail to fill this warranty, written notice shall immediately be given by the purchaser to Nichols and Shepherd Co., at Battle Creek, Michigan, by registered letter (and written notice also to the local dealer, through whom the same was received) stating particularly what parts and wherein it fails to fill the warranty. Reasonable time shall be allowed the company to get to the machine with its workmen and remedy the defect, if any there be, (unless it be of such nature that a remedy may be suggested by letter), the purchaser to render friendly assistance and co-operation in making a practical success. If a workman visits the machine for the company and does not leave it working satisfactorily, the purchaser shall give immediate notice to the company, at Battle Creek, Michigan, by registered letter, as before (and also the local dealer), and state, in writing, specifically, any failure or neglect complained of, and allow time for another workman to be sent to examine the machine and its workings. If, after giving the notices as above stated, any part of the machinery can not be made to fill the warranty, that part which fails shall be returned immediately by the undersigned to the place where it was received, with the option of the company either to furnish another machine, or part, in place of the machine or part so returned, which shall perform the work, or return the money and notes which have been received by the company for the same, and thereby rescind the contract to that extent, or the whole, as the case may be, and be released from any further liability herein. The failure of any separate machine, or any part thereof, shall not affect the contract or liability of the purchaser for any other separate machine, or for any parts of such machines as are not defective.

"It is expressly agreed that said company shall be liable only for the return of cash, and notes payable to its order, actually received by it, and not for any machinery or other property taken hereon as part payment.

"The notices herein mentioned are conditions precedent to the warranty and no evidence of the waiver of any condition, or thing to be done by the warrantee, herein expressed, shall be competent in any action arising under this contract unless in writing, signed by the proper officer of the company. If any part of said machinery (except belting) fails during the first season in consequence of any defect in material of said part, the company have the option to repair the same or furnish a duplicate of said part free of charge, except freight, after presentation of the defective piece, clearly showing a flaw in the material, at the factory, or to the dealer through whom said machinery was bought."

The company alleged that the written contract was the only agreement made by it in regard to the sale of the engine; that Guhy had kept the engine and had used it from the time it was bought to the time the answer was filed, without giving any written or other notice that it was defective, and that he had asked and obtained extensions of time for the payment of the price without complaint as to defects in the engine, promising to pay the debt if the time was extended. The allegations of the reply were denied by a rejoinder and the court ordered the case heard before a jury. At the conclusion of the evidence on both sides, the court instructed the jury peremptorily to find for the plaintiff. The defendants appeal.

It was contended, on the trial, that Guhy bought the engine as stated under the written contract. He testified that the engine from the start failed to do the work; that Long, the local agent, when he bought it, said that if it was bought direct from him, he would be there to attend to it and make it do the work; that he, on the day he started it, notified the man who set it up that the engine was not doing the work; that the next morning the man came back, but when he got there Guhy had got the pump to work and the man left; but before he had gotten home, the pump got out of fix again; that the

engine foamed and he could keep no water in it, and the pump would not work; that he had continually to stop and cool it off and could make no time; that, after about ten days, he notified Long; that Long would come out and tell him it was all right and he would send for him again; and thus things went on until the note in suit was executed; that then a man named Case came to see him to get the money; that he told Case that he could just take the engine, he was not going to pay any more on it unless it was fixed; that finally Case agreed that if he would secure the debt by giving personal security and a mortgage they would fix the engine and give him two years to pay the debt, and in this way he could make the money out of it; that, upon this agreement, he did get Harp and Burgess to go on the notes and executed the mortgage on the engine and separator. But that, after he gave the notes, they failed to do anything to the engine and that he had been unable to make it a success by reason of this. He also introduced other proof tending to confirm his statement as to the trouble that he had had with the engine and as to the agreement had with Case at the time the notes were renewed. He admitted that he had run the engine every year since he had gotten it, in threshing wheat, in summer, and that he had used it in winter in sawing and other work. He also admitted that he had paid off the first renewal note, but said he did so to have no law suit, thinking they would fix the engine.

The defendant introduced its agent, Long, who said that the only complaint that Guhy ever made to him was about the pump; that this occurred first in 1903; that the pump was then worn out and he got the necessary new parts for it. He also testified that this occurred again in 1905, and that this was all the complaint he ever heard of and that Guhy told him the engine did better work afterwards; that he did not see it any more. Case was introduced and testified that he was simply an agent to collect; that he went to see Guhy to collect the balance due on the notes then outstanding and that Guhy agreed to give the new notes with security if the time was extended; and that this was the only agreement he made with Guhy; that Guhy made no complaint to him at all about the engine, and he made no promise about fixing it. J. L. Moss testified that he was the local agent in 1905 and that no complaint was made to him about the engine.

The only warranty in the sale of the machinery was the express warranty; for where there is an express warranty, there is no implied warranty, and if the purchaser has lost his right to rely on the express warranty, he is without remedy; for the contract in such cases measures the liability of the parties. (Gaar Scott & Co. v. Hodges, 28 Ky. Law Rep., 889; Wisdom v. Nichols Shepherd Co., 97 S. W., 18, and cases cited.) Under the proof, it is manifest that Guhy, when he executed the renewal notes in February, 1905, had lost all right to rely upon the express warranty made in the sale of the engine. He had then held and used the engine for nearly four years without at any time offering to return it, and without any notice to the company that it was defective. After keeping and using the engine so long he was without defense to the payment of the price. When Case came, in February, 1905, he refused to pay the balance due on the notes, saying that the company might take the engine. If Case then agreed that the company would repair the engine and give him two years to pay the debt if he would give the new notes with security, and he accepted this proposition and executed the notes, relying on this agreement, it was incumbent on him to notify the company what repairs he wanted and to give it an opportunity to make the repairs. He could not go on and use the engine for two years longer without complaint or objection and without calling on the company to make any repairs, and then defend the action on the last note on the ground that the company had failed to repair the engine. In the meantime, he had paid off one of the notes which he had executed to Case. He

had done this without any complaint to the company that it had not repaired the engine as Case had agreed. To allow him, when sued upon the other note, to make the defense that the company had not complied with its agreement would be to allow him to mislead the company. In matters of this sort a party must use reasonable diligence and good faith. A man can not waive a matter and afterwards rely upon it. The use of the engine for two years was a waiver of any right to demand repairs upon it, and, under the testimony, the defense now made must be regarded as an afterthought. (McCormack Harvesting Co. v. Arnold, 116 Ky., 508.)

On the whole record, we, therefore, conclude that the judgment of the circuit court is in accord with the merits of the case, and it is, therefore, affirmed.

BURCHETT v. CLARKE.

(Filed April 28, 1908—Not to be reported.)

Order—Consent Order—A consent order can only be made by persons who are legally authorized to consent. The infants in this action could not consent, and it does not appear that any one consented for them; the order of revivor, was, therefore, void. The action was not revived within the time allowed by the Code, or at all, and the lower court properly dismissed it.

J. M. Roberson and E. D. Stephenson for appellant.

James Goble for appellees.

A. C. VanWinkle for guardian ad litem.

Appeal from Pike Circuit Court.

Opinion of the court by Judge Carroll, affirming.

In 1886 the appellant, Burchett, brought an action in the Pike Circuit Court against Calvin Clarke and Gorden Clarke to recover the possession of a tract of land, containing about 200 acres. In the same year the defendants answered. In 1889 an amended petition was filed, which was answered in August of that year. In December of that year a reply was filed. In 1891 there was a rejoinder, and in 1895 an amended answer. No other action was taken in the case until October, 1902, when this order was entered: "By consent, this cause is now ordered to stand revived in the name of Dixie E. Clarke, Stonewall Jackson Clarke, and Hiram Clarke, only children of Calvin Clarke, deceased, and M. A. Clarke, widow of said Calvin Clarke, and W. G. Reed, administrator of Calvin Clarke. And the cause is now ordered to proceed in their names as the real and personal representatives of Calvin Clarke, deceased, and this cause is continued."

The next order was entered in August, 1905, when P. B. Stratton was appointed guardian ad litem for the infants, the appointment being made after an affidavit had been filed stating that the infants had no guardian ad litem. Nothing else was done until 1906, when Mrs. Clarke filed an affidavit, which is not in the record, and entered a motion to dismiss the action for want of revivor. This motion was sustained and the action dismissed. No appeal is prosecuted from the order of dismissal so far as Gorden Clarke is concerned. The statement filed by appellant shows that the only appellees are the widow and children of Calvin Clarke.

Although the suit was brought in 1886, nothing was done in it except to make up the pleadings, which appear to have been completed in 1895. The record does not show when Calvin Clarke died, but counsel for appellant states in his brief that he died "some time in the year 1901, and the first court in which steps could have been taken to revive the case was the September term, 1901." The consent order of revivor was not entered until the September term, 1902. It is also conceded that at the time this consent order was made, the children of Calvin Clarke were infants; nor does it appear who consented to the order. A guardian ad litem was appointed three years afterwards, but he did not file any answer or take any steps in the case.

It will thus be seen that more than a year after the action could have been revived this consent order of revivor was entered. We are asked to sustain the judgment of the lower court dismissing the action, upon the ground, first, that the order of revivor was made too late; and, second, that in the absence of any showing that the action was revived by the consent of any person authorized, the order was void.

As the action against Calvin Clarke was for the recovery of land, it was necessary that it should be revived against his real representatives, who were in this case his children. The provisions of the Civil Code that control the disposition of this case are:

"Section 502. If the order be made by consent of the parties, the action shall forthwith stand revived; and, if not made by consent, the order shall be served, in the same manner as a summons, upon the party adverse to the one making a motion. And, at the first term, commencing not less than ten days after such service, the party upon whom it is made, may show cause against the revivor; and, if sufficient cause be not then shown, the action shall stand revived.

"Section 506. Upon the death of a defendant in an action for the recovery of real property only, or which concerns only his rights or claims to such property, the action may be revived against his real representatives or any of them, and an order therefor may be forthwith made in the manner directed in the proceeding sections of this title.

"Section 507. An order to revive an action against the personal representative of a defendant, or against him and the real representatives of the defendant, can not be made, unless by consent, within six months after the qualification of the personal representative.

"Section 508. An order to revive an action against the representative or successor of a defendant shall not be made, without his consent, unless within one year after the time when it could have been first made.

"Section 510. If it appear to the court, by affidavit, that either party to an action has been dead, or, if he sue or be sued as a personal representative, that his powers, have ceased for a period so long that the action can not be revived in the name of his representative or successor without the consent of both parties, it shall order the action to be stricken from the docket."

At the time the consent order was made, the infants upon whose motion the action was dismissed, were not parties to the suit. So far as the record discloses, they were not represented by either guardian, committee, attorney, next friend, or any one else. The revivor was against their interests. In the absence of a revivor, the action to recover the land would have abated, and left them in the undisturbed possession. The legal effect of the death of Calvin Clarke was to abate the action as to him, but his death did not immediately authorize its dismissal. It was proper to permit the action to remain on the docket to enable the plaintiff to revive it in the

manner provided in the Code. The children whose rights were prejudiced and affected by the order of revivor could not, as they were infants, consent to it. The proper way to revive the action as to them was to have filed, as provided in section 501, a petition against them stating facts necessary to authorize a revivor, with a prayer therefor, and to issue summons and have it duly executed as any other summons in an action against infants, or to have the order served as provided in section 502. Upon the return of the summons or order duly executed, if the infants had no statutory guardian to represent them, a guardian ad litem should have been appointed to make defense, if any could be made, to the order of revivor. It is very clear that a consent order can only be made by persons who are legally authorized to consent. The infants could not consent for themselves, and, as it does not appear that any person consented for them, the order of revivor was void. Aside from this, an order to revive an action must be entered within twelve months from the time the order might have been first made, although it is not essential that the action be revived within that time. When a motion, or order, is made to revive within that time, the action may be revived afterwards. (Thompson v. Williams, 86 Ky., 15.) The proper practice in cases of this character is that when the death of a party to an action occurs, and it is necessary to revive it in favor of or against his heirs or personal representative, the party desiring to revive the action against the real or personal representatives, or both of the deceased should suggest the death and ask that the action be revived against the persons whom it is desired to revive against; and these persons, unless they are qualified to and do consent, should be brought before the court in the manner hereinbefore pointed out, and their rights protected by some one authorized to represent them. (Hull v. Deatley, 7 Bush, 687; Cox v. Story, 80 Ky., 64.)

As the action was not revived within the time allowed, or at all, the lower court did right in dismissing it, and the judgment is affirmed.

WALSH v. PARR'S EXECUTOR AND TRUSTEE.

(Filed April 29, 1908—Not to be reported.)

Judicial Sales—Contingent Interests of Remainderman—Re-investment of Proceeds on Same Terms—Validity of Title—In a judicial sale of real estate for re-investment where it appears that the interest of the contingent remainderman were secured by a re-investment of the proceeds of the sale, in other property upon the same terms and conditions as specified in the deed under which it was held, the sale passes a valid title to the purchaser at said sale.

A. Scott Bullitt, Thomas W. Bullitt and James Hemphill for appellant.

O'Neal & O'Neal for appellee.

Appeal from Jefferson Circuit Court, Chancery Branch, First Division.

Opinion of the court by Judge Nunn, affirming.

This appeal is from a judgment rendered against appellant requiring him to specifically perform a contract to purchase some real estate from appellee. The only question in dispute is the validity of the title to the property involved. Appellant desires to perform

his contract to purchase if the deed tendered by appellee conveys to him a good title.

The circuit court sustained a demurrer to appellant's answer setting out the alleged defects in the title, and, upon his declining to plead further, rendered the judgment appealed from. The answer, in substance, disclosed the following facts: That prior to the year 1879, the house and lot, the title to which is in dispute, was owned by Myrah Gray, Myrah G. Bondurant, Sarah M. Heinshon and David Frantz, Sr., each owning an undivided one-fourth in fee. Myrah Gray died in 1877, leaving a will, which was duly probated, in which she devised to Joshua F. Speed, in trust, this property upon the following conditions: Speed was to rent the property, collect the rent, pay all taxes and for all repairs, and the balance he was to pay over to her son, Horace M. Gray, monthly, for the support of himself and family, and at the death of her son, Horace M. Gray, the trustee was to pay his wife, Mary Gray, the sum of \$25 a month during her life or widowhood (Mary Gray died and will not be referred to again), and on the arrival at age of twenty-one years of the youngest child of Horace Gray, the trustee, was to convey the whole of the property to them equally, and if any of his children should die leaving issue, then the issue was to take the share that would have gone to their parent, and if her son, Horace M. Gray, died without leaving lawful issue, then the trustee should convey the property to her son, W. B. Gray, and her daughters, Sarah M. Heinshon and Myrah Bondurant, equally, and if at the time, either one of them be dead, their lawful children should take the share their parents would have taken. The last item of the will is as follows: "If the said Joshua F. Speed, from any cause, fails or refuses to accept said trust, then I desire the chancellor of the Louisville Chancery Court to appoint some discreet person, with like power to act as such, paying him a reasonable and fair compensation for his services, and requiring him to settle his accounts with said court in each year."

Joshua F. Speed, named in the will as trustee, resigned his trust in an action brought in the Louisville Chancery Court, wherein E. T. Halsey was appointed by the court as his successor.

Thereafter, July 3, 1879, Myrah G. Bondurant and her husband and Sarah M. Heinshon brought an action in the Louisville Chancery Court against David Frantz, Sr., E. T. Halsey, as trustee under the will of Myrah Gray, Horace M. Gray, Horace James Gray, John McConnel Gray, who were the only children then living of Horace M. Gray and W. B. Gray, a brother of Horace M. Gray, and the same person mentioned in the will of Myrah Gray, alleging that the house and lot described in the petition in that action could not be divided among the owners without materially impairing its value and the value of the interests of each of the owners. All the defendants in that action were duly summoned, and Halsey, trustee, filed an answer denying that the property mentioned in the petition could not be divided without materially impairing its value, or the value of the interest of the several owners thereof, and alleged that the interest held by him in trust could not be sold, except for purpose of re-investing the proceeds thereof. On March 18, 1880, a judgment was entered in that action to the effect that the property described in the petition was not susceptible of division into four parts without materially impairing the value of each part.

It was further adjudged that the appellants, Myrah G. Bondurant and Sarah M. Heinshon, and the defendant, David Frantz, Sr., each owner and undivided one-fourth interest therein, and the remaining one-fourth interest was owned by E. T. Halsey, as trustee, under the will of Myrah Gray, and that the proceeds of this one-fourth interest should be retained under the contract of the court for the purpose of re-investment, upon the trust and under the conditions,

limitations and terms prescribed in the last will of Myrah Gray. The property was sold under this judgment and D. G. Parr became the purchaser. A report of sale was made and confirmed. Parr paid the purchase money, and a deed was made to him under the approval of the court. The infant defendants in that action had no guardian and no bond was executed for them. It further appears from the answer that at the time the action was instituted, and the sale made thereunder, the plaintiffs, Heinshon and Bondurant, and defendants, W. B. Gray and Horace M. Gray, each had then living children and that the children of plaintiffs and W. B. Gray were not made parties, but the children of Horace Gray were. It further appears that Horace M. Gray had three children born to him after the sale of the property mentioned in the action referred to, but it does not appear in the answer whether or not the defendant, W. B. Gray, and the plaintiffs had any children born thereafter. Appellant claims that the proceedings in the action referred to did not have the effect to divest the devisees under the will of Myrah Gray of their title to this property, for the reason the will of Myrah Gray created a contingent interest or estate in this property, which the court had no jurisdiction to sell in the case referred to, as that action was expressly brought and prosecuted under section 490, of the Civil Code, under which only vested estate, can be sold. From a synopsis of the will, it will be observed that Myrah Gray made the following provisions with regard to one-fourth of the property now in litigation, to-wit:

First, that her son, Horace Gray, should have the rents and profits thereof for life; second, at his death, and when his youngest child became of age, the fee should go to his children; third, if any child should die leaving issue, the share of such child should go to such issue; fourth, if said son, Horace Gray, should die without issue, then the fee should pass to W. B. Gray, Myrah Bondurant and Sarah Heinshon (her other children) or, if any be then dead, to the issue of such decedent.

Section 490, of the Civil Code, provides:

"A vested estate in real property jointly owned by two or more persons may be sold by order of a court of equity, in an action brought by either of them, though the plaintiff or defendant be of unsound mind or an infant—

"1. If the shares of each owner be worth less than one hundred dollars.

"2. If the estate be in possession and the property can not be divided without materially impairing its value, or the value of the plaintiff's interest therein."

The owners of this house and lot were in possession of it and had a vested interest therein. In the case of *Kean v. Tilford, &c.*, 81 Ky., 600, this court said: "Kean, Henning and Speed, holding as tenants in common this property that was indivisible, or that could not be divided without materially impairing its value, might have instituted an action, the one against the other, and required a sale of the entire property under the statute; and this being the case, the one tenant, by making a disposition of his interest by deed or will to his children, or to a stranger, containing a clause prohibiting a sale, can not take from his co-tenants or joint owners the right to have the property sold if indivisible. Kean can not, by making a grant or devise of his estate, compel Henning and Speed to sacrifice their interest in order that the provisions of his will or grant may be carried out."

Again it is said, in the same opinion: "The death of two of the original owners of this common estate, and the disposition made by them of their property by last will has created such a multiplicity of interests in the hotel as renders it essential to the interest of all that a sale should be made of the entire property."

To the same effect is the case of *Atherton v. Warren, &c.*, 27 Ky. Law Rep., 632, which overruled the case of *Dineen v. Hall*, 23 Ky. Law Rep., 1615, which expressed a contrary doctrine. In the *Atherton-Warren* case, this court said: "The Legislature evidently intended by the enactment of section 490 to give joint owners, having a vested estate in real property in their possession, when it could not be divided without materially impairing its value or the value of the plaintiff's interest therein, the right to have it sold. Under this provision of the Code, if the value of the plaintiff's interest alone is materially impaired by continuing to hold the property, he is entitled to have it sold. The tenant, by the curtesy, has a vested interest in the property the same as have the Warren heirs. This being true, the record presents a case where persons with a joint interest and in possession seek the sale of the property under section 490. They have the right to the sale of the property under that section. To take any other view would be to hold that the Legislature intended that, although persons with a vested interest, and in the possession of the property, could be prevented from selling it on account of the small interest of the remaindermen. In our opinion the intention of the Legislature is effectuated when we hold that property may be sold under section 490, where there are vested estates jointly held, although one so holding is a life tenant."

The case of *Harting's Ex'tx v. Milward's Surviving Executor, &c.*, 28 Ky. Law Rep., 776, was very similar to the one at bar. Some of the interests therein were contingent and the sale was made under section 490, of the Civil Code. In that case the court said: "We are of the opinion that the proceeding conforms, in every essential, to the requirements of section 490, and concurrent sections of the Code, concerning the sale of the infant's interest, as well as of those whose interests are contingent, and the judgment of the chancellor safeguards the rights of all concerned. (*Kean v. Tilford*, 81 Ky., 600; *Atherton v. Warren*, 27 Ky. Law Rep., 632.)"

It is conceded that if the sale was legally made under section 490 the bond required by section 493 was not necessary to be executed, for the infants, before the sale was ordered. The court, in the case at bar, protected the rights and interests of the remaindermen by requiring that the proceeds of their one-fourth of the property be re-invested in other property upon the terms and conditions of the will of Myrah Gray. It does not appear in the record whether this was done or not, but it is to be presumed, when there is nothing appearing to the contrary, that the court performed its duty in having its orders carried into effect.

The next and only other question presented by appellant, is that the children of Myrah Bondurant, Sarah Heinshon and W. B. Gray were not parties to the action to sell this property; hence those children, who are still living, are not bound by the judgment, and they were not divested of their interests. We are inclined to the opinion that, as Bondurant, Heinshon, W. B. Gray and Horace M. Gray were before the court in that action, and, as they owned the first estate created under the will of Myrah Gray, it was sufficient to pass the title and bar the claims of their children, the contingent remaindermen. (*Hermann v. Parsons, &c.*, 117 Ky., 239; *Whallen v. Kellner*, 31 Ky. Law Rep., 1285, and *Roberta Jaillette, &c. v. James E. Bell, &c.*, the opinion in which was delivered April 22, 1908.) But we do not decide this question as the case of *Fritsch v. Klausning*, 11 Ky. Law Rep., 788, controls. In that case James R. Anderson executed to his daughter, Mrs. Evans, a deed to thirty-seven acres of land, vesting in her an estate for life, remainder to her children and at her death to his (Anderson's) heirs at law, in the event Mrs. Evans left no children at her death or the descendants of children. In the case at bar the interests of the children of Bondurant, Heinshon and

W. B. Gray were more remote and contingent than the heirs of Anderson. In the deed referred to Anderson's heirs took the estate if Mrs. Evans left no children or descendants of children at her death. The children referred to in the case at bar only took an interest if Horace M. Gray left no children or descendants of children, and further W. B. Gray, Mrs. Heinshon and Mrs. Bondurant must also have been dead before the children took the estate. In that case Mrs. Evans instituted an action to sell this real estate, and made her own children parties to it, but did not make the heirs of Anderson parties. In the case at bar the children of Horace M. Gray then in being were made parties. In the Fritsch-Klausing case, *supra*, the sale was made and Klausing became the purchaser and complied with the terms of sale. The court said: "It was not necessary to make those who might be the heirs of Anderson parties to the action. Their interest, if any, was of so remote a character as not to be estimated or defined. The contingency upon which the heirs at law of Anderson are to take depending on the death of the life tenant without children, and as their rights are fully secured, if they should ever have any in the re-investment, there was no reason for making them parties."

In that case the interests of the contingent remaindermen were secured by a re-investment of the proceeds of the sale in other property upon the same terms and conditions as specified in the deed. In the case at bar the contingent remaindermen's interests are protected in the same manner, and they have no interest in the property in litigation.

For these reasons, the judgment of the lower court is affirmed.

ALDRIDGE v. ALDRIDGE, &c.

(Filed April 28, 1908—Not to be reported.)

Trusts—Trustees—Legal Presumption—The trustee here was not authorized by the will to use any part of the principal without the consent of the chancellor, and the record does not show that any of the principal was used, the legal presumption is, therefore, that Ruth Aldridge faithfully performed her duties as trustee of her sister, and at her death had possession of the fund or invested it in land, and not having the trust fund, the presumption is that she invested it in the land held by her.

Robert Harding, Emmet Puryear and Greene & VanWinkle for appellant.

R. H. Tomlinson for appellees.

Appeal from Garrard Circuit Court.

Opinion of the court by Judge Carroll, affirming.

In 1873 Catherine Aldridge made her will, which was probated in 1875. She left surviving her two daughters, Ruth and Bettie, and for their benefit made the following provisions in her will:

"I give and bequeath to them jointly sixty-two acres of my land, described as follows: * * * They, Ruth and Bettie, to have the sixty-two acres of land for and during their lives, and the survivor of them to have the whole as long as she lives, and if they, or either of them, die without issue living, the whole shall, after the death of the survivor, be equally divided between my other children, or the heirs of such of them as may be dead. If Ruth and Bettie should die

leaving issue living, such issue shall take one-half of said sixty-two acres, and if both of them should die leaving an issue, the sixty-two acres shall be divided between the issue of each of them equally, the issue of one taking one-half and the issue of the other taking the other half. I hereby give to Ruth, my daughter, the right to sell and convey the said land if she thinks it better, and shall hold one-half the proceeds in trust for the use and benefit of Bettie, or buy other land if she deems it best, and sha'll hold the land she might purchase in the same way as she would the sixty-two acres if she would keep it as provided above in this will."

Shortly after the death of Mrs. Aldridge, her children, who were the sole devisees under her will, desiring to sell the tract of land left by the testatrix, a part of which was the sixty-two acres devised to Ruth and Bettie, entered into an agreement among themselves and conveyed the land, which contained 210 acres, to one Hopper as trustee, the deed providing among other things, that the trustee, when he sold the land, should pay to Ruth, in her own right, and as trustee for Bettie, such proportion of the purchase price as the sixty-two acres of land bore to the whole price obtained; and it was further agreed that Ruth Aldridge "shall have such portion of the proceeds of said land as she may be entitled to according to this instrument and agreement absolutely, and to do as she pleased with, and shall manage and control the portion to which Bettie is entitled under the will aforesaid."

Soon after this, Hopper sold the land for \$5,152, and paid to Ruth Aldridge in her own right, to do with as she pleased, according to the agreement, \$668, the part of the proceeds to which she was entitled, and also \$668, to which she was entitled as the trustee of Bettie.

In 1887 there was conveyed to Ruth Aldridge, in her own name and by a good and sufficient deed, in consideration of \$1,900, a tract of land containing twenty-six acres. In 1902 Ruth Aldridge died, leaving a will, by which she devised the twenty-six acres of land, after the payment of her debts and some minor legacies, to Rose and James Aldridge. In this action by her administrator, with the will annexed, for a settlement of her estate, it was charged in the petition that Ruth Aldridge invested in the purchase price of the twenty-six acres of land the money received by her as trustee of Bettie Aldridge from the sale of Bettie's interest in the sixty-two acres; and that she held one-half the twenty-six acres in trust for the use and benefit of Bettie. That upon the death of Bettie, who died childless, Ruth became entitled, under the will of Catherine Aldridge, to the use of Bettie's part for her life, but upon the death of Ruth the one-half interest of Bettie in the twenty-six acres passed under the will of Catherine Aldridge to the heirs of Catherine Aldridge; the other one-half of the twenty-six acres Ruth owned in her own right and this interest the devisees in her will were entitled to.

To this petition the devisees of Ruth Aldridge, who are the appellants here, filed an answer, in which they set up that Ruth Aldridge did manage and control the proceeds of the sale of the sixty-two acres that belonged to Bettie in accordance with the will of Catherine Aldridge and expended the same for the support and maintenance of Bettie during her life, as it was contemplated by the will she should do, and that Bettie was cared for and supported by Ruth Aldridge for a period of twenty-one years and until her death. They denied that Ruth only owned one-half of the land, or that she held the other half in trust for the use and benefit of Bettie; or that Ruth Aldridge invested in the twenty-six acres any of the purchase money that she received as trustee for Bettie from the sale of the sixty-two acres. They asked that they be adjudged entitled to the whole of the land after the payment of debts.

To this answer a reply was filed, completing the pleadings. Depositions were taken by the administrator, to which exceptions were sustained, and the court, upon the pleadings and exhibits, adjudged that the devisees of Ruth Aldridge were only entitled to one-half the proceeds of the sale of the twenty-six acres which was sold under a decree of court, and that the heirs of Catherine Aldridge were entitled to the other half, the court proceeding upon the idea that the one-half the land owned by Ruth Aldridge at her death belonged to Bettie, and had been purchased with her part of the money derived from the sale of her interest in the sixty-two acres.

It is strongly insisted in behalf of appellants that this judgment is erroneous, because there is no evidence that any part of Bettie's money was invested in the twenty-six acres owned by Ruth at her death; and as the title to the twenty-six acres was in Ruth, the presumption is that she purchased it with her own money, and, consequently, had the right to dispose of it as she pleased. On the other hand, it is the contention of the appellees that, as Ruth Aldridge was appointed the trustee of Bettie under the will of Catherine Aldridge, charged with the duty of holding in trust for her use and benefit her estate and empowered with authority to sell and invest the proceeds in other land to be held in the same manner, that Ruth, in the discharge of this trust, purchased one-half the land with the proceeds of Bettie's interest in the trust fund, or at least invested the trust fund in this land, and the mere fact that she took the title in her own name, did not have the effect of divesting Bettie of her one-half interest in the land.

The real, and in fact only question in the case, is, was it incumbent upon appellee to prove that Bettie's money was invested in the land owned by Ruth at her death, or, in the absence of evidence upon this point will it be presumed that Ruth, in the discharge of her duties as trustee, invested Bettie's money in the land?

Ruth received, as trustee for Bettie, from the sale of the sixty-two acres, \$668. Under the will of Catherine Aldridge she was obliged to hold this money for the use and benefit of Bettie, or, if she invested it in land, the title to the land to be held in the same manner as the title to the sixty-two acres. Under this provision of the will it is manifest that if Ruth did not invest this money in land, that her estate must account for the principal of the fund so received. She was not authorized by the will to use any part of the principal without asking and obtaining the consent of the chancellor. Nor does the record show, except in the averments of the answer, that she did use any of the principal, and it is not claimed that the advice of the chancellor was asked. We, therefore, conclude that the legal presumption is that Ruth performed faithfully her duties as trustee, and at her death had possession of the trust fund or invested it in this land. The denial in the answer that any part of the trust fund was invested in this land was not sufficient to place the burden of proving that it was, upon the heirs of Catherine Aldridge, who asserted claim to Bettie's interest. These heirs were entitled to recover upon an exhibition of the will of Catherine Aldridge, and the deed showing that the land had been sold and the proceeds paid to Ruth.

A question is made as to the right and propriety of the administrator with the will annexed of Ruth Aldridge to assert a claim in opposition to her will, or to raise a question as to the right or interest of the devisees mentioned in the will to receive their part of the estate, or to favor the interest of persons asserting rights hostile to the will. But we do not consider this important. Ruth did not have the trust fund at her death, and the legal presumption is that she invested it in this land. As the lower court so adjudged, it must be affirmed.

FUSON, &c. v. CHESTNUT, &c.

(Filed April 30, 1908—Not to be reported.)

1. Deeds—Construction of—While the law is well settled that a deed absolute upon its face may be shown to be a mortgage, it is manifest from the facts that the deed and contract herein constituted something more than a mortgage. They were executed for the purpose of settling conflicting claims between the parties, and the effect of the deed was to vest the grantee with all the title the grantors had.

2. Judgment—Erroneous—Production of Papers—Appellant having passed title to the land, she is entitled to the purchase money, but she can not make the production of title papers a condition precedent to the payment of the purchase money.

N. J. Weller for appellants.

James M. Hays, S. B. Dishman and J. Smith Hays for appellees.

Appeal from Bell Circuit Court.

Opinion of the court by Wm. Rogers Clay, Commissioner, reversing.

In September, 1901, D. T. Chestnut and W. B. Sutton sued S. S. Fuson on an account of \$968.55; they also held an additional account against Fuson of \$500.00, which was not embraced in the suit. At the time of bringing the action, they procured an attachment, which was levied on three parcels of land in Bell county, belonging to appellants. In June, 1904, Chestnut and Sutton obtained judgment for their debt, and an order sustaining the attachment. In August of the same year, Chestnut bought the three parcels of land at the commissioner's sale, for the debt sued on, and costs, less \$62.00, and, upon confirmation of the sale by the court, the commissioner made him a deed for the three parcels of land purchased by him.

Julia Fuson, wife of S. S. Fuson, not being a party to the suit against her husband, and claiming to own the three parcels of land in question, brought suit, in December, 1904, in the Bell Circuit Court, against D. T. Chestnut and W. B. Sutton, to set aside the deed to Chestnut and have her title to the land quieted. Her husband, S. S. Fuson, joined with her in the action as plaintiff. About this time, Chestnut and Sutton sued S. S. Fuson upon the second account of \$500.00, which they held against him. Before judgment in either of these suits, and in order to settle them, Chestnut and S. S. Fuson and wife entered into the following agreement:

"This writing between S. S. and Julia Fuson, of the first part, and D. T. Chestnut, of the second part, witnesseth: That, whereas, the said parties of the first part have this day released and conveyed to the party of the second part six several tracts of land, it is agreed that, when the said second party may sell said land, that the said second party shall have of the purchase money for said land before the first parties get anything, the sum of one thousand eight hundred dollars; then said first party, Julia Fuson, shall have a sum of money equal to the said first sum before second party shall have any more of the said purchase money; then, after this second sum shall be paid to Julia Fuson, if there remains any of the purchase price for which said lands may be sold, the said D. T. Chestnut and the said Julia Fuson shall divide the same equally between them.

"Second. The said Chestnut shall sell said lands as soon as possible, and at the best possible price, and at no price within one year for less than eight (\$8.00) dollars per acre, for any of said land. Third.

It is further agreed that, at any time, said Julia Fuson may furnish a purchaser, that will give the best possible price for said land.

"This writing signed, in duplicate, this November 4, 1905.

"S. S. FUSON,

her

"JULIA x FUSON,

mark

"Witness: JAMES M. HAYS.

"D. T. CHESTNUT."

At the same time, Fuson and wife, by deed, conveyed the six parcels of land mentioned in the agreement to Chestnut. Simultaneously, Chestnut conveyed back to Julia Fuson, out of the first three tracts, 65 acres, including the dwelling-house, yard, garden and orchard.

On November 22, 1905, Fuson and wife and R. C. Ford sued D. T. Chestnut, in the same court, charging that the deed previously made to Chestnut by them was, in fact, only a mortgage given to secure what was due him from Fuson, and praying that they be allowed to redeem the land; also that Julia Fuson had previously secured a purchaser for the land at \$8.00 per acre, and that Chestnut refused to accept the redemption money therefor. On January 24, 1906, Chestnut, by separate answer, traversed the material matter of the petition, and alleged his ownership of the first three tracts by virtue of the commissioner's deed, and the other three tracts by deed from Fuson and wife. When Chestnut answered, J. S. Hays, George W. Tye and S. B. Dishman, on their joint petition, were made parties to the action, and their petition made an answer. In it the allegations were made that James M. Hays had purchased the lands from Chestnut for himself and George W. Tye, on April 25, 1905, and that James M. Hays and Tye subsequently sold their co-defendants, J. S. Hays and S. B. Dishman, an interest therein. They also charged inability on the part of the Fusons to make a good title to all the land, and averred that they were ready to pay the balance of the purchase money going to the Fusons when the latter perfected the title to the land. They further alleged their ownership of the unpaid balance of the Chestnut \$968.55 judgment, amounting to \$62.00. A reply to each answer was filed by appellants.

The lower court dismissed the petition of the Fusons, and further adjudged that the amount Julia Fuson was entitled to receive from the said Hays and Tye was a balance of said purchase money for the 425 acres at \$8.00 per acre, or the sum of \$1,546.00, with interest from March 4, 1905, until paid; but provided in the judgment that the said Hays and Tye should not be required to pay Julia Fuson any part of said sum until the said Julia Fuson should deliver to said James M. Hays all title and papers—recorded or unrecorded—in her possession, relating to said land. The judgment further provided that, as it appeared that the title to a portion of the land, consisting of about 80 acres, was defective; Hays and Tye could withhold the payment to said Julia Fuson of the sum of \$640.00 out of the purchase money going to her until further order of the court, and gave the Fusons until the next term of court to exhibit the title under which they held said land. The judgment also directed that, before paying any of the money to the Fusons, they should tender a deed releasing all liens on said land.

Appellants contend that the transaction of March 4, 1905, resulting in the written agreement and deed, constituted one transaction and a mortgage; that there was no valid sale or deed from Chestnut to James M. Hays; that James M. Hays purchased the property with full knowledge of all the facts in the case, and that said agreement and deed were only a mortgage, and that the contract and deed between Chestnut and James M. Hays should be rescinded.

It appears that James M. Hays received from Chestnut the following title bond:

"This writing witnesseth: That I have this day sold to J. M. Hays all the land conveyed to me from Julia Fuson and S. S. Fuson, at the price of eight (\$8.00) dollars per acre, to be paid when title is perfected, and deed executed.

"This April 25th, 1905.

(Signed) "D. T. CHESTNUT."

After this, Hays and Tye had the land surveyed, and Fuson helped them to locate and survey the fourth, fifth and sixth tracts of land. On October 2, 1905, Chestnut and wife conveyed all the land to James M. Hays, and reserved a lien in favor of Julia Fuson for the balance of \$1,485.30. This deed was a special warranty deed.

The first question to be determined is: Did the agreement and deed between Fuson and wife and D. T. Chestnut constitute only a mortgage? The law is well settled that a deed absolute, upon its face, may be shown to be a mortgage; and especially is this the case where there is a contemporaneous written agreement showing that the purpose of the deed was merely to secure the vendee in the payment of a debt due him from the vendor. (Ogden v. Grant, 6 Dana, 473.) At the time of the making of the agreement and deed in question, Chestnut had obtained title to three of the tracts of land by commissioner's deed. Julia Fuson was attempting to have this conveyance set aside. Chestnut and Sutton were also trying to subject the remainder of the land to the payment of a debt for \$500.00. It is evident, then, that the deed from the Fusons to Chestnut was made for the purpose of adjusting and settling their conflicting claims to the land in question. By the provisions of the deed, Chestnut was to have the first \$1,800.00, with interest from March 4, 1905. Julia Fuson was then to have a like sum, with interest from the same date. Any additional purchase money, after the payment of these sums to Chestnut and Fuson, was to be equally divided between them. At the same time, Chestnut and wife conveyed to Julia Fuson a tract of 65 acres, containing the dwelling-house, garden, &c. It is manifest, then, that the deed and contract constituted something more than a mere mortgage. They were executed for the purpose of settling all the conflicting claims between the parties thereto. The deed gave to Chestnut not only an interest in the land sufficient to pay his debt, but also one-half of the purchase money after his debt had been paid, and a like sum had been paid to Julia Fuson. The effect of the deed was to vest in him all the title that the Fusons had, with full power and authority to sell the land according to the terms and provisions of the contract and deed.

It is sought to discredit the title bond from Chestnut to Hays on the ground that Hays was Chestnut's son-in-law, and that the said title bond, as a matter of fact, was never executed. Hays and Chestnut both swear it was executed, and executed at the time therein set forth. In the face of their positive evidence upon this question, we are unable to say that the title bond was not executed, upon the ground of suspicion alone. Under the deed, Chestnut had the right to sell the land within one year at a price of not less than \$8.00 per acre. The evidence conclusively shows, we think, that the sale from Chestnut to James M. Hays was made within one year, as required by the contract and deed, and at the price of \$8.00 per acre. Under the circumstances, then, we are of opinion that the sale from Chestnut to Hays was valid.

It appears, however, that, although, by the terms of the title bond, the purchase price was to be paid when the title was perfected, James M. Hays thereafter accepted a special warranty deed from Chestnut and wife to the land in question, and this deed contained no provision in regard to perfecting the title. The effect of the special warranty was simply to warrant the title against D. T. Chestnut and those claiming under him. We are, therefore, of opinion that the title bond

was merged into the deed, and the latter now constitutes the sole agreement between Chestnut and Hays. That being the case, Hays, Tye and the others, will not be permitted to hold the land, and, at the same time, refuse to pay for it.

The judgment is, therefore, erroneous in providing that a part of the purchase money due Julia Fuson should not be paid until she delivered to James M. Hays all title papers—recorded or unrecorded—in her possession. If, as a matter of fact, she has such papers in her possession, their production can be enforced by rule, and not by making their production a condition precedent to the payment of the purchase money.

The judgment is also erroneous in directing that the sum of \$640.00 of the purchase money due Julia Fuson, be not paid until the perfecting of the title to the 80 acres referred to in the judgment. The deed from Chestnut to Hays contains only a covenant of special warranty. This covenant could not and did not impose upon the Fusons the duty of perfecting the title to the land in question. They are entitled to their portion of the purchase money at all events.

For the reasons given, the judgment is reversed and cause remanded, with directions to the trial court to enter judgment in conformity with this opinion.

SOUTHERN RAILWAY COMPANY IN KENTUCKY v. COMMONWEALTH.

(Filed April 30, 1908—Not to be reported.)

Wallace & Harris and Humphrey & Humphrey for appellant.

James Breathitt and Theo. B. Blakey for appellee.

Appeal from Woodford Circuit Court.

Opinion of the court by Judge Lassing, reversing.

The direct question involved in this appeal was decided by this court in the case of the Commonwealth v. Chesapeake & Ohio Railroad Company, April 15th, 1908, and on the authority of that opinion, and for the reasons therein stated, this case is reversed.

COMMONWEALTH v. BYERS.

(Filed April 30, 1908—Not to be reported.)

1. Druggists—License of, Evidence—The license of a druggist is prima facie evidence that he is a druggist.

2. Prescriptions—Authority of Druggist in Filling—The prescription itself is all that a druggist is required to look to, and, while section 2558, Kentucky Statutes, requires that the name of the person shall be given, while the prescription, in this case, was for the wife, but given to the husband, or in his name, the proof shows that the medicine was for his wife, and, in the absence of fraud shown, it will be presumed that he was not guilty of a violation of the local option laws. He had a license to sell spirituous, vinous and malt liquors, and the prescription was a mixture and was given by a regular practicing physician.

T. B. McGregor, C. H. Morris and W. H. Hester for appellant.

W. J. Webb for appellee.

Appeal from Graves Circuit Court.

Opinion of the court by Judge Lassing, affirming.

Appellant was indicted, tried and acquitted in the Graves Circuit Court, on the charge of selling spirituous, vinous and malt liquors, in violation of the local option law in force in Graves county. The Commonwealth appeals.

The proof shows that the sale complained of was made under the following circumstances: Appellee kept a drug store at Dukedom, in Graves county, Kentucky, and, as a druggist, had taken out a license authorizing him to sell spirituous, vinous and malt liquors on the prescription of a regular practicing physician. The license was in full force and effect at the date of the sale complained of. Dr. J. E. Simmons was a regular practicing physician living in that neighborhood. The wife of the prosecuting witness, W. S. Haynes, was sick and Dr. Simmons was called to prescribe for her; as such physician, he prescribed brandy, creosote and syrup of hypophosphites, to be mixed in certain quantities, designated in the prescription, and to be taken by the patient according to the directions stated in the prescription, which called for a tablespoonful three times a day, after meals, in a little water. The prescription stated that it was for William Haynes. It was delivered to him, and he was directed to and did take it to appellee's drug store, where it was filled and delivered to him. The records of the county court were introduced; showing that the license had been regularly granted and was then in force, and that Dr. Simmons was a regularly registered practicing physician in that county.

The Commonwealth complains that the trial court erred in permitting the appellee to testify that he was a druggist, and in not requiring him to show, by the record, that he had qualified himself and been licensed as a druggist. This claim, however, is without merit; had he not been a druggist, or shown himself qualified as such, the county court would not have been warranted in granting him a druggist's license, and it may be presumed that the county court did not act upon insufficient proof in this matter. It is admitted that he kept a drug store and there is no charge of bad faith in the record. It was the duty of the Commonwealth, in making out its case, when appellee justified the sale on the ground that it was made under the authority of his druggist's license, to show that he was not a druggist, the license being prima facie evidence, at least, of the fact that he was.

The Commonwealth also complains that the prescription affords appellee no protection, inasmuch as it stated it was for William Haynes, when, in fact, it was for his wife and William Haynes himself was not sick. So much of section 2558, of the Kentucky Statutes as applies to druggists and regulates the manner in which intoxicating liquors may be sold by them, is as follows:

"Licensed druggists may sell, for medical purposes, on a prescription written and signed by a regular practicing physician, legally authorized to practice medicine, which prescription shall state the date thereof, the quantity thereof, the quantity prescribed, and the name of the person to whom it is prescribed."

When a prescription is presented to a druggist who is authorized to sell on the prescription of a regular practicing physician, that possesses the statutory requisites, the druggist, so long as he acts in good faith, is entitled to the protection of the law, so far as the sale is concerned. The prescription itself is all that he may look to or is required to look to; he can not know whether the person for whom it is prescribed is sick or not, and if it should be developed, in any case, that the person holding the prescription, or for whom it is given, is not, in fact, sick, then it becomes a question between the

Commonwealth and the doctor issuing the prescription, and not between the Commonwealth and the druggist who, in good faith, fills it. Besides, in a case like this, where the prescription is for the wife, and is issued in the name of her husband, in the absence of any charge of fraud or wrong-doing, we are of opinion that the law is not violated.

The purpose of the statute in requiring the prescription to state the name of the person to whom it is prescribed was to prevent druggists, doctors or others from evading the law and issuing, filling or using prescriptions issued in blank, but it was certainly not intended that the person for whom the prescription was filled should necessarily be the patient. This would, indeed, be a harsh rule, for if one were sick enough to require the services of a doctor, he or she might, and frequently would, be unable to go personally and have the prescription filled. In order to comply strictly with the requirements of the statute, this prescription should have stated that it was for appellee's wife, whereas it stated that it was for him. If there was any violation of the law, it was on the part of the doctor in failing to state accurately the person for whom the liquor was prescribed. However, we are of opinion that the record shows that he was aiming to comply with the requirements of the law, but for the purposes of this case we need not enter into a consideration of that question, as, in the absence of any charge of fraud or deception practiced by the druggist or collusion between him and the doctor, there is nothing in the record to justify the conclusion that appellee was guilty of a violation of the provisions of the local option law in force in Graves county.

For these reasons, the judgment is affirmed.

FREEMAN, &c. v. BOW.

(Filed April 30, 1908—Not to be reported.)

Lands—Sale of—Purchaser Divested of Title by Pending Suit—As appellant was divested of title to a part of the land in controversy, by a judgment in an action that was pending when the title bond was executed to him, he should be allowed a rebate to the extent of the value of the land of which he was deprived.

J. W. Kinnaird for appellant.

J. W. Compton for appellee.

Appeal from Metcalfe Circuit Court.

Opinion of the court by Judge Carroll, reversing.

On January 8, 1900, the appellee executed to Eph Love the following title bond:

"This bargain and sale made and entered into this, the 8th day of January, 1900, by and between Bell Poynter (now Bow) of the one part, and Eph Love of the other part, Witnesseth:

"That for and in consideration of the sum of \$400, I have this day sold and do by these presents bind myself to convey by deed to Eph Love, my entire interest in my mother's landed estate, it being one-fourth of 200 acres, that I inherited at my mother's death, and one-eighth that my brother, Clarence Freeman, inherited at the same time, and I have since purchased it from him. The \$400 is to be paid as follows: \$200 cash in hand paid, the receipt of which is hereby acknowledged, and \$200 in twelve months from this date, provided I can make the said Eph Love a good title to the part that I purchased from my brother, Clarence Freeman."

Love, in 1903, assigned this title bond to the appellant, Emmet Freeman. Although somewhat awkwardly written, appellee sold to Love one-fourth of 200 acres. Appellee's mother had eight children, each of them being entitled to one-eighth of the estate, which was supposed to contain 200 acres. Appellee purchased the interest of her brother, Clarence, and thus became the owner of one-fourth of the estate. At the time this title bond was executed, there was a suit pending against the children, including appellee, seeking to subject a portion of the land to the payment of debts. A judgment was rendered in this action, subjecting 50 acres of land to the payment of these debts. It appeared, from a survey made after the bond was executed, that there was 205 acres of land in place of 200 acres, so that, after deducting from it the 50 acres, there was left, for division among the eight heirs, 155 acres, and, as a result, appellant only received $38\frac{3}{4}$ acres.

The controversy in this case grows out of the contention on the part of appellant that he should only be required to pay appellee for $38\frac{3}{4}$ acres of land—whereas appellee claims that he should pay her for 50 acres. The purchase price was \$8.00 an acre, and appellant has paid \$222.50, leaving a balance due of \$87.50, if his contention is sustained, and \$177.50 if appellee is correct. The lower court adjudged that appellee was entitled to recover \$177.50, and from that judgment this appeal is prosecuted. The evidence throws little light on the controversy and the case turns upon the question whether or not the title bond contemplated that Love should get one-fourth of 200 acres of land, or only the interest therein owned by appellee, whatever that might be.

Appellee insists that, by the wording of the title bond, the land was sold in gross and not by the acre. In other words, that Mrs. Bow sold her interest in her mother's estate without reference to what the amount of it might be. There is a marked distinction between sales in gross and sales by the acre, as affecting the rights of the parties to recover for any excess or deficit in the quantity of land sold that may afterwards be ascertained. When there is a sale in gross, and a surplus or deficit, no fixed rule can be laid down, in the absence of fraud, misrepresentation or mutual mistake, by which to determine the relief that the vendor or vendee may be entitled to. The equity of each case must depend upon its own peculiar circumstances. The relative extent of the surplus or deficit can not always furnish an infallible criterion. The conduct of the parties, the date of the contract, the value, quantity and locality of the land, the price and other circumstances must always be considered. (Harrison v. Talbot, 2 Dana, 258; Young v. Craig, 2 Bibb, 270; Hall v. Ely, 25 Ky. Law Rep., 954; Jesse v. Hanna, 23 Ky. Law Rep., 430.)

There was no fraud or misrepresentation in this case. When the bond was made by Mrs. Bow to Love, there was thought to be 200 acres, although, in fact, 205 acres in the tract, and Mrs. Bow was entitled to one-fourth thereof, and evidently believed that she could convey to Love the quantity of land specified in the bond, namely, "one-fourth of two hundred acres." But, after this bond was executed, and delivered, and before any conveyance was made pursuant to it, Mrs. Bow was divested by the judgment of the court of title to $11\frac{1}{4}$ acres. This being so, the relief to which the purchaser is entitled does not depend entirely upon the principles applicable to sales in gross. If Mrs. Bow, after the execution of the bond, had not been divested of title to a portion of the land, and a survey had disclosed the fact that the entire tract only contained 155 acres, in place of 200 acres, it is questionable if the purchaser, under the terms of the title bond would have been entitled to relief. But the judgment divesting her of title constitutes a marked difference between this proceeding and an ordinary suit to recover for deficit when there has

been a sale in gross. The purchaser, Love, might have been willing to risk his judgment as to the number of acres in the tract and to take a chance that it contained 200 acres; but, it is manifest that, under the facts of this case, it was not contemplated by the parties that the quantity would be reduced by the judgment of the court in the pending suit. Nor does it appear that Love knew that such an action was pending. It is also evident, from the testimony of Mrs. Bow, that she did not know or believe that her interest in the land would be reduced by a judgment in the suit. The situation of the parties is virtually the same as it would have been if a deed had been executed with a covenant of warranty and afterwards the purchaser had been divested of title by a judgment against the vendor. Our conclusion is that as the purchaser was, in fact, divested of title to so much of the land as was recovered in the judgment, he should be allowed to rebate to the extent of the value of the land of which he was deprived.

The judgment of the lower court is reversed, with directions to enter a judgment in favor of appellee for \$87.50, with interest thereon from January 8, 1901, until paid.

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3. Verdicts—Excessive Character of—Rule as to Interfering With—The rule is well settled that it is only where verdicts are palpably against the evidence, or obviously the result of passion or prejudice that courts are permitted to interfere on the ground that they are excessive. Idem 180

MAYORS—

- Members of Police and Fire Departments—Removal of—Prior to the act complained of for which the Board of Police and Fire Commissioners of the city of Lexington, removed appellee, they adopted a rule, yet in force, providing in substance that when a member of the police or fire department is suspended by the Mayor, he shall report the fact to the police and fire commissioners, prepare written charges to be served on the officer and notify him of the time and place when the charges will be investigated. * * * Appellee was not cited to appear for trial, nor was he accused of dereliction, nor removed for cause, and the rule referred to above was a complete protection to him against such arbitrary discharge. Combs, &c. v. Bonnell. 219

MEASURE OF DAMAGES—See R. R., 2; Nuisance, 1, 2.

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1. Streets—Adverse Holding—Notice—Limitation—Statutory Provision—Construction—Section 2546, Kentucky Statutes, provides, "that limitation shall not begin to run in respect to action by any town or city for the recovery of any street or other public easement until the trustees or council have been notified by the party in possession to the effect that such possession is adverse to the right of such city or town, and until such notice is given all such possession shall be deemed amicable," Held—That to meet the requirements of the statute the easements must exist as public highways and must be in the city during the period of adverse holding in order to prevent the statute from running. City of Latonia v. Latonia Ag'r. Ass'n. 138
2. Same—Dedication of Streets—Acceptance—Presumption—Continued Possession—Record of Plat—The dedication of a street or alley to the use of the public to be effectual must be accepted by the corporation, and the presumption of acceptance is rebutted by the fact of the continued possession thereof by the original proprietor and his vendees although such dedication be evidenced by the recording of a plat of the town and the sale of lots. Idem.. 138
3. Enclosure of Street or Alley—Limitation—Possession—After the enclosure and use of an alley for 15 years it is too late for the trustees of a town to urge an acceptance of its dedication to the public or to assert a right to the land. Idem 138

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1. Judgments Against—Action to Vacate—Limitation—The law is well settled in this State that a non-resident can not show cause against a judgment for errors therein, after the lapse of five years from the rendition of the judgment. <i>H. L. & B. Co. v. Audas</i>	214
2. Same—Warning Orders—Courts of Continuous Sessions—Time Required—By section 1004, Kentucky Statutes, relating to courts of continuous sessions, providing that "every warning order shall warn the defendants to appear and defend the action within sixty days after the making of such warning order, and the defendant shall be considered as constructively summoned in thirty days after the making of such warning order," a warning order made in compliance with said statute is sufficient to authorize such court in this State to render a judgment against the non-resident defendant for the sale of real estate. <i>Idem</i>	215
3 Same—Erroneous Personal Judgment—Effect on Sale of Land—In an action to sell real estate in this State in which a non-resident defendant was proceeded against by a warning order, the fact that a personal judgment rendered therein against such non-resident, was void, does not render so much of the judgment void, as orders a sale of the land in which such non-resident had an interest. <i>Idem</i>	215
4. Same—Sale of Whole Tract—No Necessity to Pay Debt—Effect—Where a judgment directs the sale, as a whole, of property susceptible of division, instead of so much thereof as is necessary to pay the lien debt, sued on, and costs, while it may be such error as will authorize a reversal, it does not render the judgment void. <i>Idem</i>	215
NUISANCE—	
1. Dam Across a Stream—Overflowing Land—Measure of Damages Recoverable—Character of Structure—Where, by the building of a dam across a stream, the water is diverted on the land of another, the measure of damages recoverable depends on whether the structure is permanent or temporary. If it is permanent the party injured is entitled to the diminution of the value of the property injured, but if it is temporary, such as that it may be easily removed or abated, the damage is the depreciation of the rental value of the property injured. <i>F. T. Co. v. Shelbyville W. & L. Co.</i>	202
2. Same—Limitation of Action—Extent of Recovery—In an action for damages to one's land, caused by the building of a dam across a stream and backing water thereon, where the injury is permanent, limitation begins to run from the completion of the structure, whatever it may be, that causes the injury, and the action is barred in five years, and all damages for past, present or future injury must be recovered in one action. But if the structure is temporary, successive actions may be brought for damages caused by a continuance of the injury. <i>Idem</i> ...	202
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Consent Order—A consent order can only be made by persons who are legally authorized to consent. The infants in this action could not consent, and it does not appear that any one consented for them; the order of revivor, was, therefore, void. The action was not revived within the time allowed by the Code, or at all, and the lower court properly dismissed it. <i>Burchett v. Clarke</i>	210

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Action by Latter for Care of Parent—Contract—Pleading—In this action to recover for services rendered in caring for their father during his latter years, the petition was properly dismissed because it was not alleged that there was a promise on the part of the parent to pay for the services. While the services were necessary, under the repeated decisions of this court, in the absence of an express contract, there can be no recovery for them. *Faugh v. Baugh*. 148

PARTNERSHIP—

Facts Showing—Finding of Chancellor Approved—This action is affirmed on the evidence, which, though conflicting, much of it biased and some of it false, we have little hesitation in reaching the same conclusion upon the disputed facts as was done by the chancellor below who had the advantage of an acquaintance with the witnesses so as to give their testimony its due weight and from which he adjudged certain parties to the controversy to be partners. *Roberts v. Adams, &c.* 207

PATENTS—See Question of Fact; *Howes v. Wells*, 212.

PEDIGREE OF COLT—See R. R., 5.

PERSONAL REPRESENTATIVE—See Ex'ors and Adm'rs.

PLEADING—

1. Relief Sought—Sufficiency of Allegations—Judgment by Default—Prayer of Petition—Under section 90, of the Civil Code, providing, that "if no defense be made, the plaintiff can not have judgment for any relief not specifically demanded," where it is stated in the body of the petition with sufficient accuracy to enable the court, from an inspection of the pleadings, to determine the amount for which the plaintiff is entitled to judgment, it is not indispensable, to support a judgment by default, that the amount claimed should be repeated in the prayer of the petition. *Brashears v. Brashears*. 233

2. Same—But if the petition is defective and fails to set out with reasonable certainty the amount to which the plaintiff is entitled, or if the court, by an inspection of the pleadings, can not readily adjudge the sum for which judgment should be entered, then the prayer must specifically state the relief demanded or a judgment by default can not be rendered. *Idem.* 232

3. Action—Damages for Cutting Timber—Averment as to Value—Sufficiency—In a petition by a plaintiff for damages for the cutting and conversion of the timber from a large tract of land an averment that the value of the trees cut and removed did not exceed \$4,944.57 is not sufficient to authorize a judgment by default for that sum. *Idem.* 233

4. Default Judgment—Relief not Sought—A judgment by default for relief not sought in the petition is a clerical error which may be corrected after the term. *Idem.* 233

5. Clerical Misprision—How Shown—How Corrected—A clerical misprision must be shown by the record and can only be corrected by the record. But if a plaintiff is given a judgment for more than his pleading shows he is entitled to or for any sum when the petition does not authorize a judgment in any amount, it is a manifest error which the defendant may have corrected on motion after notice. *Idem.* 233

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6. Limitation—In this case the motion was made as soon as the defendant learned of the judgment, or by the exercise of ordinary care could have learned of it, and within ten years of its entry, and hence the right to correct the error was not barred by limitation. *Idem* 233

POLICE OFFICER—See Principal and Surety, 1, 2.

PRINCIPAL AND SURETY—

1. Action Against Bonding Company for Injuries Inflicted by Police Officer—Bonds—Extent of Liability—In this action by appellee against appellant for injuries received by the reckless shot of a policeman whose bond was made by appellant, the rule announced in *Growbarger, &c. v. U. S. F. & G. Co.* is followed, in holding that section 3752, Kentucky Statutes, must be read into the policeman's bond in order to determine the extent to which the surety may be held liable. In view of this, the amount that may be recovered is not limited to the \$1,000 named in the bond. *U. S. F. & S. Co. v. Milstead* 186
2. Punitive Damages—Recovery of as to Whom—In such a case punitive damages may be recovered of the officer, but only compensatory damages of the surety in the bond. *Idem.* 186
3. Excessive Damages—Extent of Injury—In view of the serious character of her injuries and their permanency, it can not be said that the verdict is excessive. *Idem.* 186

QUESTION OF FACT—

- Rule in Such Cases—In Cases of this character, it is the uniform practice of this court to follow the judgment of the chancellor. *Clarke v. McDowell's Adm'r* 177

RAILROADS—

1. Shipment of Stock—Measure of Damages—Instructions—In this suit by appellee to recover of appellant damages occasioned by the injury to his stock on account of appellant's negligence in transporting it, it was error in instructing the jury to fix the measure of damages as the difference between the value of the stock if they had been transported within a reasonable time and without unusual delay and the amount they sold for at public sale. Appellee was entitled to recover the difference, if any, between the fair market value of the stock in the condition they would have been in if they had been transported with ordinary care, and the condition they were in when delivered in Louisville. *Southern Ry. Co. v. Graddy* 183
2. Evidence—Opinion of Witnesses—Pedigrees of Colt—The pedigree of a thoroughbred colt is a material thing in fixing its value, and it was important to plaintiff that he should produce to the jury the evidence of persons acquainted with the value of pedigrees and who could inform the jury touching this feature of the question they were called upon to determine. *Idem* 183
3. Shipment of Stock—Pleadings—Proofs—Instructions—In this action by appellee against appellant for injury to a horse in shipment, the only issue made by the pleadings, outside of the extent of the injury, was as to whether it was received by the horse in being removed from the car, or in being caused to jump from the platform to the ground, and the trial judge refused to instruct upon this point, and made the case turn upon an issue which was not raised by either pleadings or proof. This was error. *L. & N. R. R. Co. v. Gormley* 188

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4. Same—Appellee was entitled to recover, if at all, for an injury which was the direct cause of the accident, and in order to ascertain the extent of the injury, it would be competent to show the condition of the house immediately after the accident and following it down to the date of the trial. *Idem* 188
5. Constructing Elevated Wall in Street—Damages to Abutting Property—Subsequent Sale of Property—Effect on Recovery—The owner of a lot fronting on a street through which a railroad company constructed an elevated stone wall on which its cars were run, was entitled to maintain an action for damages for its depreciation in value caused thereby, and such right is not affected by reason of his subsequent sale of the lot before suit. *L. & N. R. R. v. Lambert*..... 199
6. Same—Measure of Damages Recoverable—In an action for damages to property fronting on a street of a city by reason of the construction by a railroad company of an elevated stone wall in the street on which its cars were run, the measure of damages as to the lots sold after the completion of the wall, was the difference in the market value thereof just before it became generally known that the work would be done, and its market value just after the work was done, and as to the lot sold during the construction of the wall the measure of damages was the difference in the market value before it became generally known that the work would be done and the market value at the date of the sale of the property. *Idem* 199
7. Same—Accrual of Cause of Action—Where an injury to real estate results from the construction of a permanent structure the cause of action accrues upon the completion of the structure. *Idem*..... 200
8. Dangerous Crossings—Care Required—Question for Jury In an action against a railroad company for killing one traveling on a public highway at a dangerous crossing, the central idea in every case is that the company must use such care and take such precautions for the safety of travelers as the character of the crossing makes reasonably necessary for their safety and protection, and the degree of care in each particular case is governed by the facts, and is a question for the jury. *Adkisson's Adm'r v. L., H. & St. L. Ry. Co.*..... 204

RAPE—

1. Assault to Commit—An attempt at rape includes every ingredient of rape except its accomplishment; that is, if the assault is made under such circumstances as that the act of sexual intercourse, if it had been actually accompanied, would have been rape, it would constitute the crime of an attempt to commit rape. *Payne v. Commonwealth*. 229
2. Same—Acts of Accused—Purpose Shown—Preparation, Ability and Intention—Where the acts of the accused were such as to show a purpose on his part to have carnal knowledge of a female by force, or by her consent, where she was under twelve years of age, and that he was prepared and able to carry such intention into effect and would have done so, but for the flight of his victim, he is guilty of attempted rape. *Idem* 229

RAPE—Continued—

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3. Same—Overt Act—While it is true that in order to make out a case of attempt to commit rape, there must, in addition to the intent, be some overt act in pursuance of such intent, but the overt act need not be such as amounts to a technical assault. *Idem* 229

ROADS AND PASSWAYS—See Telephones, 2.

- Use of—Permissive—Mistake in Erecting Poles on Road—The roadway in question is a private one, the use of the public in it is permissive, and appellant failing to show any right to have its poles erected upon it, its suit to enjoin appellees from cutting down and removing its poles was properly dismissed by the lower court. *Lou. & I. R. R. Co. v. Bailey, &c.* 179

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SHIPMENT OF STOCK—See R. R., 4, 7.

STREET RAILWAY—

1. Action for Tort—Amended Plea for Settlement—Responsive Plea—Tender of Money—In an action against a railway company for a tort by a passenger being negligently thrown from its car, in alighting therefrom, in which an amended answer was filed, pleading a settlement, to avoid this plea the plaintiff might show that the settlement was obtained when she was unconscious, and that she had promptly tendered the money back, and when the tender was refused, paid it into court, and, upon proof of such tender and its payment into court, the plaintiff was properly allowed to proceed with her action. *Louisville Ry. Co. v. Williams* 168
2. Witness—Employee of Railway—Offer to Compromise—Evidence of—Competency—Bias of Witness—On the trial of an action against a railway company, Dr. R. gave testimony in its defense. On cross-examination, the plaintiff attempted to show that he was in the service of the company, and, in order to show his bias, he was asked if he had not, during the trial, proposed to compromise it at \$400, which he denied. Held—That the proof of such offer was competent to show the bias of the witness. *Idem.* 168

STREETS AND ALLEYS—See Municipalities, 1, 3.

TELEPHONES—

1. Indictment for Cutting Down Shade Trees—Order Changing Name of Defendant—It was not error to permit the name of appellant to be changed from the one under which it was indicted to its true corporate name. (Section 125, Criminal Code.) *Russellville Home Tel. Co. v. Commonwealth.* 132
2. Shade Trees—Consent of Supervisor of Roads—Evidence—As the supervisor of roads did not know the boundary of the highway where the trees were cut, little importance is attached to his consent that they might be cut. *Idem.* 132

TRUSTS—

- Trustees—Legal Presumption—The trustee here was not authorized by the will to use any part of the principal without the consent of the chancellor, and the record does not show that any of the principal was used, the legal presumption is, therefore, that Ruth Aldridge faithfully performed her duties as trustee of her sister, and at her death had possession of the fund or invested it in land, and not having the trust fund, the presumption is that she invested it in the land held by her. *Aldridge v. Aldridge.* 246

TRUSTEES—

Page.

Judgment Against Cestui Que Trust—Duty of Trustee—

It is incumbent upon a trustee to keep an accurate account of his doings and no judgment will be entered by the chancellor against his cestui que trusts, upon the showing made by the trustee, when the mind is left in doubt as to how the account really stands. To keep an accurate account is a primary duty, and the chancellor will afford him no relief against his trust estate when there is doubt as to the standing of the account. *Potter, &c. v. Potter, &c.* 129

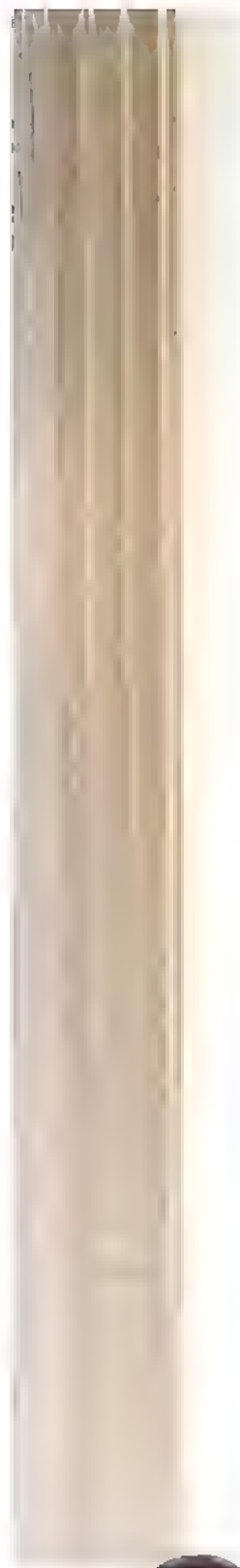
VENDOR AND PURCHASER—

Sale of Separator—Express Warranty—Action for Price—

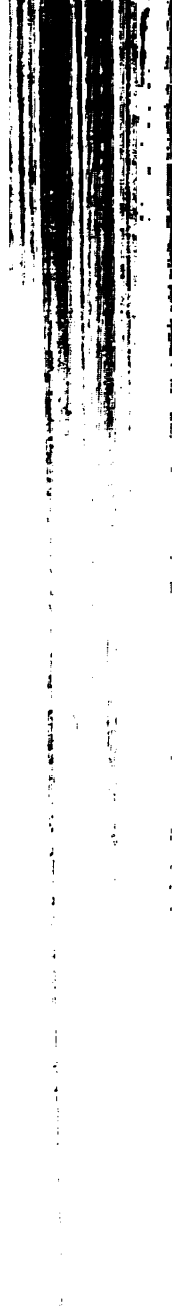
Plea of Breach of Warranty—Use Without Complaint—Appellant purchased of appellee an engine and separator upon an express warranty "that it was well made, of good material, and, with proper management, capable of doing well the work for which it was intended." In an action on the last note for the purchase price, the defendant, after having used it for four years, pleaded that it was defective. Held—That where there is an express warranty there is no implied warranty, and the purchaser, after using the machine for four years, without offering to return it, or notice to the seller that it was defective, was without defense to the payment of the note. *Guhy v. N. & S. Co.* 237

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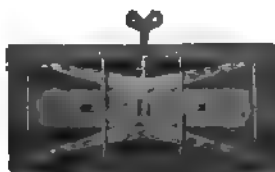


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No. 3

COURT OF APPEALS OF KENTUCKY.

AETNA INS. CO. v. ROBARDS TOBACCO CO.'S TRUSTEE.

(Filed April 20, 1908—Not to be reported.)

Fire Insurance—Actions for Loss—Surrender of Policy—Direction for Peremptory Instruction—In this action, involving the liability of the appellant on a policy of fire insurance, evidence examined and held that the policy was surrendered by the insured with the intention that it should be cancelled by the company and was accepted by the company with the belief and understanding that it was cancelled, and the peremptory instruction asked by appellant should have been granted.

Charles H. Shield and Dorsey & Stanley for appellant.

W. P. McClain, E. C. Walker and C. K. Denton for appellee.

Appeal from Henderson Circuit Court.

Opinion of the court by Judge Carroll, reversing.

In December, 1906, the Farmers Bank & Trust Company, as trustee in Bankruptcy of E. T. Robards, brought this action in the Henderson Circuit Court against the appellant company, to recover \$5,000, the amount of a policy issued by it to the Robards Tobacco Company on January 9, 1903. The property was destroyed by fire on March 8, 1903. The pleadings having been made up, the case went to trial before a jury and a verdict for the full amount sued for was returned.

A reversal is asked upon two grounds, first, that the motion for a peremptory instruction should have been sustained, and, second, that the verdict is flagrantly against the evidence.

Briefly stated, the contentions of the respective parties are these: The insurance company insists that on March 2, 1903, the policy was voluntarily surrendered to it by Robards, and cancelled before the fire. While Robards, although admitting that he delivered the policy to the company, claims that it was surrendered in order that the rate of premium might be adjusted and lowered, and the policy re-written according to the agreement in respect to premiums, theretofore made between the parties; and that it was understood, when the policy was delivered to the agent, that it should continue in force without modification except as to the rate of premium to be charged. For the purpose of determining whether or not the grounds for reversal, or

either of them, relied upon, can be sustained, it will be necessary to state with some detail the facts shown by the record.

The appellee, E. T. Robards, and his father, J. T. Robards, were partners in the ownership and conduct of a large tobacco establishment known as the Robards Tobacco Company. In February, 1903, J. T. Robards died, leaving his son, E. T. Robards, in control of the business. The tobacco company carried a large amount of insurance on its buildings and property. This insurance was placed with several companies, one of them being the appellant. Between December 1, 1902, and February 21, 1903, the tobacco company had taken out with Starr & Thompson, local agents at Henderson, insurance in seven companies, amounting in the aggregate to \$18,000. The policies issued by the appellant company, through these agents, for \$5,000, were dated January 9, 1903, and expired in one year from that date. Beginning in November, 1902, and continuing through February, 1903, there was considerable correspondence between E. T. Robards, acting for the tobacco company, and C. R. Nelson, secretary of the Kentucky and Tennessee Board of Underwriters, who represented the insurance companies and had the sole authority to fix the rates that should be charged for premiums—as to the rate that should be allowed on the property of the tobacco company. The correspondence shows that the tobacco company was complaining about the high rate of insurance it had been charged, and was endeavoring to make such improvements and changes in its factory as would reduce it, and that Nelson, acting for the insurance companies, was suggesting certain improvements that should be made to secure a lower rate, and promising to make a better rate. On November 5, 1902, Nelson wrote Robards, saying that he would send one of his commissioners to re-inspect and re-bate the risk, and hoped, within a few weeks, to have a new tobacco schedule which might possibly be some improvement on the old one. In reply to this letter, Robards wrote, complaining that there was a great inequality between the rate charged his concern and some of the other factories; and, on December 9, Nelson wrote Robards that he had established a rate of \$4.00 on the factory. On January 10, 1903, Robards telegraphed Nelson as follows:

"Improvements agreed on completed January 1st; Buckner inspected third. Policies expiring, we decline to renew as no reduction is authorized."

On the same day, in reply to this telegram, Nelson wrote that he was engaged in promulgating a new tariff for tobacco factories, but was not yet in a position to give a new rate on Robards' establishment, but advised him that, on any policies which he desired to have written, the premium would be charged at the last promulgated rate, and that, when the new rate was made, the policies could be reformed to meet the new rate. On January 19, Robards wrote Nelson as follows:

"Since writing you this morning at instigation of Mr. Starr, we called Mr. Buckner (who was inspector) up by telephone, and he advises us he received promulgation of rate at \$3.37 on our entire plant. What does this mean? There has evidently been a clerical error made, or you are not living up to your agreement with us."

In reply to this, Nelson wrote quite a lengthy letter to Robards, explaining the delay in promulgating the new rates, and giving details to show that he had not violated any agreement. Immediately after this, Robards went to Louisville, to see Nelson with reference to getting a reduction in the rates below \$3.37, but did not succeed in accomplishing his purpose. In addition to this, Starr, the local agent, at the request of Robards, went to Louisville to see Nelson for the purpose of trying to get the rate reduced, but he did not succeed.

On January 19, the rate was reduced from \$4.19 to \$3.37, and when this reduction was made, the local agents procured from Robards the three policies, including appellant's, that had been previously issued at \$4.19, and reduced the rate on them to \$3.37, returning the policies to Robards. After this, and in February, four policies in other companies were issued at the reduced rate. On March 2, 1903, none of the premiums charged for the policies issued in December, January or February had been paid, and Starr & Thompson, through their clerk, Luckett, presented a bill to Robards for the premiums. In this bill the rate on three of the policies, including appellant's issued before January 19, is shown to be \$4.19, and on the others, the reduced rate; but the premiums on all of them were reduced to \$3.37, making the total amount \$559.50, payment of which was demanded by Luckett. This bill Robards refused to pay, contending, as he testifies, that it was agreed that the premium should be reduced below this amount. On the same day that Robards refused to pay the account presented by Luckett, Starr, the local agent, went to see him in reference to the matter, and he declined to pay the premiums to Starr. He admits that Starr told him that he had been to Louisville to see Nelson, but that he could not get any better rate. After declining to pay Starr the premiums, Robards, at this interview, delivered all the policies to him, and they were received by Starr, who took them to his office. At this point, Robards testifies that he assigned as a reason to Starr for refusing to pay the bill, that the premiums charged were at a higher rate than had been agreed upon, and no allowances had been made for the improvements—that he was willing to pay a reasonable rate, and the rate that he had contracted for, and says he delivered the policies to have rate corrected. Starr's version of the affair is that he told Robards he must either pay the rate or surrender the policies, and that Robards told him he could take them and cancel them and then handed the policies to him for cancellation. That the policies were, in fact, cancelled by the company before the fire, there is no doubt. On the 5th day of March, 1903, Robards wrote to Starr & Thompson a letter, in which he said:

"As your Mr. Starr is aware, we have declined to pay the rate of \$3.35 per hundred as charged on our plant, according to the Kentucky & Tennessee Board of Underwriters, consequently surrendered the following policies under date of February 23d and 28th, respectively, Aetna, Royal Exchange, Greenwich, Home, Northern and Phoenix. You will remember that, in December, we made, through the local inspector, Mr. Buckner, an agreement with the secretary of the national board to make specific reduction in our rate, provided we should make certain improvements, consisting of fire walls, fire doors, covering with asbestos, &c. * * * According to the understanding of your Mr. Starr, this was a reduction bringing our rate down on the manufactory to less than 2 per cent. We made the improvements according to the specifications, and they were accepted by the inspector, and, notwithstanding we have lived up to the agreement in every particular, the national board of underwriters have not. We have sought, by correspondence and personal efforts, through the secretary at Louisville, the relief, and have failed. Therefore, as we stated to you some time ago, should we have a loss, we now wish to give you notice that I hold the Kentucky and Tennessee Board liable for any loss that might occur to the extent of policies written and surrendered. We are ready and willing at any time to pay a reasonable rate, and should not object to, say not exceeding 2½ per cent. on entire plant, and we have ready money to pay the premium on this amount of insurance at any time on that basis. We wish to state, furthermore, for our own protection, not that we have any hope of any recognition from the Kentucky and Tennessee Board

of Underwriters under its present management, that we have contracted for, and will be in as soon as they will be received here, wire glass windows." * * *

When the policies were delivered to, and received by, Starr, on March 2, no part of the premiums on any of them had been paid, and on March 4, Starr & Thompson presented to Robards an itemized bill showing that the premiums would be \$559.50 if the policies had run for the time stipulated in each of them. But this bill was credited by \$473.45, the amount of the rebate to which Robards was entitled as the policies had only run a short time, leaving the amount of premiums due by Robards for the time the policies had run, that is, from the time they were issued up to the date they were surrendered, \$86.05; and this amount Robards on that day paid. On March 8, 1903, the tobacco factory and its contents were destroyed by fire, and a few weeks thereafter Robards made out proofs of loss and forwarded them to the respective companies.

The record does not show any conversation or correspondence between the companies and Robards after the fire, except that he made out and forwarded proofs of loss, and thus the matter remained until December, 1906, when this action was brought.

In the fall of 1903, Robards went into bankruptcy, but in the schedule of his assets, made out and verified by him, he made no mention of these policies, or any of them; nor did the trustee in bankruptcy know anything about them. In 1905, however, there appears to have been entered an order in the bankrupt court directing the trustee to sell all claims, including insurance, that the tobacco company held; and under this order, they were sold to E. T. Robards for \$200. Afterwards, in 1906, by another order made in the bankruptcy proceedings, it appears that Robards entered into an agreement with his creditors, by which it was stipulated that a part of the insurance money, if any, recovered, should be paid to the creditors and the balance retained by Robards. The record further shows that, under this agreement, the creditors were to be paid 20 per cent. of any amount collected from the insurance companies, Robards to retain 80 per cent.

As before stated, the issue narrows down to the single question, whether or not the policy was surrendered by Robards for the purpose of cancellation. Upon this point, after a careful consideration of the facts and briefs of counsel, our conclusion is that the evidence of Robards is conclusive that the policy was surrendered with the intention that it should be at once cancelled. The letter of March 5—the fact that Robards had exhausted every effort to obtain a reduction in the rate below \$3.37, but had failed—the refusal to pay the premium charged, and the payment of the amount of premium due from the date of issue to the date of surrender—make this purpose and intention on the part of Robards plain. And that the agents of the company accepted the policy with the belief and understanding that it was cancelled, is not open to question. The theory of Robards that he surrendered these policies with the expectation that the company would yield to his importunities and reduce the rate, is flatly contradicted by the facts brought out in his testimony. The peremptory instruction asked for should have been granted.

Wherefore, the judgment is reversed with directions for a new trial, in conformity with this opinion.

CAINE v. RICH, &c.

(Filed April 30, 1908—Not to be reported.)

1. Taxes—Payment out of Purchase Money—Statutes—It was error to compel the payment of the taxes in question out of the purchase money, as provided by section 989, Kentucky Statutes, for the reason that the taxes were assessed and became due while appellees were the owners of the property, and it was their duty to pay them at the time prescribed by law. They inherited the property from their father and owned it in fee subject to the appellant's lien.

2. Construction of Statutes—Sections 989, 4024 and 4032 should be construed together and when this is done, section 989 will not authorize purchasers at judicial sales, who owe the taxes themselves, to have their own obligations discharged out of the purchase money, as against a lien holder who is only secondarily liable.

W. H. Mackoy for appellant.

Orie S. Ware for appellees.

Appeal from Kenton Circuit Court.

Opinion of the court by Judge Barker, reversing.

Samuel Rich, Sr., died intestate in 1892, domiciled in Kenton county, Kentucky, leaving eight children and a grandchild (the appellees here) as his only heirs. At his death, he was the owner of four pieces of real estate, situated in Kenton county, Kentucky, upon all of which there was a mortgage for the sum of three thousand five hundred dollars, which was owned by appellant, Caroline Caine. After the death of their father, appellees paid the interest on the indebtedness secured by the mortgage to appellant, and obtained from her several extensions of the time in which the principal might be paid. This was continued until the 7th day of May, 1904, when appellant instituted this action in equity in the Kenton Circuit Court to enforce her lien on the land. All of the appellees were made parties defendant, and afterwards such proceedings were had in the action that a judgment was rendered in favor of appellant for her debt, and enforcing her lien on the land described in the mortgage. Under this judgment the property was sold in three parcels, and was purchased by the appellees, John S. Rich, Blucher Rich and Joseph Rich, respectively. These purchases were reported by the commissioner to the court, and in due time confirmed. Afterwards it transpired that the state and county taxes on the property sold, for the years 1904, 1905 and 1906 had not been paid, and thereupon the purchasers, after due notice, made a motion, under the statute, to have the amount of the taxes summarily ascertained and paid out of the purchase money. This motion was resisted by appellant, Caroline Caine, but it was sustained by the court, and the taxes ordered to be paid out of the proceeds of the sale of the land described in the mortgage. The court also, on motion, allowed the clerk of the court a penalty of fifteen per cent. for collecting the taxes. To all of which the appellant excepted and prayed an appeal to this court to test the validity of the judgment rendered.

The proceeding to ascertain and pay the taxes out of the purchase money was under section 989 of the Kentucky Statutes, which is as follows:

"The court may, in actions for sale of real property, determine summarily, with or without written pleadings, the amount of any State, district or municipal taxes or assessment upon the property to be sold, and shall provide for the payment of the same in the judgment; and

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if the plaintiff fail to ask therefor the purchaser shall be entitled, at any time before the payment of the purchase price, to a credit for the amount thereof."

Undoubtedly, if the purchasers had been strangers to the title, the court would have been correct in ruling that they might under the foregoing statute, cause the taxes on the land to be paid out of the purchase money; but the appellees were not strangers to the title; they and their brothers and sisters inherited the property in question at their father's death, and they were thereafter its owners in fee simple subject to the lien which secured appellant's debt due from their father's estate. The taxes involved here were assessed and became due while the appellees were the owners of the property, and it was their duty to pay them to the State at the time prescribed by law. This they failed to do, and now, because they purchased the property at judicial sale, had to enforce the lien of appellant, they are asking to be allowed to take her money and with it pay off the obligation of the Commonwealth, primarily due from themselves.

Section 4024 of the Kentucky Statutes is as follows:

"All estate, real and personal, and all interest in such estate, named and specified in the tax book, shall be assessed for taxation, and the tax paid by the owner thereof to the persons authorized by law to receive the same unless otherwise specially provided."

"Sec. 4032. Any person having a lien on property upon which the owner has failed to pay the taxes, and has become delinquent, such lienholder may pay the taxes, interest and penalties thereon and shall be subrogated to the lien of the Commonwealth, county or district therefor, and the sum so paid shall bear legal interest from the date of payment, and shall be collectible in the same manner as the original claim of the lien holder."

The appellees were the owners of the property at the time the taxes in question were assessed. Their father died intestate in 1892. His children and his grandchild were his heirs at law, and, upon his death, became the owners of his real estate in Kentucky. In 1904, 1905 and 1906 they were still the owners of the property; therefore, the state taxes for those years were assessed against them as owners, and the taxes were due from them as owners. The lien holder (appellant) was only secondarily liable for the taxes. Of course her lien was inferior to that of the state for its fiscal dues, but, under the provisions of section 4032, she had a right to pay the taxes in question after they became due, and to be subrogated to the lien of the Commonwealth for what she had paid.

By what right then can it be insisted that when the property was sold to pay off the mortgage lien, these owners could bid it in for the precise sum due the appellant, and then, out of the proceeds, pay off the taxes due the State from themselves? Let us suppose that, instead of going through the form of a judicial enforcement of the lien of appellant, these purchasers had paid appellant her debt and interest without suit, could they have claimed the right to withhold from her, out of her debt, a sufficient sum to extinguish the lien on the State for taxes which had been assessed against themselves as owners? Clearly not. There was nothing in the judicial proceeding had to change the nature of their obligation to pay the State taxes assessed against themselves. Let us suppose that the property had sold for a greater sum than the appellant's debt and interest; would not she then have had the right to require the taxes to be paid out of the surplus? And assuming that there was such surplus, to whom would it have belonged? Clearly to the appellee. And it is not a matter of doubt, that, if there had been such a surplus, they would have asserted their right to it.

Now, as said before, the appellees were the owners of the property in coparcenary. The taxes were assessable and were assessed against

them as owners. It was their duty to pay them, and this duty they should have discharged. The fact that they failed to perform the duty they owed to the state, does not give them the right to shift this obligation to the shoulders of appellant.

Sections 989, 4024 and 4032, Ky. Stats., should be construed together and, when this is done, section 989 will not authorize purchasers at judicial sales, who owe the taxes themselves, to have their own obligations discharged out of the purchase money as against a lien holder who is only secondarily liable therefor.

In the argument at bar and in his brief, counsel for appellees constantly insisted that they were not the owners of the property, but only the owners of an equity of redemption. This position is unsound. Anciently a mortgagee was construed to own the title of the property upon which his mortgage rested, which became absolute at common law after the time for redemption had passed. This principle has long since passed away; and in Kentucky, the mortgagee has a lien upon the land, but not a title to it. The children of Samuel Rich, when he died intestate, became the owners of the land, as absolutely as if they had purchased it from him by deed of conveyance; and the taxes which were assessed against it after their father's death it was their duty to pay; and this obligation was their own, and not an obligation of the estate of their father.

For the foregoing reasons, the judgment is reversed, with directions to set aside the order allowing the payment of the taxes out of the purchase money of the land, and the entry of an order permitting appellant to withdraw the money in court for the purpose of extinguishing her judgment debt. This conclusion obviates the necessity of discussing, or deciding, either of the other two interesting questions mooted in the argument.

BAKER, &c. v. COOPER, &c.

Lands—Division of—Evidence—The evidence here is not sufficient to justify the conclusion that any fraud was practiced upon Mrs. Baker in the division of the land, or that there was a conspiracy to defraud her. C. made an advantageous trade in the division, but this fact alone is not sufficient to authorize the setting aside of the deeds. In brief, it appears that Mrs. Baker simply made a bad trade in the division and is seeking to be released therefrom. Her petition was properly dismissed by the court below.

Will Linn and N. B. Barnett for appellants.

James H. Coleman and Zeb A. Stewart for appellees.

Appeal from Calloway Circuit Court.

Opinion of the court by Wm. Rogers Clay, Commissioner, affirming.

On May 21, 1903, Matthew Wicker, a resident of Calloway county, Kentucky, died intestate, seized in fee-simple of five-eighths of a section of land lying in said county. He left surviving him three children and one grandchild as his only heirs at law; the appellant, Mrs. M. J. Baker, wife of W. H. Baker, and appellees, Mrs. S. A. Cooper, wife of appellee J. W. Cooper, and W. D. Wicker being the children, and Mrs. Cora Barton, wife of appellee C. G. Barton, being the grandchild. In June, after the death of Matthew Wicker, appellee, W. D.

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Wicker, filed his petition in the Calloway Circuit Court, asking that said land be divided in kind among the heirs. Soon after W. D. Wicker filed his petition, a conference of the heirs was called to meet at the home of said Wicker. The purpose of this conference was to determine what compensation should be paid W. D. Wicker for his services in taking care of his father. At this time, Mrs. Baker and her husband were living upon eighty acres of the land, W. D. Wicker upon another tract of eighty acres, and Barton and wife upon a third tract of eighty acres; while Cooper and wife were occupying the remaining tract, consisting of 160 acres. Cooper proposed that the heirs take the tracts upon which they lived, and that he compensate the other heirs for the additional land he should receive. Following this suggestion, which was acquiesced in by the others, he agreed to pay Mrs. Barton the sum of \$425, W. D. Wicker the sum of \$275, and appellant, Mrs. Baker, the sum of \$75. Thereafter the parties met in Murray, and deeds were executed in conformity with this agreement. Subsequently the appellant, Mrs. Baker (the plaintiff below) instituted this action, charging Cooper, Wicker and Barton with having entered into a conspiracy to cheat and defraud her, and asking that the deeds be set aside. From a judgment dismissing the petition, this appeal is prosecuted.

According to the evidence for appellant, appellee Cooper called at her home and said that the other heirs had agreed to trade with him, and he would make the trade provided he could make a trade with her. He then asked her if she would take the land upon which she lived and be satisfied. She said "no;" that she thought she was "entitled to something in addition to that." She then suggested that they go over and discuss the matter with her husband, who was at work in an adjoining field. She then asked Cooper what he had given her brother (W. D. Wicker), and he said "nothing," but that he had given Barton \$400. He then agreed to give appellant \$50, but appellant told him she thought she ought to have more than that; that all she wanted was to get what the other children received. Cooper stated that the land could not be divided in kind, and that it would cost \$400 or \$500 to have the property sold and divided. The consideration recited in her deed, in addition to the eighty acres, was \$75. The consideration in Mrs. Barton's deed was \$425 in addition to the land. The deed to Wicker did not state any money consideration in addition to the land. After the party reached Murray, where they went to execute the deeds, Mrs. Baker's brother stated in her presence, that he was to get nothing in addition to his land. Willie Baker, her husband's son, also testified to the fact that Cooper had stated it would cost \$400 or \$500 to sell the land and divide the proceeds, and that W. D. Wicker was to receive nothing in addition to the land.

Appellee, J. W. Cooper, testified that the heirs met on the 24th of June, and he asked them what they would take to let him have the home place. Each one told him about what he would take. They could not agree in regard to the price that evening. The next morning, W. D. Wicker proposed to take \$275 and eighty acres of land. Cooper agreed to give it if he could trade with Mrs. Baker satisfactorily, Barton proposed to take \$425 and eighty acres of land. Cooper then went over to see appellant, Mrs. Baker, and asked her what she would take. She stated she did not know what to say, but would have to go and see her husband. She then went out to the field, where her husband was, and, after stating the matter to him, she agreed to accept eighty acres and \$50. Cooper then left with the understanding that they were to meet at his house, provided he traded with the others. Thereafter, Baker met him on the road and told him they were going to back out unless they got \$100. Cooper told him they could do as they pleased; that he would not give any more. Mrs. Baker said

it looked like she ought to have more. Cooper told her he would not give any more. Appellant then started away, but turned around and told him she would take \$75. Cooper agreed to give this amount, and the whole party then came into town to make the deeds. Cooper denied saying to Mrs. Baker that W. D. Wicker was to get nothing in addition to the land. He did tell her, however, that Barton was to receive \$425, but denied having entered into any conspiracy with Barton and Wicker to defraud appellant.

W. D. Wicker testified, and denied that he had told Mrs. Baker that he was to receive nothing in addition to the land; also denied having entered into a conspiracy to defraud her.

C. G. Barton testified to the same effect, and stated that, at the time the deeds were made, appellant knew exactly what each was to receive.

The testimony as to the value of the different tracts of land is very conflicting. We are of opinion, however, that the evidence given by those who seemed to be best posted as to the value of the different tracts is to the effect that the Barton tract of eighty acres is worth about \$1,000; the W. D. Wicker tract, about \$1,200; and the Baker tract about \$1,400. This being the case, the amount received by each of the heirs was as follows: Barton, \$1,425; Wicker, \$1,475; Baker, \$1,475. The 160 acres of land received by Cooper was worth about \$2,600.

Appellant's chief ground of complaint is that she did not receive a sum equal to that received by the other heirs; that, if she had known what they received, she would not have made the trade. While she claims that Cooper told her that Barton was to receive only \$400, it is nevertheless true that she did know, prior to the execution of the deed, that Barton had received \$425. She, therefore, knew what one of the heirs received, and, on this account, then, she certainly has no cause to complain. As to whether or not she knew what Wicker received, the evidence is very conflicting. While she swears that both Cooper and Wicker told her the latter was to receive nothing, and that she would not have made the trade, had she known what Wicker was to receive, she nowhere swears in positive terms that she did not know. On the other hand, C. G. Barton swears that, before the execution of the deed, she did know what each of the heirs was to receive.

The evidence is not sufficient to justify the conclusion of any fraud or conspiracy on the part of Cooper, Barton and Wicker. Barton and Wicker each made his own trade, and fixed the amount which he was to receive. The amount that they received was substantially the same as that received by the appellant, Mrs. Baker, for the land which they got was inferior in quality to that which she holds. There can be no doubt that Cooper made a good trade, so far as he was concerned, with each of his brothers and sisters. Barton and Wicker, however, are not complaining. Mrs. Baker complains on the ground that she did not receive as much as Barton and Wicker. We fail to see any ground for this complaint, as she received substantially the same as Barton and Wicker. It was not alleged, or shown, that Mrs. Baker was mentally incompetent to contract. We think the evidence shows that she simply made a bad trade, and is now seeking to be released therefrom. If we were satisfied that any fraud was practiced upon her, we would not hesitate to direct that the deeds be set aside. Cooper undoubtedly made an advantageous trade; but this fact alone is not sufficient to authorize the setting aside of the deeds. Such was the view of the chancellor, and for the reasons given, the judgment is affirmed.

PUTNAM v. COMMONWEALTH.

(Filed May 1, 1908—Not to be reported.)

Appeals—Failure to File Transcript—Agreement to Waive Such Failure—Section 348, Criminal Code, is a limitation upon the jurisdiction of the Court of Appeals, and an agreement by the Commonwealth's attorney to waive the failure to file the transcript, does not vest the court with jurisdiction, and the appeal herein is dismissed.

S. A. Russell for appellant.

James Breathitt and Theo. B. Blakey for appellee.

Appeal from Marion Circuit Court.

Opinion of the court by Chief Justice O'Rear, dismissing appeal.

Appellant was convicted of a misdemeanor. At the judgment term he was granted an appeal to this court. But he did not file the transcript with the clerk of this court within sixty days after the appeal was granted, nor did he obtain or apply for an extension of time for that purpose. The Commonwealth's attorney for the district and appellant's counsel have filed an agreement up here, in which they stipulate that appellant's failure to perfect his appeal seasonably shall be waived by the Commonwealth, as the representative of the latter is particularly anxious to have the important public question involved in the merits authoritatively passed upon for guidance in future similar prosecutions.

The attorney general, however, declines to accede to that agreement, upon the ground that the statute giving jurisdiction on appeal to this court in such cases, does not authorize it to be vested even by consent of parties in spite of a statute fixing the conditions upon which it may be exercised. Nor is it clear that the court could be vested with jurisdiction by consent of the parties.

The Criminal Code of Practice, section 348, provides on this subject:

"The appeal must be prayed during the term at which the judgment is rendered, and shall be granted upon the condition that the record be lodged in the clerk's office of the Court of Appeals within sixty days after the judgment."

This court has consistently construed this section of the Code as being a limitation upon our jurisdiction, it being said in Commonwealth v. Barbour, 29 Ky. Law Rep., 622:

"The record was filed in this court * * * not within sixty days after the decision complained of. The appellee makes no objection to the record's not being filed in time, but the court has no jurisdiction unless the record is filed in sixty days."

(Commonwealth v. Schlitzbaum, 25 Ky. Law Rep., 1022; Atkinson v. Commonwealth, 102 Ky., 94; Stamper v. Commonwealth, 30 Ky Law Rep., 1296; Clark v. Commonwealth, decided April 16, 1908.)

The record presents, therefore, only a moot question, which the court is not at liberty to decide.

Appeal dismissed.

SLONE v. COMMONWEALTH.

(Filed May 1, 1908—Not to be reported.)

1. Homicide—Instructions—Evidence—There was evidence tending to show that deceased and Combs were acting in concert attacking Slone, and, if this was true, he had the right to take into consideration the danger at the hands of both of them in determining what

was necessary in his self-defense. It was error, therefore, for the lower court to predicate Slone's right of defense wholly upon the danger at the hands of deceased.

2. Dying declarations—All that deceased said in his dying declaration may be proved, but what he said on another occasion can not be admitted.

3. Evidence—As to Declarations Before Homicide—It was error to allow proof of declarations made by Combs before the homicide as to what he and deceased had done. This could not be given because it tended to confirm Combs' testimony.

Walter S. Harkins, Joseph D. Harkins and W. H. May for appellant.

James Breathitt and Theo. B. Blakey for appellee.

Appeal from Floyd Circuit Court.

Opinion of the court by Judge Hobson, reversing.

C. C. Slone was indicted for the murder of Joe Maggard. On a trial of the case, he was found guilty of voluntary manslaughter, and his punishment fixed at two years in the penitentiary. The court entered judgment upon the verdict, and he appeals.

The shooting occurred on Sunday, April 17, 1905, at Allen City, in Floyd county. Slone had a raft there, and wanted some money to pay some hands. He went to the store of a man named Akres, in which Maggard was clerk. He asked Maggard to cash a check of \$10 for him. Maggard could not do this, but gave him \$8, which he charged to Slone as cash. Slone then bought a pair of shoes for his wife, which he also charged to him. Maggard invited Slone to drink with him, and they then drank out of a bottle which Slone had. After drinking the whisky, they went across the street together and drank cider at another place, after which they returned to the store of Akres; and, when Slone got ready to go home, he looked at the shoes which Maggard had tied up for him, and told Maggard they were not the shoes he had bought. A difficulty followed, in which Slone punched Maggard with his pistol. At this, Maggard ordered Slone out of the house, and was following him with his pistol, when Hiram Gibson knocked the pistol up and it went off. Maggard went to the door, and, patting his breast, called upon Slone to shoot, and taunted him with being a coward. Both had their pistols in their hands and finally both got out on the ground and were quarreling, each with his pistol in his hand. Hiram Gibson was between them, endeavoring to quiet the trouble. At this juncture, Henry Combs, who was about forty yards off, ran down to where they were, with his hand in his pocket. Slone caught his arm and pulled the hand out of the pocket, and when the hand came out of the pocket, he had his pistol in it. At this juncture a shooting occurred. The proof of the Commonwealth is to the effect that Slone first shot Maggard and then turned and shot at Henry Combs, and while he was so turned, Maggard shot him twice in the back, while Henry Combs was trying to shoot him with the pistol which he had, but it would not go off; that Maggard then dropped his pistol and left, and Slone followed him; that Maggard said to Slone: "Don't shoot me any more. I am killed;" but that Slone then shot him a second time. The proof for the defendant is to the effect, by himself, Gibson and Combs, that, when Combs ran down there, Slone said, "Boys, I can't shoot with you both;" that about that time Combs shoved his pistol against Slone and that it failed to go off; that Slone then went to shooting at Combs, and that Combs got behind a tree; that then Slone wheeled and shot at Maggard, who had been shooting at him while he was shooting at Combs;

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that Maggard turned to leave, and that Slone shot him after he turned, but that he did not follow him. Slone had two shots in the back, which inflicted serious wounds. He was also wounded in the leg. Maggard was shot twice in the chest, either of the wounds being fatal. Slone testified that Maggard did not say to him, "Don't shoot me again. You have killed me;" and there was proof tending to show that the shooting all occurred in a very few seconds after it began. Slone testified that he and Maggard were friends, and that there had been no ill feeling between them; but he proved, by other witnesses, that Maggard had made threats to kill him, and had, on other occasions, tried to put these threats into execution. On these facts, the circuit court, in instructing the jury on self-defense, predicated Slone's right of self-defense wholly upon the danger at the hands of Maggard. This was error; for there was evidence tending to show that Maggard and Henry Combs were acting in concert; and, if Slone was attacked by both of them, he had a right to take into consideration the danger at the hands of both of them, in determining what was necessary in his self-defense. Instruction 4, given by the court, should have read as follows :

"Although the jury may believe, from the evidence, beyond a reasonable doubt, that the defendant, C. C. Slone, shot and killed Joe Maggard, still, if they further believe that at the time he did the shooting and killing, as aforesaid, he, C. C. Slone, had reasonable grounds to believe, and did believe, that the said Joe Maggard or Henry Combs, acting in concert with him, was then and there about to inflict upon him, the said C. C. Slone, death or great bodily harm, then the defendant had the right to use such means as was necessary or reasonably appeared to him to be necessary to avert the impending danger, real or apparent, and if you believe that, in shooting and killing the said Joe Maggard, he (C. C. Slone) used only such means as was necessary, or reasonably appeared to him to be necessary, to avert said danger, then you will find him not guilty on the grounds of self-defense and apparent necessity."

In the second instruction given by the court, he directed the jury to find the defendant guilty of manslaughter. On another trial the court will use the words "voluntary manslaughter" in place of "manslaughter," in this instruction and in No. 3.

The dying declaration of Maggard was properly admitted as the proof was sufficient to show that he made it in extremis and after he had given up all hope of recovery. But proof was incompetent that Maggard, at another time, said that, if he died and Slone got well, he did not wish him prosecuted. All that Maggard said in the dying declaration as to the circumstances of the homicide, may be proved, but what he said on another occasion, not as a dying declaration or as to his personal wishes, can not be admitted. Henry Combs testified on the trial as a witness for the defendant. The court allowed proof of declarations made by Henry Combs before the homicide as to what he and Maggard had done. This proof should not have been admitted, as it only tended to confirm the testimony of Henry Combs, and could not be given in evidence for that purpose. The court properly allowed the proof of the statements by Hiram Gibson as to who fired the first shot, as Gibson denied making the statement and testified differently on the trial. The court also properly charged the jury that the evidence was only to be considered by them to contradict Hiram Gibson and not as substantive testimony.

Judgment reversed and cause remanded, for a new trial.

MANN v. COMMONWEALTH.

(Filed May 1, 1908—Not to be reported.)

Indictments—Malicious Shooting—Instructions—Appellant's plea was that he did not intend to shoot the marshal, and that the firing of the pistol was accidental. The court erred in failing to submit his defense to the jury, and in instructing the jury as to the law of self-defense.

W. H. Blanton and O. H. Pollard for appellant.

N. B. Hays, D. B. Redwine and Chas. H. Morris for appellee.

Appeal from Breathitt Circuit Court.

Opinion of the court by Judge Nunn, reversing.

Appellant was indicted for the crime fixed by section 1166 of the Kentucky Statutes, for the willful and malicious shooting at, with intent to kill, James L. Stidman, but without wounding him. The facts produced upon the trial, as they appear in the record, are, in substance, as follows: While crossing a street in Jackson, appellant was seen to take a pistol from one pocket and place it in another. The marshal of the city was informed of this fact, and he followed appellant into a store, where he was standing at a counter talking to a clerk, walked up to appellant's back, laid his hand on his shoulder, and said to him, "Jim, give me that pistol." The marshal and another witness testified that he drew his pistol, turned and pointed it at the breast of the marshal, who knocked it up and it fired, the ball entering the ceiling of the room. The marshal left the room and appellant was shortly thereafter arrested. Appellant testified that he turned with the intention of complying with the marshal's request, and, in handing him the pistol, the marshal became excited and knocked the pistol up, and it "went off" accidentally. Appellant introduced a witness who tended to corroborate him. This was all the evidence introduced.

The court instructed the jury on the offense described in the indictment and coupled with it an instruction on self-defense, and then gave an instruction on the lower degree of the offense as defined in section 1242 of the Statutes, and coupled with it an instruction on self-defense, and then gave a separate instruction on self-defense. The fourth instruction was upon the question of reasonable doubt. The court further instructed the jury that, if they believed, from the evidence, beyond a reasonable doubt, that defendant was guilty, but had a reasonable doubt as to the degree of the offense committed, they should find him guilty of the lesser offense as defined in instruction number 2.

The court erred in coupling with the instructions the law of self-defense, and in giving a separate instruction thereon. There was not a scintilla of proof that the marshal made any attempt to injure appellant, and appellant did not pretend that he was acting in self-defense when the shot was fired. His only plea was that he did not intend to shoot at the marshal, and that the firing of the pistol was an accident; and the court erred in failing to submit his defense to the jury. (*French v. Commonwealth*, 28 Ky. Law Rep., 64, and *Howard v. Commonwealth*, 26 Ky. Law Rep., 465.)

The court, on another trial, if the evidence is the same, should give in substance, the following instructions. First: If the jury believe, from the evidence, beyond a reasonable doubt, that the defendant, in this county, before the finding of the indictment, did willfully and maliciously shoot at James L. Stidman, with intent to kill him, but without wounding him, then they will find the defendant guilty and fix his punishment at confinement in the penitentiary for not less than one, nor more than five years.

Second. If the jury believe, from the evidence, beyond a reasonable doubt, that the defendant, in this county, and within twelve months before the finding of the indictment herein, did, in a sudden affray, or in sudden heat and passion, without previous malice, and not in self-defense, shoot at James L. Stidman, without wounding him, then the jury will find the defendant guilty of shooting in sudden heat and passion, or in sudden affray, and will fix his punishment by a fine of not less than \$50.00 nor more than \$500.00, or confinement in jail for not less than six nor more than twelve months, or both, in the discretion of the jury.

Third. If the jury believe, from the evidence, beyond a reasonable doubt, that the defendant has been proven guilty, yet, if they have a reasonable doubt as to the degree of the offense which he committed, that is, whether of malicious shooting, as defined in the first instruction, or shooting in sudden heat and passion, or sudden affray, as defined in the second instruction, then they will find him guilty of the lesser offense, as defined in instruction number two.

Fourth: If the jury believe, from the evidence, that the defendant, when the shot was fired, had no intention of shooting at Stidman, and the pistol was accidentally discharged, then they will find for the defendant.

Fifth. If, upon the whole case, the jury have a reasonable doubt as to the defendant's having been proven guilty, they will acquit him.

Appellant also complains of improper remarks made by the prosecuting attorney, in his closing argument to the jury. It is not necessary to repeat them, but is sufficient to say that they were improper and ought not to have been permitted by the court. However, they were not sufficiently prejudicial, of themselves, to have authorized a reversal of the judgment.

For these reasons, the judgment of the lower court is reversed and remanded, for further proceedings consistent herewith.

BURT & BRABB LUMBER CO. v. HURST, &c.

(Filed May 1, 1908—Not to be reported.)

1. Instructions—Error to Submit Law and Facts—The instruction complained of is erroneous in that it submits both the law and facts to the jury.

2. Rule of Caveat Emptor—An officer selling land under execution does not act as agent of the plaintiff. The sale is made by law, and the rule of caveat emptor applies to such sales.

James H. Jeffries for appellant.

J. G. & J. S. Forrester and W. F. Hall for appellees.

Appeal from Harlan Circuit Court.

Opinion of the court by Judge Hobson, reversing.

Appellees, M. B. Hurst, &c., brought this suit against the Burt & Brabb Lumber Company to recover damages for some poplar trees cut by the Burt & Brabb Lumber Co. from land which they alleged they owned. The defendant admitted the cutting of the trees, but denied that the land was the property of the plaintiffs. The plaintiffs claim the land under a patent issued to Lewis Harris, on a survey made August 7, 1873. The defendant claimed that this patent lapped upon an older patent, No. 6436, issued to David Turner upon a survey made June 7, 1842. As the Turner patent was older than the Harris patent, the case turned entirely upon the location of the Turner

patent. If the Turner patent was located as claimed by the defendant, it included the trees in controversy. If it was located as claimed by the plaintiffs, it did not include them. Lewis Harris was a son-in-law of David Turner. The defendant introduced on the trial a son of David Turner, who carried the chain in the original survey. He located the lines of the patent as claimed by the defendant, and testified that the corners and lines were marked in that survey, and identified a number of the marked trees still on the ground. The defendant proved the same facts by another son of David Turner, and by Wilson Lewis, a grandson who lived with him. The plaintiffs, on the other hand, introduced some proof tending to show that the patent was located as claimed by them; but the proof as to the marked lines and corners on the ground decidedly preponderated in favor of the defendant. The jury found for the plaintiffs, and the defendant appeals.

The court, in effect, instructed the jury simply that, if they believed, from the preponderance of the testimony, that the defendant cut any timber upon the lands set out in the petition, which the jury believed were lands of the plaintiffs, they should find for them; otherwise, they should find for the defendant. This instruction was the only one given except a general instruction that a patent is void in so far as it embraces land previously surveyed; and that, in locating a patent, course and distance must yield to known objects found on the ground. It is erroneous in that it submits both the law and the facts to the jury. The facts are for the jury, but the law is for the court. In lieu of the instructions given, the court should have instructed the jury as follows:

"1. If the jury believe, from the evidence, that the trees in controversy, or any of them, were cut from land not included in patent No. 6436 to David Turner, read in evidence, they should find for the plaintiffs the fair market value of the trees so cut, and may, in their discretion, allow interest from the time of the cutting. But, if they believe, from the evidence, that the land from which the trees were cut is included in patent No. 6436, to David Turner, they should find for the defendant.

"2. In locating a patent, course and distance must yield to marked lines or corners of the patent found on the ground.

"3. It is immaterial that the plaintiffs claim under an execution sale made on an execution in favor of defendant. The only question the jury are to determine is whether patent No. 6436 to David Turner, includes the land from which the trees sued for were cut. The deed from Ransom Turner, &c., to defendant, is only to be considered by the jury in so far as it may throw light on the proper location of the patent boundary."

Although the defendant does not hold the entire title to patent No. 6436, issued to David Turner, and may be liable to those who hold that title, for a part of the timber it cut, it is not, for this, liable to the plaintiffs, for, if it were held liable to them in this action, it might still be held liable in another action by the true owners; it can not, therefore, be held liable to the plaintiffs in this action, for any trees cut within the boundaries of that patent. The fact that the plaintiffs claim the Harris patent under an execution sale on an execution issued in favor of the defendant, gives the plaintiffs no better right than if that sale had been made under an execution in favor of any one else. The sheriff, in selling under an execution, is an officer of the law. The sale is made by the law. The rule of caveat emptor applies to such sales. The officer, in selling, does not act as an agent of the plaintiff. It was shown, in the evidence, that two of the children of David Turner, in conveying to the defendant, had conveyed only to the boundary now claimed as the boundary of the patent by the plaintiffs. This fact may be considered by the

jury in determining where the true boundary of the patent is, but it is not conclusive upon the defendant. The deed referred to only calls for 175 acres of land, while the patent is for 200 acres. The instructions of the court to the jury enlightened them in no way as to the law of the case, and did not limit them to the single question of fact in the case, which was the location of the Turner patent. The proof was undisputed that the trees sued for were cut within the Lewis Harris patent, and were the property of the plaintiffs, unless they were also within the Turner patent, in which event the plaintiffs had no title to them. So, the location of the Turner patent was the only question to be submitted to the jury under the evidence.

The proof being that the actual surveying in the original entry stopped at the two chestnuts and that the other lines were not run; in the absence of any marks on the ground, the calls of the survey must control; and, if the two chestnuts are established as the corner, the survey must be closed by reversing the closing line from the beginning corner, with the proper variation on the course and for the distance called for in the patent, and then running a line from this point to the two chestnuts.

Judgment reversed and cause remanded, for a new trial.

ELY v. HARTFORD LIFE INS. CO., &c.

(Filed May 1, 1908—To be reported.)

1. Life Insurance—Life of Husband—Wife Beneficiary—Assignment—Plea of Duress by Wife—Knowledge of Assignee—In an action on an insurance policy on the life of a husband, payable to his wife, on which a third party claimed a lien by assignment by the husband and his wife before the husband's death, in which the wife claims that she made the assignment under threats and duress of her husband, such duress, if shown, would not affect the validity of the assignment to the third party in the absence of proof that he had knowledge of it.

2. Same—Duress—Avoidance of Contract—Knowledge of Third Party—Duress, in order to avoid a contract, must be the act of the other party himself or his agent, or must be imposed with his knowledge or taken advantage of by him for the purpose of obtaining the agreement. Duress by a third person will not avoid a contract made with a party who was not cognizant of it.

3. Non-Resident Defendants—Judgments in Rem—Constructive Service—Validity—While it is the law that a judgment in personam against a non-resident defendant, not served with process in the jurisdiction of the court, is void, it is equally true that a judgment in rem against a non-resident defendant, though only before the court on constructive service, is not only good against him, but against all other persons claiming interest in, or title to, the property proceeded against, having notice of the proceedings.

Hobbs & Farmer for appellant.

E. L. Hutchison, J. R. Morton and Edw. P. Bradstreet, of the Cincinnati Bar, for appellees.

Appeal from Fayette Circuit Court.

Opinion of the court by Judge Settle, affirming.

This action was instituted by appellant in the court below to recover of the appellee, Hartford Life Insurance Company, \$2,000.00, alleged to be due appellant as the named beneficiary in a policy of insurance for that amount, issued upon the life of her husband, Joseph Ely, some

years previous to his death, which occurred in Fayette county in September, 1898.

The Union Savings Bank & Trust Company, assignee of the Specialty Carriage Company, and the Specialty Carriage Company, both incorporated under the laws of Ohio, and having their chief offices and places of business, respectively, in the city of Cincinnati, that State, were also made parties defendant to the action, but the action was later, and on appellant's motion, dismissed as to these defendants, and thereafter prosecuted against the appellee, Hartford Life Insurance Company, alone.

The answer of the latter admitted the issual to Joseph Ely, deceased, of the policy for the benefit of appellant, but averred that the former, several years before his death, became indebted to the Specialty Carriage Company in a considerable sum, for which he executed to that company a writing acknowledging and promising to pay it, and to secure its payment, together with his wife, the appellant, Naomi Ely, by a proper writing, pledged and assigned to it the policy in question; and that the policy and written assignment were, thereupon, delivered to the Specialty Carriage Company, and that thereafter appellee, upon the presentment to it of the written assignment, consented thereto by proper statement upon the policy and by making the customary entry upon its records.

The answer further averred that, at the death of Joseph Ely, the Specialty Carriage Company still held the policy under the assignment as collateral security for his indebtedness to it, which then amounted to \$2,053.57. That, soon after the death of Joseph Ely, the Specialty Carriage Company made an assignment of its property to the Union Savings Bank and Trust Company, for the benefit of its creditors, by which it came into possession of the policy in question, and, as such assignee, it made out and forwarded to appellee proof of the death of Joseph Ely, and shortly thereafter brought suit against it in the Superior Court of Hamilton county, Ohio, to recover the amount of insurance due under the policy. That appellee filed an answer in that action which admitted its indebtedness upon the policy, and willingness to pay it to whomsoever the court might adjudge, but asked that it be not required to pay until appellant could be brought before the court and be permitted to show what interest, if any, she had in the policy. The answer was made a cross-petition against appellant, who was therein, and by an order of interpleader entered by the court, made a party defendant to the action and cross-action, and called upon to answer and assert whatever claim she might have to the proceeds of the policy in controversy. It further appears, from the averments of the answer filed in the action in the Fayette Circuit Court, that copies of the petition, answer and cross-petition and order of interpleader entered by the Superior Court of Hamilton county, Ohio, making appellant a party to that action, were, together with a summons issued from that court, duly served upon her in Fayette county, Kentucky, by a person appointed by the Ohio court to perform that duty; and that, after the expiration of the time allowed her by the order of interpleader to appear in the Ohio court to assert claim to the proceeds of the policy, but before that court rendered judgment directing that the proceeds of the policy be paid the assignee of the Specialty Carriage Company, in satisfaction of the indebtedness of Joseph Ely's estate to it, as a matter of precaution, other copies of the same pleadings, order of interpleader and an additional summons were served upon appellant by another appointee of that court.

In addition to the foregoing facts, the answer pleaded in apt terms the jurisdiction of the Ohio court of the parties to, and subject-matter of, the action in that court; also the conformity to the provisions of the Ohio Code, of the steps taken to make appellant a party to the action, and afford her an opportunity to assert in that court whatever claim

she might have to the proceeds of the policy, and finally that the judgment of the Ohio court was, and is, conclusive of the rights of the parties and a bar to the action brought by appellant in the Fayette Circuit Court.

The averments of the answer were traversed by reply, but later an amended reply was filed, in which the jurisdiction of the Ohio court and the validity of its judgment was denied, and it was alleged that appellant was induced to place her signature to the writing, assigning the policy on her husband's life to the Specialty Carriage Company, by the importunities and threats of her husband, and the misconduct of the carriage company, and the act, being the result of duress, did not divest her of her interest in the policy or right to its proceeds. The affirmative matter of the original and amended reply was controverted by rejoinder.

Upon the issues thus formed, and the proof taken by the parties, the court rendered judgment dismissing the action at appellant's cost, and she, being dissatisfied with the judgment, has appealed.

We think the judgment was proper. Appellant's contention that her signature to the writing, by which the policy was assigned to the Specialty Carriage Company, was the result of duress, is not fairly sustained by the evidence. Her version of that transaction is that the policy had been delivered to her by her husband after it was issued and was kept by her in a drawer, from which he took it and sent it to the carriage company which retained it several months and then sent it to her husband, with the request that he and his wife execute the assignment and return the policy. That she was induced to execute the assignment by the threats of the carriage company, to whom her husband was indebted, that he would be prosecuted for embezzlement if she did not join him in the assignment, and by the husband's threats that he would kill himself if she did not sign the paper. She did not claim that any officer or agent of the Specialty Carriage Company was present when the instrument was signed by her, or that any representative of the company had ever communicated with her on the subject, but that she had seen, and for a time had in her possession, several letters from the company to her husband, containing intimations of prosecution unless an assignment was made of the policy. None of these letters were offered in evidence. It is true, appellant testified they were burned with her house, and her daughter testified to having seen some of them, and a son, one of them. Appellant, her son and daughter say she refused to write her name to the assignment when the son, by request of the husband, carried it to her for that purpose. Appellant and her daughter also said that the husband then came and asked her to sign it, and she refused to do so until he threatened to leave home and kill himself, and that she then yielded, but wept when she signed the paper.

In view of the testimony of appellant, her son and daughters, it is strange that she said, in a letter, enclosing the policy to the carriage company, written November 27, 1895, by her for her husband—this being the first time the policy was sent: "I have had the policy in the desk at the shop for some time to send to you, but would forget to mail it." And, stranger still, that, on April 23, 1896, when the policy was returned with the assignment to the carriage company, she again wrote: "I send, under separate cover, the insurance policy (which, according to the evidence, was sent with the assignment); it was just handed me a few days ago by Ambrose." The Ambrose here mentioned was the attorney of appellant and her husband.

After this, several letters, covering a period of two years, were written by appellant for her husband to the carriage company, in one of which the company was thanked for paying a premium on the policy, and in not one of which was there complaint that appellant had acted under duress in executing the assignment, or even an intimation made on her own account or for her husband, that she had reluct-

antly signed it. Sterrett, the manager of the carriage company, who admittedly conducted all its correspondence with the Elys, testified that he had no information that appellant had executed the assignment under duress, but supposed that she had done so voluntarily and freely, and that he had never written a letter to her or her husband containing a threat of arrest or prosecution for embezzlement or any other crime or offense. He was corroborated by the stenographer who wrote all his letters, including the correspondence with the Elys. Another circumstance appears to be unexplained in the record. That is the failure of appellant to rely upon and plead, in her original reply, the duress complained of. The amended reply gives no reason for the omission.

Upon the question of duress, we are not prepared to say that appellant is supported by the weight of the evidence.

If, however, it be conceded that the conduct and threats of appellant's husband were such as to constitute duress, in the absence of proof sufficient to connect the carriage company with, or show its knowledge of it, such duress would not affect the validity of the assignment of the policy to it.

Duress to avoid a contract must be the act of the other party himself, or his agent, or must be imposed with his knowledge and taken advantage of by him for the purpose of obtaining the agreement. Duress by a third person will not avoid a contract made with a party who was not cognizant of it.

In *Long, &c. v. Branham*, 30 Ky. Law Rep., 552, there was an attempt to set aside a mortgage, one of the grounds being that the wife had executed it under duress, produced by the acts of her husband, aided by the conduct of the grantee. In respect to this complaint, the court said:

"While the evidence is conflicting, we are not disposed to disagree with the conclusion of the lower court that the weight of it is against appellant's contention that Mrs. Long executed the mortgage under duress, unless it was such as proceeded from the husband alone. That, in signing or acknowledging the mortgage, she acted with great reluctance, we are satisfied, but the excitement and distress under which she labored at the time were apparently produced by the influence upon her by him. It was the conduct of the husband, or what he said to her in the conversation between them, after the mortgage had been written, and before she acknowledged it, that gave her distress and caused her to weep." (*Fightmaster v. Levi*, 13 Ky. Law Rep., 412; *Hall v. Hall*, 118 Ky., 656.)

Although it is insisted by counsel for appellant that the claim of the Specialty Carriage Company against the estate of Joseph Ely, has not been sufficiently made out, we are unable to see that any item of it is controverted by appellant. We think the claim sufficiently established by the proof. At the time of the assignment of the insurance policy by appellant and her husband to the carriage company, the latter's indebtedness to it was \$3,945.89. Between that date and his death, this amount was reduced by successive payments to \$2,053.57, and this is the amount for which it obtained judgment in the Ohio court. It is apparent, therefore, that the amount of the insurance policy was not quite sufficient to pay the debt.

The course taken by appellee to bring appellant before the Ohio court seems to have conformed literally to the requirements of the statutes of that State. Section 5049 of which provides:

"Service may be had by publication in actions which relate to, or the subject of which is real or personal property in this State, when a defendant has, or claims, a lien thereof, or an actual or contingent interest therein, or the relief attempted consists wholly or partly in excluding him of any interest therein and such defendant is a non-resident of the State."

Another part of the same section contains the further provision: "That when service may be made by publication, personal service of a copy of the summons and petition may be made out of the State upon such defendant."

Although properly served with summons, copy of the petition, cross-petition and copy of the order of inter-pleader, twice, at her home in this State, appellant allowed the appointed time for answering to expire without making a defense to that action, and having thus made default, the Ohio Court proceeded to enter judgment in the case against the appellee in favor of the Specialty Carriage Company, decreeing that the proceeds of the policy of insurance owing by appellee be paid into court and applied to discharge the carriage company's debt.

Appellant's action in the Fayette Circuit Court was instituted after that in the Ohio Court, and after she had been served with process from the Ohio Court. At the time the action was brought in the Ohio court, the policy of insurance was held by the carriage company, plaintiff in that action, as security for its debt, and was filed with the petition in that action, therefore the situs of the property, the lien upon which was asked to be enforced, was in the county of Hamilton, State of Ohio, and within the jurisdiction of the court in which the action was brought. Appellant was legally notified of the pendency of that action, its nature and object, and had ample opportunity to set up a claim to the policy in that action, and this being true, we think the judgment of that court was a final determination between her, the Specialty Carriage Company, and appellee as to the disposition of the proceeds of the policy. While it is unquestionably the law that a judgment in personam against a non-resident defendant not served with process in the jurisdiction of the court is void, it is equally true that a judgment in rem against a non-resident defendant, though only before the court on constructive service, is not only good against him, but as against all other persons claiming interest in, or title to, the property proceeded against, having notice of the proceedings.

It has been held by this court that a debt due a non-resident from a person in this State may be attached and recovered by the creditor of such non-resident, by bringing the latter before the court by constructive service only, and that a judgment rendered on such state of case is a complete bar to an action subsequently brought by the non-resident against the debtor in whose hands the money was garnished; the doctrine being that the proceedings, so far as the thing attached is concerned, is an action in rem. (1. C. R. R. Co. v. Smith, 19 Ky. Law Rep., 577; Bragg v. Gaynor, 21 Ky. Law Rep., 161; Newfelder v. German American Ins. Co., 22 L. R. A., 287; Williams v. Preston, 3d J. J. M., 690; Whiting v. Johnson, 5 Dana, 391.)

The doctrine announced in these several cases that, to entitle a judgment in a proceeding in rem, authorized by a statute of the State in which such proceeding is instituted, but in which the defendant was not personally served with process and did not appear, to full faith and credit in another State, the res must have been attached or seized, or at least have been within the jurisdiction of the court rendering the judgment.

For the reasons indicated, the judgment is affirmed.

HILTON, &c. v. HILTON'S ADM'R.

(Filed May 5, 1908—Not to be reported.)

Personal Representative—Appointment of—The statute does not contemplate that persons who are related by blood, but have no interest in the estate, shall determine who shall be appointed administrator, and, although the sister of deceased and his father and mother,

sought to have the administrator removed and the sister appointed, beyond the fact that he proposes to charge the five per cent. commissions for settling it, no reason is shown to have him removed. But, as he led the father and mother to believe that he would have nothing in the way of compensation, and procured their written request to the county court to appoint him, he should not be allowed commissions for his services, but should only be allowed his expenses as administrator.

J. W. Alcorn and C. C. Williams for appellants.

Sharp, Bethuram & Cooper and J. N. Sharp for appellee.

Appeal from Rockcastle Circuit Court.

Opinion of the court by Judge Hobson, affirming.

Martin Hilton was killed in a railroad accident on May 28, 1906. He left his father and mother as his sole distributees and heirs at law. J. D. Hamm was the constable in the district in which they lived, and had served the father in drawing up pension papers for him. When the news came that Martin Hilton had been killed in the railway wreck, Hamm went to an attorney and had him to prepare a paper to be signed by the father and mother, designating him as the person to be appointed administrator of Martin Hilton's estate. The next morning he went to their home. The body of the son was in the house. He explained to them that an administrator would have to be appointed for the son, and they signed the paper, requesting the county judge to appoint him as administrator. He then went before the county judge and was appointed. The father and mother soon learned that the railroad company was willing to pay \$5,000 for the death of Martin Hilton, and that Hamm was claiming a commission of five per cent. as administrator. They became dissatisfied and appeared before the county judge and asked that Dr. Percy Benton be appointed in lieu of Hamm. The court refused to do this, and later they moved the court to remove Hamm and appoint their daughter, Hattie Turner. The court overruled this motion and they appealed to the circuit court. In the circuit court, the case was tried again. The circuit court concurred in the conclusion reached by the county court. From this judgment the appeal before us is prosecuted.

Hattie Turner was a sister of the decedent, and was a widow. She was shown to be properly qualified to act as administrator and offered a good bond. It is insisted that the court erred in appointing Hamm, who was a stranger, although the appointment was made on the written request of the father and mother, who were the sole distributees of the estate. Section 3896, Kentucky Statutes, is as follows:

"The court having jurisdiction shall grant administration to the relations of the deceased who apply for the same, preferring the surviving husband or wife, and then such others as are next entitled to distribution, or one or more of them whom the court shall judge will best manage the estate."

The proof shows, without question, that the father and mother are not qualified to act as administrator. But, as they were the sole distributees of the estate, it was proper for the county court, on their motion, to appoint a suitable person as administrator. It is not controverted that Hamm is a suitable person. While Hattie Turner was a sister of the deceased, she had no interest in his estate, and the county court was not required to wait until the next term before making an appointment when both of the sole distributees requested the appointment of Hamm. The purpose of the statute is that the surviving husband or wife shall be preferred and then such other relations as are next entitled to distribution. Here there was no wife,

and Hattie Turner, who was not entitled to distribution in any part of the estate, had no control of the matter. It often happens, when a person dies, that administration should be granted promptly upon the estate, and it has been the universal custom in the county courts to appoint some suitable stranger at once when requested by all of those who are entitled to distribution. The statute does not contemplate that persons who are related by blood but have no interest in the estate, shall determine who shall be appointed as administrator. We, therefore, conclude that the court properly appointed Hamm upon the showing made at the time.

On the question whether Hamm should have been removed and Mrs. Turner appointed, on the proof that was made before the county court, nearly two months afterward, the county judge and the circuit court, who were both upon the ground and heard and saw the witnesses, refuse to remove him. We must give some weight to these findings, and, as the evidence is conflicting, we have concluded, with some hesitation, not to disturb their finding. But the weight of the evidence clearly shows that Hamm obtained the consent of the old people to his appointment upon his professions of friendship for them, and the statement that it would not be a nickle in his pocket. The old people had a right to understand, from what he said at the time, that he would charge them no commission; and, as soon as they learned that he was proposing to charge commissions, they asked for removal. In view of the way in which his appointment was secured and the circumstances surrounding the old people at the time, as he has insisted upon the appointment, he should not be allowed any commissions for his services, and should only be allowed his expenses as administrator.

Judgment affirmed.

BINGHAM, COUNTY ATTORNEY v. HAGER, AUDITOR, &c.

(Filed May 5, 1908—Not to be reported.)

County Attorney—Prosecuting Suits by Auditor's Agent—In prosecuting suits instituted by the auditor's agent, as the law provided, in May, 1904, the time the proceeding was instituted, the county attorney discharged an official duty which was covered by his annual salary allowed him by the fiscal court, and he was not entitled to special compensation.

W. W. Davies, Eli H. Brown, Jr., and Sweeney, Ellis & Sweeney for appellant.

James Breathitt and Chas. H. Morris for appellee.

Appeal from Franklin Circuit Court.

Opinion of the court by Judge Hobson, affirming.

In May, 1904, A. J. Bizot, as auditor's agent, instituted a proceeding in the Jefferson County Court in the name of the Commonwealth against the Southern Pacific Co., under sections 4241, 4260 and 4363, Kentucky Statutes, to list for assessment certain property which had been omitted from taxation for the year 1904. The suit was prosecuted to judgment, which fixed the amount of the taxes at \$26,000. R. W. Bingham, as county attorney, appeared in the action and assisted in its prosecution. The taxes having been paid into the treasury, he filed this suit against the Auditor to require him to issue a warrant in his favor for \$6,500, being 25 per cent. of the total amount paid into the treasury. The circuit court sustained a demurrer to his petition, and he appeals.

His rights to the relief claimed is based by his counsel on section 4068, Kentucky Statute:

"The county attorney shall prosecute under the preceding sections, and he shall receive for his services twenty-five per cent. of the amount recovered."

It will be observed that this section only refers to the preceding sections. It does not refer to sections that follow it in other parts of the act. Sections 4241, 4260 and 4263 are not sections that precede section 4068. That section is a part of article 2, regulating the assessment of property. In it are penalties provided against taxpayers, against the assessor and against other officers; section 4068, which follows these provisions, refers to them. The meaning is that the county attorney shall prosecute the persons who are subject to the penalties prescribed under the preceding sections, and that he shall receive for his services 25 per cent. of the amount recovered. The section has no reference to taxes paid into the treasury and it was not intended to give the county attorney a right to 25 per cent. of such taxes. In prosecuting suits instituted by the auditor's agent, as the law then stood, the county attorney discharged an official duty which was covered by the annual salary allowed him by the fiscal court, and he was not entitled to special compensation. (Spalding v. Thornberry, 103 S. W., 291; 108 S. W., 907; Terrill v. Trimble Co., 108 S. W., 848.) The statute has been since changed.

Judgment affirmed.

CITY OF RICHMOND v. BENNETT.

(Filed May 5, 1908—Not to be reported.)

Deeds—Construction of—Exemption of Building Pavement—The sole question, in this case, is whether the condition in the deed that the grantor should never be required to build a pavement, was a personal exemption, or went with the land to the heirs and assigns of the grantor. The language of the deed shows that it was intended as a personal exemption. To consider it a covenant running with the land would have to be done by inference, and this is not allowed in construing deeds which affect the public interest.

T. H. Collins, John H. Chandler, Maximilian Schoetz and Hines, Chandler & Norman for appellant.

A. R. Burnam & Son for appellee.

Appeal from Madison Circuit Court.

Opinion of the court by Judge Nunn, reversing.

Appellant, Waller Bennett, is the owner of a house and lot at the corner of Main and Fifth streets, and extending back with Fifth street to North street, in the city of Richmond, two chains and fifty-four links. Appellee's grantor, prior to appellee's purchase of the property, had deeded to the city of Richmond a strip twelve feet wide along the edge of his property, which now constitutes a part of Fifth street, for the following consideration:

"In consideration of two hundred and fifty-two dollars, in hand, and the building by the trustees of the city of Richmond, Ky., of a good post fence on the eastern side of my lot, and the further consideration that said trustees, for themselves and the said town of Richmond agree that I shall never be compelled to grade, curb or build a pavement at any of said proposed new street on the eastern side of my lot, have this day sold and do hereby convey," &c.

After obtaining this strip of land, appellant, City of Richmond, constructed a board walk along this street next to the property of

appellee. The walk, in course of time, having decayed and become greatly out of repair, the city council, by ordinance regularly passed, ordered and directed appellee to repair the walk. Whereupon, by agreement between the parties, appellee instituted this suit, enjoining the city from enforcing the ordinance, until the question could be judicially determined. Appellant demurred to the petition, which was overruled, and it declined to plead further, and the circuit court entered judgment that, by virtue of the condition and reservation in the deed from appellee's grantor to the city, appellee was exempted from building the pavement, and permanently restrained the city from proceeding against him for that purpose.

The sole question presented by the demurrer was whether the condition in the deed that the grantor should never be required to build a pavement was simply a personal exemption, or went with the land to his heirs and assigns. Appellee's contention is that the covenant in the deed from Chenault to the city of Richmond exempting this property from assessment for the purpose of building a sidewalk is a covenant running with the land owned by him. Appellant claims that the exemption is a personal exemption from assessment, and was for the benefit of Chenault so long as he owned the property. There is much contrariety in the decisions as to what covenants are personal or collateral, and which are attached to the realty, or covenants running with the land. Appellee cites the case of *Beinlein, &c. v. Johns, &c.*, 102 Ky., 570, and section 2342, of the Kentucky Statutes, which are to the effect that every estate in land created by deed or will, without words of inheritance, shall be deemed a fee simple, or such other estate as the grantor or testator had the power to dispose of. This principle is correct, but we are of the opinion that it does not apply to the case at bar, for it is not a case of title or easement, but of a benefit reserved in a deed—a question of the extent of the exemption reserved—a question which touches the public.

In our opinion, it is unreasonable to construe this language in the deed: "I (Chenault) shall never be compelled to grade, curb or build a pavement, at any said proposed new street on the eastern side of my lot," as meaning that the lot then owned by Chenault should forever be relieved from liability for the improvements named, and thereby compel other citizens of the town to pay for same. Certainly, the parties to the deed did not intend such a construction, even if the city council had the power to grant such relief, which, however, is not decided. The language used in the deed shows that it was intended as a personal exemption to Chenault, and to consider it as a covenant running with the land would have to be done by inference, and this is not allowed in construing deeds and other contracts which affect the public's interest.

This court, in the case of *Kligus, &c. v. Trustees of Orphanage of Good Shepherd, &c.*, 94 Ky., 439, in construing a statute which was claimed to exempt certain property from an assessment for street improvements, said:

"And not being clearly and expressly exempted from due proportion of the cost of constructing adjacent streets, it can not be held to so exempt without violating a well established rule of construction. For, as said in *Sedgewick on Statutory and Constitutional Law*, 344, statutes under which exemptions from common burdens are claimed 'are regarded with a jealous eye and strictly construed.'"

The same rule should apply to the case at bar. To grant appellee's contention would relieve this property from such burdens for all time to come, and place the same on the other citizens of the town, which, in our opinion, from the language used in the deed, was not intended by the parties to it.

For these reasons, the judgment of the lower court is reversed and remanded, for further proceedings, consistent herewith.

The whole court sitting.

WHITLEY v. WHITLEY'S ADM'R.

(Filed May 5, 1908—Not to be reported.)

J. J. Osborne for appellant.

M. C. Swinford and Swinford & Webster for appellee.

Appeal from Harrison Circuit Court.

Judge Nunn delivered the following response to petition for rehearing, overruling.

Appellee asks a withdrawal of the opinion herein and an affirmance of the judgment for the reason that there was proof showing that Harriett Whitley, for several years before her death, was of unsound mind, and, therefore, unable to put the law in motion to obtain her rights, and the Statute of Limitation did not run against her claim while she was of unsound mind. On another trial, appellee can ask an instruction upon this point.

Petition for rehearing overruled.

MORGAN, OATES & CO. v. COMMONWEALTH.

(Filed May 5, 1908—To be reported.)

Revenue and Taxation—Agency for Selling Sewing Machines—Selling Without License—Liability—Under section 1, sub-division 4, article 12, Act of 1906, Kentucky Legislature, a license is required "on each agency for selling sewing machines," and, by section 12, sub-division 1, a fine is imposed for a violation thereof; a firm engaged in selling sewing machines which employed an agent to drive about over the country from house to house to sell sewing machines, furnishing a wagon for that purpose, requiring him to carry machines with him for immediate delivery when sold, is guilty of maintaining an agency in the meaning of the statute, and liable to a fine unless having a license therefor.

Gibson & Kincheloe for appellant.

James Breathitt and Theo. B. Blakey for appellee

Appeal from Hopkins Circuit Court.

Opinion of the court by Judge Settle, affirming.

The appellants, T. M. Morgan, Nick Oates and Martin J. Morgan, partners composing a firm doing business as Morgan, Oates & Company, complain that they were illegally convicted and fined \$51.00, in the court below, under an indictment charging them with the offense of maintaining a sewing machine agency and employing an agent to sell sewing machines in Hopkins county, without having a license so to do.

Section 12, sub-division 1, article 12, Act of 1906, entitled "An Act relating to Revenue and Taxation," provides:

"Any person who shall engage in any business or sell or offer to sell, any article on which a license is required, before procuring the license and paying the tax thereon as required by law, shall be deemed guilty of a misdemeanor, and, on conviction, be fined not less than fifty nor more than one thousand dollars for each offense, unless otherwise specially provided."

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Section 1, sub-division 4, of article 12, same act, provides:

"Before engaging in any occupation or selling any article named in this sub-division of article 12 (page 202) of this act, the person desiring to do so shall procure license and pay tax thereon as follows: * * * On each agency for sewing machines employing one agent, for each county, ten dollars. On each additional agent for sewing machines, each county, five dollars."

The indictment under which appellants were convicted was based upon the foregoing provisions of the act, *supra*. The right of trial by jury by the parties was waived and the law and facts submitted to the court, whose judgment was as above indicated.

The evidence introduced by the Commonwealth proved, beyond doubt, that appellants composing the partnership of Morgan, Oates & Company, have a store or ware room at Morton's Gap, and another at White Plains, Hopkins county, in each of which they kept for sale pianos, organs and sewing machines, and that, within a year before the finding of the indictment the firm of Morgan, Oates & Company, employed Allen Thompson to act as salesman, and consequently the firm's agent; under which employment he was required to haul from the store and ware rooms, referred to, sewing machines and sell them in Hopkins county. That for this work appellants furnished Thompson a sewing machine wagon containing, in large letters, the name of the firm, and paid him a commission upon all sewing machines sold or exchanged by him. Thompson testified to having made numerous sales and exchanges of such sewing machines in Hopkins county; and other witnesses that they had bought of Thompson sewing machines, or had seen him sell or trade them to others. Thompson's sales were all made at the homes of the purchasers, where he invariably carried the sewing machines for inspection, and oftentimes left them for trial, before effecting the sales. He made no concealment of the fact that the sewing machines he was peddling were the property of appellants, and the persons who bought machines of him knew that he was the agent of appellants and traded with him as such. Oates and T. M. Morgan, members of the firm in question, testified in their own behalf, but neither of them attempted to contradict the witnesses of the Commonwealth. They did, however, state that they did not receive or sell sewing machines on commission, but kept in stock pianos, organs and sewing machines, which they bought and sold for a profit, and were accustomed to pay for at the end of four months from their purchase of them, whether sold by them or others within that time or not.

It was contended by appellants on the motion for a new trial in the court below, and they now insist, that they were not the agents, or their places of business agencies for the sale of sewing machines, for which reason, it is claimed, they should have been adjudged not guilty as charged. We do not regard this contention tenable. The offense charged in the indictment was, not that appellants became agents or established an agency for the sale of sewing machines by receiving from the manufacturer or a dealer, such machines to sell for it or him, or that they made such sales as agent for the manufacturer or dealer, but that they had and maintained a sewing machine agency by employing agents, or an agent, to sell such machines in Hopkins county as Thompson was employed to sell and did sell. If employing an agent to drive about over the county from house to house to sell sewing machines, furnishing him with a vehicle for that purpose, requiring him to carry such machines with him for immediate delivery when sold, and, upon consummating a sale, to take of the purchaser a written obligation, whereby the latter undertakes to pay appellants for the machine upon the installment plan, is not establishing or maintaining an "agency for sewing machines" in the meaning of the statute, we are at a loss to know by what name such an enterprise should be known.

We do not think it material whether the agent in such an undertaking be paid a stated salary, or a commission upon sales made by him; in either event he is an agent, and in employing him for such work and having him perform it, the employer or principal establishes and maintains an agency for the sale of sewing machines, for which the law requires him to procure license. It is admitted that appellants did not have license authorizing them to establish or conduct an agency for sewing machines, when they employed Thompson, or at any time during the work of the latter in peddling sewing machines under and by virtue of such employment. Being without such license they were guilty of the offense charged; therefore, the fine of which they complain was legally imposed by the judgment rendered.

Wherefore, the judgment is affirmed.

ILLINOIS CENTRAL R. R. CO. v. CURRY.

(Filed May 5, 1908—Not to be reported.)

Trabue, Doolan & Cox and J. Smith Hays for appellant.

Beckner & Jouett for appellee.

Appeal from Clark Circuit Court.

Judge Hobson delivered the following dissenting opinion:

Judge Barker and I concur in the conclusion reached by the court, as the oral contract and the written contract here were substantially the same, but we do not concur in so much of the opinion as holds that, a connecting carrier is bound by a parol contract made without his authority by the initial carrier and of which he had no notice. The cases cited do not sustain this conclusion. They were suits on the written contracts under which the connecting carrier had accepted the goods. Having accepted the goods under the written contracts he was held bound thereby. But where there is a verbal agreement made by the initial carrier not incorporated in the bill of lading under which the connecting carrier receives the goods, and not made by his authority, or brought to his notice, the rule is different.

"The liability of the second carrier is not under the contract made with the first carrier, but upon the contract, express or implied, under which the second carrier has accepted the goods for transportation." (6 Cyc., 487; Hutchinson on Carriers, section 248; Dwyer v. R. R. Co., 7 L. R. A., 478; Thomas v. R. R. Co., 116 Ky., 879.)

It seems to us the court should follow the rule it has heretofore laid down.

We, therefore, dissent from the opinion.

BALTHASER v. ILLINOIS LIFE INSURANCE CO.

(Filed May 5, 1908—Not to be reported.)

Life Insurance—Contract for Extended Insurance—Default—Failure to Apply for Extension—Recovery Denied—A policy of life insurance by a husband for his wife for \$2,000 provided that, upon his failure to pay the fourth premium, he was entitled to paid-up insurance of \$300, cash surrender value of \$102 or extended insurance, if applied for, of five years and six months. He made three payments and defaulted on the fourth, and died without applying for extended insurance.

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Held—That, having failed to exercise the option of applying for the extended insurance, the other provisions, with reference to paid-up insurance, automatically went into effect, and there could be no recovery on the contract for extended insurance.

D. G. Park and Hal S. Corbett for appellant.

Wheeler, Hughes & Berry for appellee.

Appeal from McCracken Circuit Court.

Opinion of the Court by Judge Settle, affirming.

July 31st, 1899, Louis Balthaser obtained of the Mutual Life Insurance Company, of Kentucky, a policy of \$2,000.00, upon his life; his wife, the appellant, Maude K. Balthaser, being the beneficiary named in the policy. After the issue of this policy, the Mutual Life Insurance Company of Kentucky went out of business, but before doing so sold and conveyed its property and assets to the appellee, Illinois Life Insurance Company, the latter assuming its insurance contracts and policy liabilities, the policy on the life of Louis Balthaser being of the number.

The annual premium on the policy in question was \$55.88. The first premium was paid as of the date of the policy, July 31st, 1899, and was thereafter paid July 31st, 1900, and July 31st, 1901; making three payments of premium altogether. When the fourth premium became due July 31st, 1902, the insured failed to pay it. With respect to such a default the policy provided:

"If any premium should not be paid as agreed, the policy shall then become void, except as specified in the table endorsed hereon."

The table referred to contains the following provision:

"The amount of paid-up insurance, the cash value of extension, if applied for, to which the assured is entitled after failure to pay a third or any subsequent annual premium, is shown in the following table."

The table shows that upon Louis Balthaser's failure to pay the fourth premium he was entitled to paid up insurance of \$306.00, cash surrender value of \$102.00, or extended insurance, if applied for, of five years and six months. As he died December 16th, 1905, the period of extension, if the extended insurance had been applied for, would have gone beyond the date of his death. Claiming to be entitled to the extended insurance, appellant, as the beneficiary named in the policy, furnished appellee proofs of her husband's death and demanded of it payment of the full amount of insurance named in the policy. Appellee failed to comply with the demand, and appellant thereupon brought this action in the circuit court to recover it.

It is the contention of appellant that when the insured failed to pay the fourth premium on the policy at its maturity, it was appellee's duty to notify him of the necessity of making the election allowed by the provisions of the policy, and that, as this was not done, he had until his death, which occurred within five years of the default in payment of premium, to make such election, and, not having done so, the right to take the benefit of the extended insurance could be exercised by appellant after his death, and at any time within the five years named; which right was asserted by her within that time. On the other hand it is contended by appellee, and such was the defense set up by its answer, that the default in payment of the premium rendered the policy in question void, except that the insured had the right to elect at that time to demand paid up insurance to the amount of \$300.00, accept the cash surrender value of the policy which was \$102.00, or apply for extended insurance, which would have carried the policy in force for a further period of five years and six

months, and beyond his death; but that, as he then failed to apply for such extended insurance, he automatically became entitled to the paid up insurance, which was all the beneficiary could realize upon the policy at his death.

It would seem, therefore, that the right of appellant to recover upon the policy the extended insurance entitling her to the entire \$2,000.00 named in the policy, depends upon whether the insured could have availed himself of such extended insurance without applying therefor. This question has been settled by this court adversely to the appellant's contention. It seems to be conceded that the insured did not apply for the extended insurance and that no claim therefor was made by appellant until she demanded the entire \$2,000.00 for which the policy was issued.

The case of *Michigan Mutual Life Insurance Company v. Mayfield's Adm'r.* 28 Ky. Law Rep., 825, involved the construction of a policy containing provisions similar to those under which appellant claims the right to avail herself of the extended insurance; the only difference being that the policy in the *Michigan Mutual Life Insurance Company* allowed thirty days after the default in the payment of premiums to make application for the extended insurance. In passing upon the rights of the parties, under this provision, the court said:

"The solution of the question depends upon the terms of the policy. The parties were capable of contracting. It is the business of the court to ascertain and enforce the contract. It is expressly provided, in clause six, that the company is not liable for the payment of the insured sum; that the policy shall cease and determine after the premiums have been paid for three years, if default be made in the payment of any premium thereafter. It is then provided that the policy is valid as a non-participating policy for a fractional part of the sum insured, this sum to be paid on the death of the insured. This provision is automatic in character. When the insured failed to pay the premium, as shown by the table of paid up insurance, printed on the policy. It is not necessary that the insured should do any thing as a prerequisite to the right to paid-up insurance. By the 5th clause of the policy the insured has the right to give written notice to the company within thirty days after the default in the payment of the premium, and in lieu of the paid-up insurance, provided for in the policy, to have the full amount insured carried as non-participating insurance, without further payment of premiums for the time specified in the table relating to extended insurance. The right under this clause of the policy is optional with the insured. He can substitute extended insurance in lieu of paid up insurance, if he desires. However, after the default in the payment of the premiums, until he exercises this option, his rights are determined by the clause of the policy which provides for paid up insurance. It is insisted, however, as the insured has 30 days in which to apply for extended insurance, that the policy for the full amount remains in force until the expiration of 30 days. This contention is in the face of the plain terms of the policy. To take this view of it we would have to hold that the policy remains in force for 30 days after default in the payment of premiums, although it is expressly provided that the company is not liable for the payment of the insured sum after default in the payment of the premiums, but only for a paid-up policy for a fractional part of the sum insured. * * * If we so held, we would say that the clauses intended to fix the rights of the parties upon the default of the payment of the premium, did not become operative until thirty days thereafter, and that appellant carried the risk for 30 days without compensation. Either the clause providing for paid up insurance, or the one for extended insurance became operative and in force upon the default in the payment of the premium, as both of the clauses could not be in force at the same time. As the paid up insurance clause automatically went into

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force upon the default in the payment of the premiums, the insured could not substitute the extended insurance in lieu thereof without making the election to which reference has been made. As the insured did not make the election, his personal representative cannot do so. The provisions of the policy fixing the rights of the parties upon the default of the payment of the premiums differ widely from the provisions in the policies which this court has been called upon to construe, both by counsel for the appellant and appellee. In most of these cases the insured was not entitled to paid up insurance, unless he had, before the expiration of a certain period, surrendered his policy and demanded paid up insurance. In the case at bar, as we have stated, the insured was entitled to paid up insurance for a specified sum without any further act upon his part, other than default of the payment of premiums."

In the more recent case of *Wortham, &c. v. Illinois Life Insurance Company*, a policy issued by the same company and precisely like the one under consideration in this case, was involved. In the opinion of that case it is said:

"It will be observed that the policy does not provide for a written application to the company. All that it requires is that the extended insurance shall be applied. That being the case, it could be applied for either orally or in writing."

One of the issues in the case, *supra*, was that Mrs. Wortham, the insured, had made application to Rue, the alleged agent of the insurance company, for the extended insurance provided for by the policy. It was, however, claimed by the insurance company, that Rue was not its agent, so, upon the issues as to whether she made such application, and whether Rue was the agent of the company, this court held that the trial court should have allowed the case to go to the jury, and, because of its failure to do this, the judgment of the lower court was reversed.

In the case at bar, the policy does not provide when the application for extended insurance shall be made; this being the case, the insured, in order to obtain the benefit of the extended insurance available under the policy, could have applied therefor when he made default in the payment of the premium. However, the question of whether he might have entitled himself to the extended insurance, by applying for it within a reasonable time after the default in the payment of the premium, or at any time before his death, is not before us, and need not be decided. It is enough to say that he did not make the necessary election, or apply for the extended insurance, either at the time of the default in the payment of premium, or before his death, and this being true, neither his personal representative, nor the beneficiary in the policy, could do so after his death.

We do not think notice from the insurance company requiring him to make the election was necessary. He had notice of the time of the maturity of the premium and had, in his possession, the policy of insurance upon his life, and must be presumed to have had knowledge of its provisions with reference to his right to take the extended insurance, and of the necessity of his making application therefor. The right of election was in the insured alone, and having failed to exercise the option by applying for the extended insurance, the other provision with reference to paid up insurance automatically went into effect. There being no contrariety of testimony as to the only question that was decisive of the case, a peremptory instruction requiring the jury to find for appellee would have been proper. However, the appellant cannot complain that the case was submitted to the jury, and the instructions were more favorable to her than she was entitled to ask or demand.

Wherefore, the judgment is affirmed.

GRINSTEAD, &c. v. KIRBY, JUDGE JEFFERSON CIRCUIT COURT.

(Filed May 6, 1908—To be reported.)

1. Gaming—Betting on Races—Selling French Pools on Race Track—Statutes Considered—Kentucky Statutes, sec. 1960, makes it a felony for any one to set up and carry on any machine or contrivance used in betting whereby money or other thing may be won or lost. Sec. 1961 provides that "no prosecution shall be commenced under sec. 1960 later than five years after the commission of the offense, nor shall its provisions apply to persons who sell combination or French pools on any regular race track during the races thereon." Held—That in adopting sec. 1961 the Legislature evidently had in mind granting a privilege to the regular race tracks during the races thereon.

2. Same—To hold that the men who sell the pools may not be punished, but that those who buy them may be punished, would be to give no effect to that part of the act which limits the selling of the pools on regular race tracks during the races thereon. The object of the exception was not to protect those who sell the pools, but what the Legislature had in mind was to protect the regular race tracks during the races thereon. Manifestly the Legislature intended that the selling of combination or French pools on any regular track, during the races thereon, should not be illegal.

A. E. Richards and Helm Bruce for plaintiffs.

A. P. Humphrey and D. W. Baird for defendant.

Appeal from Jefferson Circuit Court.

Opinion of the court by Judge Hobson, denying motion dissolving injunction.

Under the statutes in force previous to 1893, this court held that the machine known as French Pool or Paris Mutuel, used in betting on horse races, was a contrivance used in betting within the meaning of the statutes, and that the persons who conducted the business were indictable. (Commonwealth v. Simons, 79 Ky., 618; Commonwealth v. Cheek, 100 Ky., 1.) In 1893 the Legislature, in revising the statutes of the State, adopted the Kentucky Statutes. Section 1960, Kentucky Statutes, makes it a felony for any one to set up and carry on a machine or contrivance used in betting whereby money or other thing may be won or lost. Section 1961, Kentucky Statutes, is in these words: "The change of the name of the games, banks, tables, machines or contrivances mentioned or included in the preceding section, shall not prevent the conviction of any person violating the provisions thereof; but no prosecution shall be commenced under said section later than five years after the commission of the offense, nor shall its provisions apply to persons who sell combination or French pools on any regular race track during the races thereon. An indictment for a violation of the preceding section may charge the accused in one count with any or all of the offenses mentioned or included therein."

Section 1877 provides that any persons who engage in any hazard or game on which money or property is bet, won or lost shall be subject to a fine of not less than \$20 and not more than \$100. The question is presented whether, under section 1961, persons may buy combination of French pools on any regular race track during the races thereon. It is insisted that the only effect of section 1961, so far as combination or French pools are concerned, is to exempt the persons who sell them from the operation of section 1900, under which the setting up of the machine or contrivance would be a penitentiary

offense; and that persons who buy the combination or French pools on any regular race track during the races thereon, may be prosecuted under section 1977. It is urged that the language of section 1961 goes no further than this, and does not except from the operation of section 1977 those who buy combination or French pools on any regular race track during the races thereon. But an act of the Legislature, like any other instrument, must be so construed as to carry into effect the intention of the makers. In *Bailey v. Commonwealth*, 11 Bush, 691, this court, after referring to the rule that the words in a statute are to be taken according to the approved use of language, said: "But there are other rules of construction of equal dignity and importance which must not be overlooked, and which, although not incorporated in our statute, are as binding upon the courts as if embodied in it. One of these rules is that 'every statute ought to be expounded, not according to the letter, but according to the meaning,' and another that 'every interpretation that leads to an absurdity ought to be rejected;' and still another that a law 'ought to be interpreted in such a manner as that it may have effect and not be found vain and illusive.'"

This rule was recently followed and approved by this court in *New South Brewing Co. v. Commonwealth*, 29 Ky. Law Rep., 873. The exception in the statute in favor of combination or French pools sold on any regular race track during the races thereon, was not in the previous statutes, and we must assume that the Legislature had some purpose in inserting this exception in the present act. Under the former Constitution special legislation was allowed. The different racing associations operated under special charters, which conferred upon them privileges more or less broad. When the new Constitution came into effect, and special legislation was prohibited, it was perceived by the Legislature that some general provision must be made, if the privileges which these racing associations then enjoyed, were to continue. The raising of horses for the track had long been a favored industry in a large part of the State, and much capital was invested in it. The Legislature evidently had in mind granting a privilege to the regular race tracks during the races thereon. It will be observed that, under the statute, any person who sells combination or French pools elsewhere than on any regular race track, or during the races thereon, is guilty of a felony under section 1960. This shows that the Legislature did not have in mind exempting merely the selling of combination or French pools from the provisions of the act, but that they intended to provide that those who sold these pools on any regular race track, during the races thereon, should not be punished. To hold that the men who sell the pools may not be punished, but that those who buy them may be punished, would be to give no effect to that part of the act which limits the selling of the pools on regular race tracks during the races thereon. The object of the exception was not to protect those who sell the pools. What the Legislature had in mind was the benefit to the regular race tracks during the races thereon. The privilege of selling the combination or French pools on any regular race track during the races thereon would be entirely nugatory if all who buy the pools may be punished. It can not be presumed that the Legislature intended in one section of the act to legalize the selling of the pools and in another section to impose a penalty on all those who buy pools. If the buying of the pools is illegal, then the offering to sell them is an incitement to others to violate the law; and, therefore, illegal. But, manifestly, the Legislature intended that the selling of combination or French pools on any regular race track during the races thereon should not be illegal.

We, therefore, conclude that the circuit judge properly granted the temporary restraining order. This conclusion makes it unneces-

sary for us to consider any of the other questions raised by counsel. Chief Justice O'Rear did not hear the argument, and did not participate in this decision.

Motion denied.

JACKSON'S ADM'X v. RICHARDSON COAL CO., &c.

(Filed May 6, 1908—Not to be reported.)

Master and Servant—Death of Servant—Falling of Roof of Mine—Action for Damages—Allegation of Petition—Sufficiency—In an action of an administrator of a deceased miner, against the owners of the mine for damages for negligently causing his death by the falling of the roof of the mine, an allegation in the petition "that it was not the duty of the servant to prop the mine, but that it was the duty of the owners to keep the roof in a reasonably safe condition, and to have a competent mine boss to inspect the mine, but they negligently failed to prop the mine or to have such mine boss," states a good cause of action and a demurrer thereto was improperly sustained.

J. M. McDaniel, O. H. Pollard and B. G. Williams for appellant.

Gourley & Roberts and Sutton & Hurst for appellees.

Appeal from Lee Circuit Court.

Opinion of the court by Wm. Rogers Clay, Commissioner, reversing.

Appellant, Jane Jackson, as administratrix of her deceased husband, Joseph J. Jackson, instituted this action in the Lee Circuit Court, against appellee, Richardson Coal Company, to recover damages for the injury which resulted in the death of her husband. The allegations of the original petition with reference to the negligence of the defendant are: That the Richardson Coal Company was engaged in the operation of a coal mine in Lee county, Kentucky; that appellant's intestate was employed by the defendant, and was engaged in drawing stumps in the mine of the defendant, and while so engaged in this duty was injured from a fall of slate in the mine; that the fall of slate was caused by the gross negligence of the defendant, its agents and servants, in failing to securely and adequately prop said slate and keep same adequately propped; that defendant negligently failed to regularly inspect the premises where intestate was at work, and to give proper instructions relating to the safety and security of carrying on the work; and also negligently failed to exercise the care which the character of the work and premises required.

A demurrer was filed to this petition, and pending said demurrer, an amendment was filed to the petition, making an additional defendant a party to the action, and amplifying the allegations of the petition as to the negligence by adding the charge that it was the duty of the defendant to employ a competent mine boss, which the defendant failed to do, and the further charge that the defendants did not furnish said intestate a reasonably safe place in which to work.

On July 9th, 1907, a demurrer was filed to the petition as amended, and, pending this demurrer, a second amended petition was filed, in which it was charged that the roof which fell and injured appellant's intestate was not one which, in the ordinary course of business, the intestate was charged with the duty of propping.

Upon the hearing of the demurrers, the court dismissed the petition and amended petitions, and the plaintiff appeals.

In support of the ruling of the trial court, counsel for appellees insist that the petition and amended petitions are defective in that they contain no allegation of failure on the part of the appellees to furnish the necessary timber for props at the place of injury; that it is a well-settled rule that, in removing stumps or pillars of coal in a mine, it is the duty of the miner to prop the roof with timbers to prevent its falling; while the only duty of the mine owner is to furnish timber for that purpose. Counsel cite the cases of *Sandy River Cannel Coal Co. v. Caudill*, 22 Ky. Law Rep., 1175, and *East Jellico Coal Co. v. Golden*, 25 Ky. Law Rep., 2056. It is true the principle contended for by counsel for appellees is laid down in the cases *supra*; but those cases were decided upon the facts as therein developed. If, upon the hearing of this case, it should turn out that the facts are the same, the same principle would apply. But for the purpose of passing upon the demurrer herein, we can not assume that the facts are the same as in those cases. The only facts we can consider are those set out in the petition and amended petitions. The demurrer admits these facts to be true. The allegations of the petition and amended petitions do not show that it was the duty of appellant's intestate to prop the mine. On the contrary, the allegation is made that it was not his duty. Furthermore, in the amended petition it is charged that it was the duty of appellee to keep the roof in a reasonably safe condition, but they negligently failed to do so. Appellant also charged that it was the duty of appellees to have a competent mine boss to inspect the mine, and that it likewise failed to perform its duty in this respect.

We are of opinion that the facts stated in the petition and amended petitions are sufficient to constitute a cause of action. If, upon the trial of the case it should turn out that the facts as therein stated are not true, but are as claimed by counsel for appellees, a different question will be presented.

For the reasons given, the judgment is reversed and cause remanded, with directions to overrule the demurrer to the petition and amended petitions.

WEIKEL v. CLARKE.

(Filed May 6, 1908—Not to be reported.)

1. Services Rendered—Action for—Part Performance—Compensation Recoverable—One who is employed by another to render two kinds of service, is entitled to a reasonable compensation for the service he rendered, although he may not have accomplished both the things he undertook to perform.

2. Same—In an action for service rendered in the absence of any agreement for the price to be paid therefor, it is a question for the jury to fix a reasonable sum for the service shown by the proof to have been performed.

O. H. Harrison for appellant.

Bodley & Baskin for appellee.

Appeal from Jefferson Circuit Court, Common Pleas Branch, Third Division.

Opinion of the court by Judge Carroll, affirming.

This is an appeal from a judgment rendered against the appellant, who was defendant in the court below, in favor of appellee, plaintiff below, for \$250.00.

Appellee was engaged in the brokerage business and also accepted employment to adjust business difficulties between parties who sought his assistance. The appellants, Rolph and Little, were the owners of capital stock in the F. Weikel Chair Company. Weikel was anxious to sell his interest in the corporation, and to induce Rolph and Little to sell theirs. He had a prospective purchaser, provided Rolph and Little would sell. Weikel also had some personal disagreement with Rolph, who was threatening to institute legal proceedings against him, and also against the corporation. In order to adjust the differences between himself and Rolph, and to influence Rolph and Little to sell their stock, Weikel sought the assistance of appellee, and succeeded in enlisting his efforts to accomplish the desired ends. In the settlement of the matter, appellee went to see the father of Rolph and prevailed on him to influence his son to desist from his contemplated suits. He also obtained from Rolph and Little a satisfactory agreement with reference to the sale of their stock—thus accomplishing everything that appellant desired. As compensation for his services, he demanded of appellant the sum of \$250.00, which he refused to pay; and thereupon he instituted this action against him.

After denying generally the averments of the petition, appellant pleaded in substance that the service performed by appellee was gratuitous. In an amended answer he set up that appellee and his son were partners, engaged in business under the partnership of P. N. Clarke & Company, and the right of recovery, if any, was in the partnership. A reply denying the affirmative matter in the answer completed the pleadings.

Each of the parties testified in behalf of their respective contentions, and there was some other evidence introduced in support of the claim asserted by appellee. The failure to make the son of Clarke a party, or to prosecute the action in the name of the partnership, is of minor importance. The evidence conduces to show that, under the business arrangements between Clarke and his son, the charge for the service rendered did not become a partnership asset, but was the individual property of Clarke. Upon the conclusion of the evidence, the court instructed the jury that, if they believed that Weikel requested Clarke to go to Philadelphia to see the father of Rolph and use his influence to prevent the son from instituting proceedings against Weikel, and also to induce Rolph and Little to consent to sell their interests in the Weikel Chair Company, and further believed that Clarke complied with the requests so made, and did go to Philadelphia, and through his influence prevented the institution of suits against Weikel, or did induce Rolph and Little to sell their interests in the corporation, then the jury should find for Clarke in such sum as they may believe from the evidence the services so rendered by him were reasonably worth, not exceeding \$250. They were further instructed that unless they believed from the evidence that said services, or some of them, were rendered by Clarke at the instance and request of Weikel, they should find for Weikel, and so, if they believed the services were rendered gratuitously.

The objection urged to the instructions by appellant is, that they authorized the jury to allow Clarke reasonable compensation, if he rendered either branch of the service which he agreed to perform. Under the contract as stated in the petition, Clarke agreed to do two things, first, to go to Philadelphia and secure the influence of Rolph's father to induce the son not to institute the contemplated suits, and second, to prevail on Rolph and Little to sell their stock. It was not necessary to a recovery by Clarke that he should show that he accomplished both of these things. If he had failed in one, but succeeded in the other, he would have been entitled to a reasonable compensation for the service he did perform; although the evidence introduced in his behalf tended to show that he succeeded in doing both. Looking at the instructions from either standpoint, they were not prejudicial

to appellant. The jury evidently believed, and had the right to believe, from the evidence, that Clarke succeeded in accomplishing both purposes for which his services were engaged. But, if they had concluded that he only succeeded in accomplishing one of these purposes, they might yet have allowed him \$250.00 for that.

Upon the whole case, we are unable to perceive in what respect the substantial rights of appellant were prejudiced by any ruling of the trial court, and, therefore, the judgment is affirmed.

BRACKETT'S ADM'R, &c. v. BOREING'S ADM'R, &c.

(Filed May 6, 1908—Not to be reported.)

1. Pleading—Failure to Ask Personal Judgment—Refusal to Render Judgment—In this action in which Moss was made a party by Brackett's Adm'r, it no where appearing that a personal judgment was sought against Moss for land sold Brackett to Boreing, the lower court did not err in refusing to render a personal judgment against Moss.

2. Debtor and Creditor—Offset by Debtor—Debts Owed by Creditor—In the absence of a contract to that effect, a debtor is never a trustee for his creditor. The law is well settled that a debtor may purchase debts due from his creditor to others, at less than their value, and demand a settlement for the full amount of the debt so purchased.

3. Evidence—Exceptions Not Acted On—Waiver—Exceptions to the competency of testimony filed in an action, that are not acted on by the trial court, are, on appeal, deemed to have been waived.

4. Settlement—Unsatisfactory Evidence—Judgment Not Disturbed—Where the evidence on a question of settlement is so vague and unsatisfactory as to leave the mind in doubt, the judgment of the chancellor thereon will not be disturbed.

5. Attachments—Notice—Effect—In this case Boreing was in debt to Brackett; Hendrickson had attached the money due from Boreing to Brackett in Boreing's hands, which was sustained, and so much of the money due to Brackett by Boreing as equalled the Hendrickson judgments was then due, not to Brackett, but to Hendrickson. At the same time the bank's assignee attached in Boreing's hands the money thus due to Hendrickson. Held—That Boreing was holding money or property in which Hendrickson had an interest, and the service of the attachment on him was notice that it was the purpose of the bank to attach the funds so held by him.

N. B. Hays, J. Smith Hays and Dishman & Dishman for appellants.

Cook & Jones for appellees.

Appeal from Bell Circuit Court.

Opinion of the court by Wm. Rogers Clay, Commissioner, reversing.

This is the second appeal of this case; the opinion on the former appeal will be found in 28 Ky. Law Rep., 386.

In 1889, John Brackett sold to Vincent Boreing and M. J. Moss his land. Boreing and Moss, as part of the consideration therefor, executed their note to Brackett for \$1,612.79. Brackett, who had purchased a tract of land from E. Carrico and executed his note in part consideration therefor, pledged the Boreing and Moss note as collateral security. In 1891, Brackett, for the benefit of Carrico, brought suit against Boreing and Moss on the note of \$1,612.79, alleging that it was wholly unpaid, and that it was part of the purchase price of the land sold and conveyed by him to Boreing. He also alleged that he was indebted to E. Carrico, and, to secure the latter in his debt,

had pledged the note to him, but that Carrico, not wishing to incur the expense and trouble of an action, had returned the note to him to collect and refused to join in the action. On July 19, 1897, P. Hendrickson filed his petition to be made a party to the action, and praying that it be taken as an answer and cross-petition against Boreing and Brackett. In this pleading, he set up that he had obtained judgments and return of "no property found" in 1893, and that he had taken out an attachment to the action instituted thereon and summoned Boreing and Moss as garnishees, attaching any money in their hands that they owed Brackett.

At the same term, the three actions that were pending in the court—E. Gregory v. Brackett, Hendrickson and Boreing, P. Hendrickson v. Brackett and Boreing, and Hogan Miller and Dink Miller v. Brackett, Hendrickson and Boreing—all of which were actions by creditors upon return of "no property found" against John Brackett, in which Boreing was garnishee—were consolidated with the suit of John Brackett v. Vincent Boreing, &c., above referred to.

On September 10th, 1897, William Lock, assignee of the Cumberland Valley Bank, which had procured judgments against P. Hendrickson amounting to \$781.24, and upon which execution had been returned "no property found," instituted an equitable action against P. Hendrickson and V. Boreing, in which he alleged that he was "informed, believes and charges it to be true that defendant, V. Boreing, had in his hands considerable money which is owing to one John Brackett, but had been attached by and will be and is due and owing to defendant, P. Hendrickson." On October 30th, 1899, Lock filed an amended petition in which he fully sets out the attachment lien of Hendrickson, and then says: "At said time the said Boreing was indebted to said Brackett by note for purchase money on land in the sum of \$1,612.79, with interest from September 24th, 1890, until paid, and also the sum of \$3,178.00 for and on account of purchase money that was due and owing said Brackett." Boreing was summoned to answer and disclose any legal or equitable interest or other property in his hands belonging to said Hendrickson on September 10th, 1897.

On January 31st, 1900, Hannah Hendrickson, administratrix of P. Hendrickson, filed a petition for revivor, and asked that she recover of John Brackett and V. Boreing the sum of \$250.00, pursuant to a compromise agreement between John Brackett and Hendrickson, which she alleged was executed on August 17th, 1898. On December 28th, 1900, V. Boreing filed his answer to this petition, which, in part, is as follows:

"He (Boreing) says that on the 8th day of August, 1898, by writing, the said P. Hendrickson then and there signed and delivered to this defendant and sold and assigned each of the judgments held by him against said John Brackett and mentioned in the said petition of Hannah Hendrickson; and this defendant is and has been, ever since, the owner and holder of said judgment." * * *

On January 14th, 1901, Hannah Hendrickson, by a verified reply, pleaded non est factum as to the alleged writing of August 8th, 1898. On October 21, 1901, Brackett's administrator filed a reply to said answer of Boreing, in which it was denied (1) that Boreing purchased the three judgments of Hendrickson against Brackett, or that Hendrickson executed, signed or delivered the alleged writing of August 8th, 1898; (2) that John Brackett made a full and complete settlement with his creditor, P. Hendrickson, on August 17th, 1898; that said settlement was made in good faith, without notice, actual or constructive, of any assignment of said judgments to said Boreing; (3) that if said writing of assignment was ever made, it was procured for the further purpose of defrauding the said Brackett and his creditors, and was procured by fraud, covin and deceit; (4) that if Boreing did pay said Hendrickson the alleged \$100.00, for the alleged assignment of said judgments, he did so as the agent of said Brackett, and the

\$100.00 so paid, was the money of said Brackett, which the said Boreing held in trust for him.

On the former appeal of this case the judgment was reversed, and the trial court directed to enter a judgment in favor of Brackett's administrator for the sum of \$3,178.00, with interest from July 5th, 1899, in addition to the judgment on the note as given by the circuit court. Upon the return of this case, it was submitted to the court for the determination of the following questions: (1) Whether personal judgment should go against M. J. Moss for the sum of \$3,178.00, with interest. (2) To determine the conflicting claims between Brackett's administrator and Boreing, as to the various judgments claimed to have been purchased by Boreing. (3) To determine the conflicting claims between Boreing and Hendrickson's administratrix with reference to the Hendrickson judgments. (4) To determine the conflicting claims between Boreing and the assignee of the Cumberland Valley Bank. Thereupon the trial court held that Brackett's administrator was not entitled to a personal judgment against Moss for \$3,178.00, with interest; that Boreing's administrators were entitled to credit for the amount of the judgment in favor of Hogan and Dink Miller, and for the amount of the judgments in favor of P. Hendrickson; also for certain other credits which are not disputed; that the claim of Hannah Hendrickson, administratrix of P. Hendrickson, against the administrator of John Brackett, by reason of the alleged settlement made between Brackett and Hendrickson, should be dismissed; also that the claim of the assignee of the Cumberland Valley Bank be dismissed. Judgment was then entered accordingly, and Brackett's administrator and the assignee of the Cumberland Valley Bank prosecute this appeal.

First. It appears that Brackett's administrator simply made Moss a party defendant to the action. Nowhere in the record did Brackett or his administrator pray for a personal judgment against Moss for the land sold by Brackett to Boreing. Under these circumstances, Brackett's administrator was not entitled to a personal judgment against Moss, and the lower court did not err in so holding.

Second. Brackett's administrator contends that Boreing's administrators are not entitled to credit for the Hogan and Dink Miller and P. Hendrickson judgments upon the following grounds: (a) Boreing was indebted to Brackett, and, after the service of the attachment by the attaching creditors on Boreing, the money of Brackett was tied up in Boreing's hands, and was then held by Boreing as trustee for Brackett, and he could not, therefore, use the money of Brackett to purchase the judgments of the attaching creditors, as the relationship then existing between Brackett and Boreing was thereby made one of trust. (b) Boreing entered into a positive agreement with Brackett to purchase the judgments in question for the benefit of Brackett.

A. In support of the first proposition, counsel for Brackett's administrator cite several authorities, but an examination of these authorities shows that they do not go to the extent of holding that a debtor, who is garnisheed, thereby becomes a trustee for his creditor whose funds are attached. On the other hand, the authorities, in certain jurisdictions, hold that the garnishee, by virtue of the attachment, becomes the trustee merely of the attaching creditors. (*Perkins v. Guy*, 2 Mont. 8., 15; *Roger, &c. v. Fleming, &c.*, 58 Mo., 438.) Manifestly, unless there is a contract to that effect, a debtor is never a trustee for his creditor. Nor do we see how the fact that the funds in the debtor's hands are attached, can at all change the relation which the debtor sustains to his creditor. The law is well settled, that a debtor may purchase debts due from his creditor to others at less than their value, and demand a settlement for the full amount of the debts so purchased (*Young v. Miller*, 7 B. Mon., 540; *Otwell v. Cook*, 9 B. Mon., 357; *McBrayer v. Dean, &c.*, 100 Ky., 398); and we fail to see any reason why this rule should be changed merely because the cred

tor, from whom such claim has been purchased, has also filed suit and obtained an attachment against the debtor. We are, therefore, of the opinion that the attachments against Boreing by the judgment-creditors of Brackett did not make Boreing a trustee for Brackett, so as to require that he should be entitled to set off against Brackett only the amounts actually paid for the judgments.

B. As to whether or not Boreing acted as the agent of Brackett in the purchase of the Hogan and Dink Miller and Hendrickson judgments, the evidence is about as follows: Boreing swears positively that he had no agreement or understanding with Brackett whereby he was to purchase such judgments as the agent of Brackett. Moss, who made the purchases for Boreing, swears that they were purchased for Boreing, and not for Brackett. On the other hand, Brackett swears that Boreing agreed with him to purchase the judgments in question for his (Brackett's) benefit. There are also certain letters from Boreing and Moss to Brackett. Moss, in one of his letters, advises Brackett to settle with Hendrickson; Boreing also wrote to Brackett that Hendrickson was anxious to settle, and asked Brackett what he (Boreing) should do. Brackett's reputation for truth is discredited by several witnesses. The letters of Boreing and Moss to him tend somewhat to confirm his statements. It does not appear, however, in the record, that Brackett ever acted upon the suggestion of Moss, or that Moss acted for Brackett in making the settlements with the Millers and Hendrickson. Nor does it appear that, after the receipt of the letter from Boreing, Brackett acted upon the suggestion therein contained and directed Boreing what to do. On the contrary, it appears that Brackett thereafter effected, or attempted to effect, a compromise with Hendrickson. In this attempted settlement, he acted upon his own initiative. He did not, nor did he pretend to, act through the intervention of Boreing as his agent or trustee. We must, therefore, conclude that he decided to ignore Boreing's proposition, and to act for himself with reference to the settlement of the Hendrickson judgments.

Brackett's administrator contends that the evidence of Boreing and Moss is incompetent, for the reason that both Brackett and Hendrickson were dead at the time this testimony was given. It does appear that, at the time a portion of their testimony was offered, Brackett and Hendrickson were both dead. While Brackett's administrator filed exceptions to certain answers of Boreing and Moss, it does not appear that these exceptions were passed upon by the trial court, and they will, therefore, be deemed to have been waived. (*Lewis v. Wright, &c.*, 3 Bush, 311; *Patterson, &c., v. Hansel, &c.*, 4 Bush, 654; *Hon v. Harned*, 18 Ky. Law Rep., 864.)

With the evidence of Boreing and Moss upon the one side, and the evidence of Brackett, and the letters to Brackett from Boreing and Moss, on the other, with nothing to show that he (Brackett) ever acted upon the suggestions contained in the letters, we are unable to say that the conclusion of the chancellor that Boreing acted for himself in purchasing the judgments in question is erroneous. It appears however, according to the testimony of Moss, that Boreing paid \$100.00 for the Hendrickson judgment, and also agreed to pay the fee of Weller and Hays. In the year 1903 judgment was entered directing Boreing to pay the fee of Weller and Hays and that he be given credit for the amount so paid, as against Brackett. Whether this judgment was entered because of the agreement on behalf of Boreing to pay the fee of Weller and Hays, or whether it resulted alone from the fact that Weller and Hays had a lien upon the judgments in question for the amount of their fee, does not appear. In either event, the amount so directed to be paid was in effect a part of the purchase price paid for the judgments, for Boreing had purchased the Hendrickson judgments prior to that time and was then the owner and holder of them. Manifestly, then, it would be improper for Boreing to set off both the

full amount of the Hendrickson judgments and the amount of the fee paid Weller and Hays. Brackett's estate can not be charged with the judgments in full and a portion of the purchase price paid for the judgments. In this respect the judgment herein is erroneous. As the judgment of 1906 directed that Boreing be given credit for the amount of the Weller and Hays fee, the amount so credited should be deducted from the amount of the Hendrickson judgments.

Third. The assignment of the Hendrickson judgment by Hendrickson to Boreing appears to have been made on August 8, 1858, Hannah Hendrickson, as administratrix of P. Hendrickson, filed a settlement alleged to have been made between Hendrickson and Brackett by the terms of which it was agreed that Hendrickson should be paid the sum of \$250.00. She, therefore, claims the amount going to her husband under that settlement. It appears, however, that the settlement in question was made on August 17, 1898, about nine days after the assignment previously made by her husband to Boreing. The evidence as to the exact time when the assignment from Hendrickson to Boreing was made, and the evidence as to whether any such settlement was ever effected between Brackett and Hendrickson are so vague and uncertain as to leave the mind in doubt; and for this reason the judgment of the chancellor, dismissing the claim of Hannah Hendrickson, will not be disturbed. (*Burt & Brabb Lumber Co. v. Bailey*, 22 Ky. Law Rep., 1264; *Spencer v. Society of Shakers*, 23 Ky. Law Rep., 854.)

Fourth. The last question to be determined concerns the claim of the assignee, Cumberland Valley Bank. The bank contends that it has a lien on the money owing Brackett by Boreing for the satisfaction of its debt against Hendrickson, and that this lien is superior to the claim of Boreing arising out of his purchase of the Hendrickson judgments. It appears that the bank's action was filed on September 10, 1897, after it had procured judgments and a return of "no property found" against P. Hendrickson. This action was instituted prior to the time that Boreing purchased the Hendrickson judgments. At the time of the institution of this suit, Hendrickson had obtained judgments against Brackett, and attachments had been issued against Boreing. These attachments had been sustained. The original petition, filed by the bank's assignee, alleged that "he is informed, believes and charges it to be true that defendant, V. Boreing, had in his hands considerable money, which is owing to one John Brackett, but had been attached by and will be and is due and owing, to defendant, P. Hendrickson." To this suit Boreing and Hendrickson were both made parties. Thereafter an amended petition was filed making Brackett a party defendant, and Brackett entered his appearance. Between the filing of the original petition and the amended petition, Boreing bought the judgments in question. The trial court dismissed the claim of the bank's assignee on the ground that Brackett, who was a necessary party, had not been made a party to the action prior to the time that Boreing bought the judgments, and that Boreing was in no sense the debtor of Hendrickson.

Section 439 of the Civil Code of Practice is as follows:

"After an execution of fieri facias, directed to the county in which the judgment was rendered, or to the county of the defendant's residence, is returned by the proper officer, either as to the whole or part thereof, in substance, no property found to satisfy the same, the plaintiff in the execution may institute an equitable action for the discovery of any money, chose in action, equitable or legal interest, and all other property to which the defendant is entitled, and for subjecting the same to the satisfaction of the judgment; and in such actions persons indebted to the defendant or holding money or property in which he has an interest, or holding evidence or securities for the same, may be also made defendants."

This court has held that the above section was intended to enable the creditor to subject to the payment of his claim any money, choses in action, equitable or legal interest, and all other property to which the debtor is entitled; that the statute is remedial and should be liberally construed, with a view to promote its object, which, evidently, was to enable a creditor, after a return of "no property found," to reach, by this kind of proceeding, all property of the judgment-defendant. (*Merriwether v. Bell, &c.*, 22 Ky. Law Rep., 844; *Farmers' Bank of Kentucky v. Morris, &c.*, 79 Ky., 157.)

In this case Boreing was indebted to Brackett; Hendrickson had attached the money due from Boreing to Brackett in Boreing's hands; the attachment had been sustained, and so much of the money due Brackett by Boreing as equaled the Hendrickson judgments was then due, not to Brackett, but to Hendrickson, whose attachment had been sustained. At this time the bank's assignee attached in Boreing's hands the money thus due to Hendrickson. We are, therefore, of opinion that Boreing was holding money or property in which Hendrickson had an interest, and the service of the attachment upon him was sufficient notice that it was the purpose of the bank's assignee to attach the funds so held by him. Boreing had notice of the purpose of the attachment, and the fact that Brackett was not then a party could in no way affect his liability. Before final judgment Brackett was made a party. In the meantime, Boreing bought the Hendrickson judgments at his peril. Nothing that he could do after the service of the attachment could defeat the claim of the bank to the funds attached in his hands. The trial court, therefore, erred in dismissing the claim of the bank's assignee. Upon the return of the case, the court will direct the payment by Boreing's administrators to the assignee of the Cumberland Valley Bank of its debt, interest and costs. Boreing's administrators will then be credited against Brackett's administrator with the full amount of the Hendrickson judgments, less the Weller and Hays fees, but will not be entitled to credit for the amount directed to be paid to the assignee of the Cumberland Valley Bank.

For the foregoing reasons, the judgment as to Hendrickson's administratrix is affirmed, and the judgment as to Brackett's administrator and the assignee of the Cumberland Valley Bank is reversed, and cause remanded with directions to the trial court to enter judgment in conformity with this opinion.

BOARD OF COUNCILMEN OF THE CITY OF FRANKFORT V. MORGAN, &c.

(Filed May 6, 1908—Not to be reported.)

1. Municipalities—Taxes—Action to Recover—Defense—Burden of Proof—In an action by a city against a tax-payer, to recover taxes due the city, the burden is on the tax-payer; if he desires to resist payment, not only to point out in his answer the particular grounds relied on, but he must establish their existence by proof.

2. Same—Validity of Levy—Presumption—Under section 157, of the Constitution, authorizing cities of various classes to levy taxes, the presumption is that the council or authority levying the tax has not exceeded its power, and the tax-payer, in attacking the validity of a tax upon the ground that it exceeds the constitutional limit, must point out in his pleading the grounds he relies on, and sustain his contention by evidence.

Wm. Cromwell for appellant.

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John W. Ray for appellees.

Appeal from Franklin Circuit Court.

Opinion of the court by Judge Carroll, reversing.

This suit, was brought by appellant to recover taxes alleged to be due the city for the years 1897 to 1906, inclusive. The petition reads as follows:

"The plaintiff, Board of Councilmen, for cause of action herein, says: The defendant is indebted to the city of Frankfort for city taxes on real estate, with interest and penalties thereon, as set forth and shown by the tax bill filed herewith as part hereof. Said taxes are for the years 1897, 1898, 1900 and 1901 and upon the property set forth and described in said tax bill. Said property was properly listed by the city assessor for city taxation in each of said years. The ordinance levying the taxes, for each of said years, was duly adopted by the common council, and all the steps necessary to secure a lien upon said property, for said taxes, have been duly and properly taken.

"Defendant has no personal property in the city out of which said taxes could be made. The ad valorem levy imposed by the common council for each of said years is as follows:

"1895 \$— per \$100.00 in value.

"1896 \$— per \$100.00 in value.

"1897 \$— per \$100.00 in value.

"1898 \$— per \$100.00 in value.

"1899 \$— per \$100.00 in value.

"Due demand for said taxes has been made, and a tax receipt therefor tendered defendant by the proper collecting officer, and no part of same has been paid.

"The plaintiff is entitled to recover herein as follows: For the year 1897, \$59.45, with interest thereon at 8 per cent. from Oct. 1st, 1897; and \$59.45, with like interest from Oct. 1st, 1898; and \$47.85 with like interest from Oct. 1st, 1900; and \$47.85 with like interest from Oct. 1st, 1901, and 5 per cent. penalty on said taxes.

"The plaintiff holds a first lien upon said property for the satisfaction of the city's demand hereinbefore set forth. Said property is described as follows:

"On the south by the property of Mrs. W. C. Herndon, on the north by Campbell street, on the east by an alley and on the west by Logan street.

"WHEREFORE, plaintiff prays that it recover of the defendant herein, taxes, interest and penalty, as follows: For the years 1897, \$59.45 with interest at 8 per cent. per annum from Oct. 1st, 1897; and like interest from Oct. 1st, 1898, on \$59.45; and \$47.85 with like interest from Oct. 1st, 1900; \$47.85 with like interest from Oct. 1st, 1901, and 5 per cent. penalty on each of said years' taxes, and that said lien be adjudged and enforced, and that said property be sold in satisfaction of the plaintiff's said demand.

"Plaintiff prays for its costs and all proper relief." The tax bill, or exhibit, mentioned in and filed with the petition reads as follows:

"Frankfort Ky., December 26, 1902.

Mrs. John H. Morgan,

To City of Frankfort, Dr.

To City taxes for the year 1897.....	59.45
To City taxes for the year 1898.....	59.45
To City taxes for the year 1900.....	47.85
To City taxes for the year 1901.....	47.85

\$214.60

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2 lots 50 feet on Logan, between Campbell and Todd streets, 192 feet deep, valued at \$1,000.....\$2,000
1 lot 180 Logan between same streets, 192 feet deep, valued at \$1,300.
Tax rate for years 1897, 1898, 1900 and 1901, \$1.45 on the \$100.
Penalty 5 per cent..... \$10.73

\$225.33

"I certify the foregoing list to be true and correct.

"BEN MARSHALL, City Clerk."

An amended petition was filed, and with it an exhibit certified by the City Clerk, seeking to recover taxes alleged to be due for the years 1902, 1904 and 1905; the tax rate for these years being \$1.70 on each one hundred dollars' worth of property for 1902, and \$1.50 on each one hundred dollars' worth of property for the years 1904 and 1905.

The answer traversed generally the allegations of the petition, but did not specifically deny that the defendant owed taxes for the years mentioned—the averment on this point being "they deny that they or either of them are indebted to the City of Frankfort for taxes as set out in the accounts filed as part of the petition and amended petition, "The answer further sets out, that:

"They deny that the tax rate imposed by ordinance was \$1.45 per \$100 in value for the years 1897, 1898 or was \$1.70 per \$100 in value for 1902, or was \$1.50 per \$100 in value for years 1904 and 1905, and deny the power and authority of the common council to levy or fix the tax at such figures for either of the said years named. Defendants say that Frankfort is and was a city of the third class and during all the years named above had a population of less than ten thousand people and because of the provisions of section 157 of the Constitution the plaintiff had no power to levy or collect taxes in excess of seventy-five cents on the one hundred dollars of value, for other than school purposes, and that the tax rate for school purposes in said city as provided for the several years was and is as follows, 25 cents on each \$100 of valuation for each of the years sued on except 1905, and for 1905 50 cents on each \$100 of valuation."

In a reply it was denied that the city during any of said years had less than ten thousand inhabitants, or that by reason of the section of the Constitution mentioned the city had no power to levy and collect taxes in excess of seventy-five cents for all purposes other than school purposes, and denied that the tax rate for said years for school purposes excepting 1905 was only twenty-five cents on the one hundred dollars' worth of property.

On motion of the appellant, who was plaintiff below, the action was submitted for judgment upon the pleadings and exhibits, whereupon the petition was dismissed.

The only question before us is whether or not the city was entitled to a judgment on the petition, notwithstanding the averments contained in the answer. Or, to put it in another way, did the answer present issues that placed the burden of proving the allegations of the petition upon the plaintiff. If it was necessary that the city should prove the averments of the petition, then the action of the lower court was correct. On the other hand, if the answer did not present any defense, or if it was necessary that the defendant should prove the averments thereof, it must be reversed.

The sections of the Kentucky Statutes applicable are sections 3396 and 3397, reading as follows:

"On the first day of January in each year, after the assessment of the city taxes, the tax collector shall make out tax-bills against all persons or corporations owing taxes on real estate, with a description and location of the property assessed, and upon which taxes are

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due, and the amount thereof, which bills shall be certified by the city clerk as being true and correct lists, and he shall furnish said lists or bills to the city attorney, whose duty it shall be to bring, without delay, suits for the recovery thereof in the circuit court of the county.

"Said lists or bills, when certified by the city clerk, shall be prima facie evidence that the property was properly listed by the city assessor, that the ordinance levying the taxes was duly adopted, and that all the steps necessary to secure a lien on the property have been duly and properly taken, and that the person owing the taxes has no personal property in the city out of which said taxes could be made."

It was formerly the rule in this State that in actions to recover taxes the petition must affirmatively set up the existence of every fact necessary to show that all the provisions of the statute authorizing the imposition of the tax were complied with by the assessing officers. But this rule has been changed by the statute supra, as well as by the later decisions of this Court, *Alexander v. Aud*, 28 Ky. Law Rep., 69, *Hughes v. Owens*, 29 Ky. Law Rep., 140, the purpose of the statute and decisions being to put upon the tax-payer, when sued, to recover taxes, the burden of pointing out the particular defects in the creation, levy or assessment of the tax that he relies on to defeat its collection. In the case before us, the tax bill certified by the city clerk is made prima facie evidence that all the steps necessary to secure a lien on the property were duly and properly taken. It is not necessary that the tax bill filed as an exhibit with the petition as a basis of the cause of action should be the identical bill made out by the tax collector, or that the tax collector's name should appear on it. The bills made out by the tax collector are required to be delivered to the city clerk, and when the city clerk certifies a bill similar to the exhibit filed with the petition, such bill is made, by the statute, presumptive evidence of the correctness of all preliminary steps. If the tax-payer desires to resist the collection of the taxes, he must not only point out in his answer the particular grounds relied on, but he must establish their existence by proof. The city is not required to introduce any evidence until the tax-payer has made out a case that will overcome the legal presumption that the proceedings by the city and the taxing officers are regular. This rule of law, and the practice growing out of it, does not impose any unreasonable burden upon the tax-payer. The facts upon which he may desire to rely are matters of public record, that he has the right to inspect in the preparation of his defense; and if he has a legitimate defense, he can easily establish it by proof. On the other hand it prevents a delinquent taxpayer from interposing defenses lacking in merit to defeat the collection of taxes that are due; and enables the city to collect promptly the taxes due it. The city government cannot exist without the money derived from the collection of taxes; and every tax-payer should be required to pay his proportion of the burden. If he fails in this the city, in attempting to enforce the collection of taxes, will not be put to the necessity of showing affirmatively that the law was complied with in the levy, assessment and attempted collection of the taxes. It is true that in the levy and imposition of taxes, the city and taxing authorities should be required to observe all the substantial provisions of the law authorizing its collection; and if they have not done so, the tax cannot be exacted.

In respect to the defense that the population of the city, in the years named, was less than ten thousand, it will be necessary to examine section 157, of the Constitution, which provides in part that:

"The tax rate of cities, towns, counties, taxing districts and other municipalities, for other than school purposes, shall not, at any time, exceed the following rates upon the value of the taxable property

therein, viz: for all towns or cities having a population of fifteen thousand or more, one dollar and fifty cents on the hundred dollars; for all towns or cities having less than fifteen thousand, and not less than ten thousand, one dollar on the hundred dollars; for all towns or cities having less than ten thousand, seventy-five cents on the hundred dollars; and for counties and taxing districts, fifty cents on the hundred dollars; unless it should be necessary to enable such city, town, county or taxing district to pay the interest on, and provide a sinking fund for, the extinction of indebtedness contracted before the adoption of this Constitution." * * *

The limitations upon the tax rate contained in this section are mandatory, and cannot be exceeded or evaded by the council or other authority vested with the power to levy taxes. A city having a population of less than ten thousand cannot, without the approval of the voters, at an election, impose a greater tax rate than seventy-five cents on the one hundred dollars, unless it be necessary to pay an indebtedness contracted before the adoption of this Constitution, or for school purposes. But, here again, the tax-payer, who is assailing the tax, must prove the averments of his pleading. The presumption is that the council or authority levying the tax has not exceeded its power; and the taxpayer attacking the validity of the tax upon the ground that it exceeds the constitutional limitation must point out in his pleading the grounds he relies upon and sustain his contention by evidence. (*Maysville & Lexington T. P. R. Co. v. Wiggins*, 20 Ky. Law Rep., 724; *Sparks v. Robinson*, 24 Ky. Law Rep., 2336; *O'Brien v. City of Owensboro*, 24 Ky. Law Rep., 469; *Town of Bardwell v. Harlin*, 26 Ky. Law Rep., 101.)

Upon the return of the case either party may amend his pleadings.

The judgment of the lower court is reversed for proceedings in conformity with this opinion.

BALLARD'S ADM'X v. LOUISVILLE & NASHVILLE RAILROAD CO.

(Filed May 7, 1908—Not to be reported.)

Lewis B. Herrington and Smith & Smith for appellant.

Benjamin D. Warfield and John T. Shelby for appellee.

Appeal from Madison Circuit Court.

Judge Nunn delivered the following dissenting opinion:

The question in this case is not whether Hodge was acting in the service of the company at the moment he killed John Ballard, or whether he was assigned to use the compressed air hose, the instrument that produced Ballard's death.

The law is: The master is required to furnish the servant a reasonably safe place to work and reasonably safe tools and appliances and reasonably careful fellow servants to work with. It is alleged in the petition that Hodge was not a careful person, but, on the contrary, was a reckless and dangerous person; that he possessed such habits for a long time and the defendant knew that he was a reckless and dangerous person, and kept him in its employment with that knowledge, and failed to warn the plaintiff's intestate of his dangerous character, and by reason thereof his intestate lost his life. The gravamen of the charge is that the defendant owed deceased the duty to furnish him a reasonably safe person with whom to labor, but, on the contrary, the master knowingly furnished him a reckless

and dangerous servant to work with, and by reason thereof the deceased lost his life. And the truth of this is admitted by the demurrer. In my opinion a cause of action was stated in the petition. The court, in its opinion, notwithstanding it was alleged in the petition that this compressed air hose was a dangerous instrument and the defendant knew that fact, which was admitted to be true by the demurrer, says that it seems inconceivable that if such an instrument was dangerous that defendant could have known it; that but one instances of such an injury has been recorded, and that was Curry, referred to in the Texas case cited in the opinion. It is possible that other injuries of any kind may have occurred, and defendant heard of them as well as Curry's injury, but this is a question of evidence with which the court has nothing to do. The only question involved on this appeal was, whether a cause of action was stated in the petition. In my opinion, if it had been alleged and proven in the cases cited in the opinion, that the persons who threw the lump of coal, placed the torpedo upon the track and played pranks with the compressed air hose had been doing so for a long period of time, making it dangerous to their fellow servants, and that the defendant in each case knew of the fact and failed to discharge them, and the persons injured had been placed to work with them without any warning of the character of persons they were placed with, the results in the cases would have been different.

For these reasons, I dissent from the opinion of the court.

LOUISVILLE & NASHVILLE R. R. CO. v. LAWLER.

(Filed May 8, 1908—Not to be reported.)

Benjamin D. Warfield and J. I. Blanton for appellant.

J. J. Osborne for appellee.

Appeal from Harrison Circuit Court.

Judge Lassing delivered the following response to petition for rehearing; petition denied.

The question as to whether the plaintiff, Pat Lawler, intended to step from the top of the flat car, four and a half to five feet, across to the platform of the passenger car, or whether he intended to step down perpendicularly, from four and a half to five feet, to the station platform, was not material to the decision of this case. With his foot caught in the standard stirrup near the top of the flat car on which he was standing, it was not important on which of the two above-named places he intended to land, for as soon as he lost his equilibrium, his fall and consequent injury was certain. We fell into the error of saying that he undertook to step from the top of the flat car to the platform of the passenger car, because he, himself, said so, and we did not notice in the re-district examination that he corrected this mistake. Our statement on this subject was not intended to be material, but merely historical in giving the general outline of the facts. Appellee Lawler put his heel in the standard stirrup, and then stepped out into space. That the standard stirrup caught his heel and held it so as to make his fall and consequent injury inevitable, was not the fault of the railroad.

The petition for a rehearing is overruled.

Judges Nunn and Hobson dissenting.

N. C. & ST. L. RY. CO. v. BEAN'S EX'OR.

(Filed May 8, 1908—Not to be reported.)

Railroads—Action for Damages Against—Trespassers—Evidence—
In this action against appellant for the death of decedent, who was a trespasser upon its track at the time he was killed, its liability depends entirely upon whether or not those in charge of the engine after they discovered the peril of the deceased, could, by the use of ordinary care, have stopped the train in time to prevent its striking him. The evidence examined, and Held—That a peremptory instruction should have been given, directing the jury to find for appellee

Wheeler, Hughes & Berry and R. L. Shemwell for appellant.

Hendrick, Miller & Marble for appellee.

Appeal from Marshall Circuit Court.

Opinion of the court by Judge Carroll, reversing.

The decedent, W. A. Bean, a man about seventy-five years of age, partially blind, as well as deaf, was killed by one of the trains of appellant company, while walking along its track in the day time. In this action by his executor to recover damages, he was awarded the sum of \$750.00 by a jury. Of this verdict and judgment thereon, the appellant complains, and asks a reversal, chiefly because the trial judge refused its request to direct the jury to return a verdict in its favor. It also complains of error in the instructions; but, if it was entitled to a peremptory instruction, it will not be necessary to inquire into the correctness of the instructions given by the court.

The appellant did not introduce any evidence, so that the first question to be investigated is whether or not the testimony introduced in behalf of appellee was sufficient to take the case to the jury.

It is conceded that the deceased was a trespasser at the time he was struck and killed by a passenger train going in the same direction that he was walking on the track. The accident occurred at a point about a mile and a half north of the town of Benton, in the direction of Paducah, to which point the train was going. His body was thrown from the track some fifty feet north of a trestle, which was about 116 feet in length. A crossing, known as the Rickman crossing, is south of the trestle and about 2,800 feet from it. The track for more than a mile south of where the deceased was struck, is perfectly straight, and a person in the engine would have an unobstructed view of a person walking on the track at any place within a mile south of the point where appellee's intestate was killed.

The liability of appellant depends entirely upon whether or not the persons in charge of the engine, after they actually discovered the peril of deceased, could, by the exercise of ordinary care, have prevented striking him. Being a trespasser, the railroad company did not owe him the duty of look out or warning, or any duty except to exercise ordinary care, by using all reasonable means at hand to prevent injury to him, after his peril was actually discovered. (C. & O. Ry. Co. v. Nipp's Adm'r, 30 Ky. Law Rep., 1131; Smith's Adm'r v. Illinois Central R. Co., 28 Ky. Law Rep., 723; L. H. & St. L. R. R. Co. v. Jolly's Adm'r, 28 Ky. Law Rep., 939; C. & O. Ry. Co. v. Barbour, 29 Ky. Law Rep., 339.)

No person was introduced as a witness who saw the deceased when he was struck, nor is there any direct testimony conducing to show when or where the deceased came upon the railroad track, or how long he had been walking on the track before he was struck, or when his peril was discovered by the persons in charge of the train, or that after actually discovering his peril they could, by the exercise of

ordinary care, have stopped the train in time to avoid injury to him—the only evidence upon these material points are some circumstances that will be noticed in the course of the opinion.

Mrs. Ratcliffe, who was a passenger on the train, testified that the train whistled for the Rickman crossing and then whistled several times between there and where the deceased was killed. She did not know what had happened until the train stopped, when she learned that a man had been killed; that the train did not slacken in its speed, and she could not tell how far it ran after she heard the alarm whistle.

J. M. Johnson, who was also a passenger on the train, did not remember to have heard it whistle for the crossing, or that he heard any whistles until it gave the alarm whistle, and a few minutes afterward, the train suddenly checked its speed and ran probably one hundred yards before it stopped. Asked if after the alarm whistle sounded it was kept up until the train stopped, or did the whistling cease before the train stopped, he answered that the whistling stopped before the train had come to a standstill. He did not know how fast the train which consisted of an engine, baggage car, smoker, and one coach, was running.

Monroe Collins, also a passenger, heard the alarm whistle sounded several times, and although the train ran probably one hundred or two hundred yards beyond the place where deceased was struck before it came to a stop. That the body was found between thirty-five and fifty feet from the north end of the trestle. The hat of deceased was found under the edge of the trestle.

Hinson testified that on the Sunday following the accident, which happened on Friday, he discovered a spot or two of blood on the trestle, fifty or sixty feet from the south end.

J. G. Morgan, who was in company with Hinson, said that about the middle of the trestle there was something that looked like blood, but he could not tell certainly what it was. That the place where the body was thrown by the impact was fifty or sixty feet from the place where he saw what he believed to be spots of blood.

Boyd Hinson also said he saw on the trestle some spots of either blood or paint—he thought it was blood.

Another witness testified that the body was found fifty feet from the north end of the trestle, which was 116 feet in length; and that he saw some spots of blood, as he thought, on the trestle, about 95 feet south of the place where the body was found.

Other witnesses, introduced as experts, said that a train like the one that killed deceased, running thirty-five or forty miles an hour, could be stopped inside of 400 feet.

We have given the substance of all the testimony introduced, and, in our opinion, it fails to make out even by circumstantial evidence, a state of case that would authorize a submission to the jury. The fact that the train ran about 100 yards or probably more after the alarm whistle was sounded, that some spots of blood were found about ninety feet south of the point where the body was found, that if deceased had been walking on the track the engineer, if keeping a look out, must have seen him in time to have stopped the train. If he exercised ordinary care—fall far short of showing when the peril of the deceased was actually discovered by the trainmen, or that, in the exercise of ordinary care by the use of all reasonable means at hand, they could have prevented striking him, after his peril was so actually discovered.

We can not supply the failure in the evidence for appellee to show the existence of these facts so indispensable to a recovery by assuming that, as the track was straight, the persons in charge of the engine must have discovered the peril of deceased in time to prevent injury to him by the exercise of ordinary care on their part. He may have been struck at the south end of the trestle, or in the middle of the

trestle or at the north end of it. The blood spots found on the trestle do not necessarily show that he was at that point when hit by the engine, as it is not an uncommon occurrence that persons are carried on the pilot or cow-catcher of the engine for a hundred yards or more before falling off on the side of the track. But, if it should be assumed that the deceased was in the middle of the trestle when struck by the engine, there is a total failure of proof as to when the persons in the engine discovered his peril. And they were under no duty to discover it any sooner than they did, whenever that was. They may not have been keeping a lookout, or, if keeping one, may have concluded that the deceased, if he was either at the south or north end of the trestle, would get off the track in time to avoid being injured. In cases like this, where it is sought to recover for injury to a trespasser on the track, there must be some evidence conducing to show two things: First, when the persons in charge of the train actually discovered his peril; and, second, that, after the discovery, they could, by the exercise of ordinary care, with the use of all reasonable means at hand, prevent injury to him.

Having reached the conclusion that the peremptory instruction requested should have been granted, the judgment of the lower court is reversed, with directions to proceed in conformity with this opinion.

C. N. O. & T. P. RY. CO. v. BAXTER.

(Filed May 8, 1908—Not to be reported.)

Railroads—Spark Arresters—Injury to Eye—Statutes—In this action by the appellee for the recovery of damages for an injury which resulted to his eye by the emission of a cinder from its chimney, there should have been a peremptory instruction to find for appellant, for the reason that the evidence is such as to warrant the belief that the cinder would have escaped through a spark arrester of the most approved pattern, so small was it. Moreover, the language of the statute, (section 782) shows that it was enacted to prevent injuries from sparks of fire, and was not intended to apply to cinders small enough to enter the human eye.

A. G. DeJarnette and John Galvin for appellant.

Clore, Dickinson & Clayton and Overton S. Hogan for appellee.

Appeal from Grant Circuit Court.

Opinion of the court by Wm. Rogers Clay, Commissioner, reversing.

Appellee, George Baxter (plaintiff below), instituted this action to recover damages of appellant, Cincinnati, New Orleans & Texas Pacific Railway Company, for an injury to one of his eyes, alleged to have been caused by a spark or cinder from one of its freight trains. The jury awarded appellee damages in the sum of \$925.00, and the railroad company complains.

Appellee was a man 45 years of age, and had been working on railroads for about 25 years. At the time of the accident, he was in the employ of appellant, and was engaged, with some 20 other hands, leveling and ballasting its track. A freight train approached, and appellee and the other hands stepped back into a ditch to allow it to pass. As the train passed, a spark or cinder escaped from the locomotive and lodged near the inner corner of appellee's eye, at a point between the corner and iris. Appellee described the accident in the following language: "We was in the ditch, waiting until it passed. When it went

up, the sparks was rolling out pretty bad; high wind, elements was filled with sparks, and one got in my eye." Appellee further stated that the engine cast out a greater amount of cinders and sparks than he had ever seen one do before. When the cinder got in his eye, it burned and pained him greatly. He immediately extracted part of it; then Heber Justice, who worked with him, extracted a second piece. Afterwards, appellee removed one more piece. The next morning, Dr. A. D. Blain extracted a fourth fragment that was imbedded in the ball of the eye. He had never had any trouble with his eyes prior to the accident. If they were diseased in any way, he had no knowledge of it, as he had never had them treated. Heber Justice, who claims to have been near when the accident occurred, corroborates the statements of appellee as to his injury and the removing of the cinder, as well as the amount of sparks emitted by the engine.

Dr. A. D. Blain, a physician, testified that appellee came to his office on October 29. He examined appellee's eye and found in it, right at the corner, a small cinder, about the size of the head of a pin. He found blisters on the eye around where the cinder was sticking. The eye was slightly burned by the cinder, and was red, and the lids were swollen. He removed the cinder and proceeded to treat the wounded condition for about five or six days. Thought appellee was getting along all right, but, on the seventh or eighth day, his eye was much worse. Prior to that time he had never turned up appellee's eye-lids. Upon examination at that time, he found what is termed granulated lids in the right eye. At that time he had no trouble with his left eye. Did not believe that the cinder had anything to do with causing the disease to the eye, but was of opinion that the inflamed condition might make it more susceptible to infection. On cross-examination, he stated that the disease known as granulated lids is an infectious disease. The hot cinder could not have conveyed the poison there. To become infected, it was necessary that the foreign poison be placed there by some means. At the time of the trial, could not see any scar in the eye. The transparent or clear part of the eye was not affected or touched by the cinder. On re-direct examination, the witness testified that, where the surface of the eye is inflamed, it is in the best possible condition to fertilize bacteria. The eye would be much more liable to be inoculated, with disease, when the mucous membrane is inflamed and irritated.

Appellee bases his cause of action upon the negligence of appellant in failing to comply with section 782, of the Kentucky Statutes, which requires all railroad companies to "place in, on or around the tops of the chimneys of engines a screen, fender, damper, or other appliance, that will prevent, as far as possible, sparks of fire from escaping from such chimneys." Appellee's contention is that, it being unlawful to operate engines that are not provided with proper spark arresters, and the statute being designed for the protection of the property and person of the citizen, it follows, as a logical sequence, that there is liability for an injury resulting from a violation of the statute. Assuming, however, that the statute in question was enacted for the purpose of preventing such an injury as appellee received, it does not appear, in this case, that the injury was a probable consequence of appellant's violation of the statute. Nowhere in the record is the size of the cinder disclosed. Appellee claims to have removed two pieces of cinder from his eye; his witness, Heber Justice, a third piece; while Dr. Blain extracted a fourth piece. The piece extracted by the latter was about the size of the head of a pin. There was no testimony as to the size of the other pieces. Assuming that they were not separate cinders, but all particles of one cinder (a supposition not at all probable), and that all of the pieces were of the same size as the one extracted by Dr. Blain, it is manifest that all four pieces would have made but a small cinder. Indeed, the very fact that the cinder entered appellee's eye without striking the iris, and remained there, shows

that it was necessarily very small. To make out a case, it is not sufficient merely to show a defective spark arrester and an injury; the injury must have been the probable result of the defective apparatus. It does not appear that appellee's injury was caused by a cinder which a proper screen would have arrested. On the contrary, the evidence as to the size of the cinder is so conclusive as to make it reasonably certain that it would have escaped through a spark arrester of the most approved pattern. The failure to have a spark arrester was not then, the cause of appellee's injury, for the reason that the cinder would have escaped, notwithstanding the spark arrester.

Furthermore, it is manifest, from the language of the statute, that it was enacted to prevent injuries resulting from sparks of fire. It was not intended to apply to cinders small enough to enter the human eye. Indeed, the very effect of a spark arrester is to increase, rather than diminish, the danger to the eye. Large sparks may be seen and avoided; small ones penetrate the eye before we are aware of them. The spark arrester separates the sparks into particles, thus making them smaller and more likely to penetrate the eye. It can not be said, then, that the purpose of the statute is to avoid injuries made more likely to occur by a strict compliance with its terms. Trains must be run by engines. Engines are run by steam. Steam is produced by coal. Coal emits smoke and cinders. While it is possible, in a large degree, to prevent the emission of sparks of fire, it is also true that, up to this time, no device has been invented with openings sufficiently fine to prevent the emission from the coal now in use of cinders small enough to enter the eye, and at the same time permit the smoke itself to escape. Negligence can only arise from a failure of duty possible of performance. The law imposes no liability where human wisdom and foresight can not prevent the injury.

For the reasons given, we are of opinion that the trial court should have given a peremptory instruction to find for the appellant.

Judgment reversed and cause remanded, for further proceedings consistent herewith.

ISOM, &c. v. HOLCOMB.

(Filed May 8, 1908—Not to be reported.)

Pleading—Action to Enforce Lien—Infants—The material allegations of the petition were controverted by answer. To entitle the plaintiff to a judgment enforcing his lien, his allegations should have been supported by evidence, but, aside from this, under section 126, Civil Code, although no answer had been filed by the infants, it was necessary to prove the material allegations of the petition. In addition to these errors, no recovery could be had until the required affidavit was filed. (Section 3872, Kentucky Statutes.)

Fields & Fields and Ira Fields for appellants.

Salzer & Baker for appellee.

Appeal from Letcher Circuit Court.

Opinion of the court by Judge Carroll, reversing.

In 1903, the appellee, David Holcomb, filed his petition against the appellants, Mary Isom, who, before her marriage with William Isom, was the widow of Grant Holcomb, and the children of Grant Holcomb, averring that in 1893 he sold to Grant Holcomb, under a verbal contract, a tract of land containing one hundred acres, for the agreed price of three hundred dollars, \$138 of which had been

paid. That, when the sale was made, Grant Holcomb took possession of the land and occupied it until his death, after which time his widow and children continued in possession. He averred a willingness to execute to the heirs a deed for the land in conformity with the contract, provided they should pay him the sum of \$162.00, the balance due—or, that the contract be rescinded and that he be restored to the possession of the land. The children being under the age of twenty-one, a guardian ad litem was appointed for them, and they also filed an answer by their mother, as next friend and guardian. In this answer, they denied that there was no written memorial of the contract between David and Grant Holcomb, or that he agreed to pay for the tract of land three hundred dollars, or any price, except three dollars per acre; or that there was due him on the purchase price of the land any sum except \$42.00. For further answer, they set up that Grant Holcomb purchased all the land in a certain boundary, to which David Holcomb could make a good title, the number of acres to be ascertained by survey. That, in pursuance to this agreement, the land was surveyed and it was found to contain only sixty acres, which, at the agreed price of three dollars per acre, would make the purchase money \$180.00, of which \$138.00 had been paid—leaving a balance of \$42.00, which had theretofore been and was again tendered to David Holcomb. They further averred that, after the purchase, Grant Holcomb made lasting and valuable improvements on the land to the amount of \$944.00. They expressed a willingness to perform the contract and pay David Holcomb \$42.00, or a greater sum at the rate of three dollars per acre, if the tract of land was found to contain more than sixty acres. They asked that plaintiff convey to them the land, or, failing in this, that they recover of him the value of the improvements placed thereon.

By order of court a survey was made, but the record does not show the number of acres found by the surveyor.

Afterwards, by agreement of parties, the affirmative matter contained in the answer was traversed of record. No evidence was taken by either party, or exhibits filed, nor was there any affidavit that the claim asserted for the balance of the purchase money was just. With the record in this condition, the court, at the September term, 1905, entered a decree adjudging that Grant Holcomb was indebted to David Holcomb in the sum of \$162.00, for the balance of the purchase money, and that he had a lien to secure the payment of it on the tract of land described in the petition; and directed a sale of so much thereof as might be necessary to satisfy the indebtedness.

In pursuance of this judgment, the land, after having been appraised at \$1,000.00, was sold and purchased by one R. J. Holcomb for \$230. The purchaser executed bond, with David Holcomb as surety. Afterwards, by an order of court, the equity of redemption was ordered to be sold, and, after being appraised at \$500.00, it was sold to David Holcomb for \$149. We have not made a calculation, but it appears that both sales realized a sufficient sum to pay the debt, interest and costs. A deed was made, conveying the property to David Holcomb.

The appeal before us was granted on behalf of the infants, by the clerk of this court, and we are asked to reverse the judgment of the lower court because of error committed in rendering it before any proof was taken to sustain the averments of the petition.

Although all the material allegations of the petition were controverted by the answer, the court rendered a judgment giving to plaintiff the relief prayed for in his petition. With the pleadings in this condition, it was necessary, to entitle the plaintiff to the relief prayed for, that he should have supported by evidence the allegations of his petition. Failing in this, he was not entitled to take judgment as if by default for the amount claimed. Aside from this, under section 126, of the Civil Code, although no answer had been filed by the infants, it would have been necessary to prove the material allegations of the

petition. In addition to these errors, under section 3872, of the Kentucky Statutes, no recovery could be had for the demand sued upon until the required affidavit was filed.

Upon a return of the case, the lower court will set aside the sales and order a survey made, for the purpose of ascertaining the quantity of land in the boundary described in the petition, to which David Holcomb can make good title—unless it has heretofore been done—and, as David Holcomb has expressed a willingness to execute the contract, upon payment to him of the amount due on the purchase price, with interest from November 30, 1893, until paid, estimating the land to which he can make title, at three dollars per acre, to be credited by \$118, as of November 30, 1893, and \$20, as of November 30, 1897—the court will, if it is deemed best for the infants, accept from David Holcomb a deed to the widow and children—the widow to have the same interest therein as if Grant Holcomb had died the owner thereof. If the persons representing the children, do not desire to pay the purchase money herein named, or the court does not deem it best for their interest, then the case may be referred to a commissioner to ascertain the value of the permanent and lasting improvements, if any, placed thereon by Grant Holcomb and appellees, and the reasonable rental value of the land during the time they have been in possession. If there is found to be any sum due them, they will be given a lien on the land to secure the same, as well as the amount of purchase money paid, viz: \$138, with interest, and if it is not paid by David Holcomb, the land will be sold to satisfy the amount found due appellee. In other words, the case will be adjudged by the chancellor, according to equitable principles.

Wherefore, the judgment is reversed, with directions for a new trial, in conformity with this opinion.

STARETT v. C. & O. RY. CO., &c.

(Filed May 8, 1908—Not to be reported.)

1. Railroads—Injury to Trespasser—Drunk or Unconscious—Lookout—Appellant had no right upon the track of appellee at the place he was injured, and, therefore, the company owed him no lookout duty whatever. The question whether he was drunk or unconscious from sickness was immaterial.

2. Instructions—Expert Testimony—Physical Facts—An instruction that expert testimony must give way to physical facts, was erroneous. It invaded the province of the jury, telling them what weight to give to evidence. It was also error to instruct the jury that, after seeing appellant, the engineer was not required to stop the train, that the presumption was that he would heed the warning and leave the track in time to prevent the injury. Had the man been standing on the track, it might be different, but a man sitting on a cross-tie of a railroad track asleep or unconscious presents an unusual spectacle, and it was the province of the jury to determine whether or not an engineer of ordinary prudence, seeing a man in such situation, ought not to commence to check his train in time to prevent the injury, should it transpire that he was unconscious or asleep.

A. D. Cole for appellant.

W. H. Wadsworth, LeWright Browning and Worthington & Cochran for appellees.

Appeal from Mason Circuit Court.

Opinion of the court by Judge Barker, reversing.

The appellant, Edward Starett, either under the influence of liquor, or being sick and faint, sat down on the end of a cross-tie of appellee's railroad track, just outside of Maysville, Kentucky. He rested his elbows on his knees and his face in his hands, and went to sleep, or became unconscious. While in this position, one of appellee's trains passed along and knocked him off the track, inflicting severe personal injuries, one of which required the amputation of an arm at the shoulder joint. To recover damages for this injury, which he alleged to have been the result of the negligence of those in charge of the train, he instituted this action.

Appellant was clearly a trespasser, and, therefore, the company owed him no duty, except that of ordinary diligence to prevent injuring him after his peril was actually discovered by those in charge of its train. The question as to whether or not the appellant was drunk, or unconscious from sickness, was immaterial. He had no right upon the track of appellee at the place where he was injured, and, therefore the company owed him no lookout duty whatever. (C. N. O. & T. P. Ry. Co. v. Reynolds' Adm'r, 31 Ky. Law Rep., 529.)

The circuit judge properly sustained the exceptions to C. M. Barnett's deposition, because the notice to appellee's counsel was not sufficient, under the Code. Appellant should have retaken the deposition if he desired to use it upon the trial.

Instruction No. 7, given by the court, is as follows: "The court instructs the jury that the opinion of expert witnesses in this case, when opposed to the physical facts proven, must give way to such physical facts." This instruction is clearly erroneous. It invades the province of the jury, and tells them what weight to give to the evidence. In addition to this, we do not understand the application of the instruction to the facts in this case. The expert testimony went simply to the ability of the engineer to stop the train in a given distance, and we can not recall any physical facts proved which would conflict with this evidence. At best, the instruction is a mere legal abstraction, and is bad for that reason, if no other.

We think instruction No. 6 should have been omitted altogether.

Instructions Nos. 1 and 2 should have been embraced in one instruction, and the court should have omitted that part of instruction No. 2 which told the jury that, after seeing the appellant sitting on the cross-ties, the engineer was not required to check the speed of the train or to stop it, "but they had the right to presume plaintiff would heed the warning and leave the track in time to prevent the injury, and this presumption prevailed and lasted until the defendant, Donehoo, saw, or had reasonable grounds for believing, that plaintiff did not intend to leave the track, or was oblivious to his surroundings." In this case, as said before, it is not questioned that the appellant was a trespasser, but the evidence tends to show—and, we think, does show—that the engineer actually saw appellant at a sufficient distance to have stopped the train in time to prevent injuring him. We do not think that, as a principle of law, it can be stated that, where a trespasser is seen sitting upon the track, with his head in his hands and his hands resting on his knees, apparently asleep or unconscious, the presumption is that he will hear and obey the signals of the engineer, warning him of the approach of the train. This, undoubtedly, would be true if the trespasser were walking or standing on the track. In that case, the very fact that he was moving or standing up would indicate that he was not asleep or unconscious, but had possession of his faculties, and the engineer would have the right to suppose that he would hear and obey the danger signals. But the same rule would not necessarily prevail where the situation is as detailed in this case. A man sitting on a cross-tie of a railroad track, apparently asleep or unconscious, presents an unusual—not to say extraordinary—spectacle, and we think it was the province of the jury to determine whether or not an engineer of ordinary prudence, seeing a man so situated, ought

not to commence checking the train in time to prevent injuring him if it should transpire that he was unconscious or asleep. Our view as to what the court should have said on the subject of appellant's apparent peril, when seen by the engineer, sitting on the track, is expressed in an instruction directed to be given by the trial court in the opinion in the case of *Hovius v. Cincinnati, New Orleans & Texas Pacific Ry. Co., &c.*, 32 Ky. Law Rep., 786; and upon another trial of this case, we suggest that the principle therein expressed be incorporated in the instruction to the jury in this case, if the facts are substantially the same as upon the former trial.

The evidence as to appellant's having been drunk on other occasions than the day on which he was injured was incompetent, as it tended to throw no light upon his condition at the time he was hurt; and, as said before, the question as to whether or not he was drunk, or unconscious from sickness, is immaterial. If it was sought to show that appellant was an habitual drunkard, for the purpose of affecting the question of damages, by reason of his being incapacitated for further labor, then the evidence should have been limited by the court to that question.

For these reasons, the judgment is reversed for a new trial consistent with this opinion.

HOUSMAN v COMMONWEALTH.

(Filed May 7, 1908—To be reported.)

1. Criminal Law—Trial for Murder—Death from Wound—Doubtful Proof—Conviction for Malicious Cutting—Legality of Instruction—On the trial of one indicted for murder by willfully cutting and wounding another with a knife, where the deceased lived for some time after the difficulty, and the proof was conflicting as to whether he died of the wound inflicted or from improper treatment, it was proper for the court to instruct the jury under section 1166, Ky. Statutes, for malicious cutting and wounding, and also under section 1242 for cutting in sudden heat and passion, and a verdict for malicious cutting was properly rendered.

2. Misconduct of Commonwealth's Attorney—Argument to Jury—Limitations Allowable—Much latitude is allowed the Commonwealth's Attorney in the presentation of his case to the jury, the only limitation being such as require him to confine himself to the facts introduced in evidence, and the fair and reasonable deductions and conclusions to be drawn therefrom, and, bounded alone by these limitations, he may, with propriety, appeal to the jury with all the power, force and persuasiveness which his learning, skill and experience enable him to command, and of this character of argument the accused can not complain.

McCormac & Warren and B. C. Seay for appellant.

James Breathitt, Theo. B. Blakey, Thos. B. McGregor, Chas. H. Morris and W. H. Hester for appellee.

Appeal from Graves Circuit Court.

Opinion of the court by Judge Hobson, affirming.

Appellant was indicted for the willful murder of Flem Poplin. On a plea of "not guilty" he was tried, convicted and his punishment fixed at imprisonment for five years in the penitentiary. To reverse that judgment this appeal is prosecuted.

He complains that the trial court did not properly instruct the jury, and that the prosecuting attorney, in his closing argument, was guilty of such misconduct as warrants a reversal. His chief objection to the instructions is that the court instructed the jury under sections 1166 and 1242, of the Kentucky Statutes, in addition to the usual instructions given on a trial where the charge in the indictment is murder. The deceased lived for some time after the difficulty, and much evidence was introduced on the trial tending to show that his death was due to a lack of treatment or improper treatment, rather than to the wound with the knife which had been inflicted by appellant. To meet this phase of the case the trial judge instructed the jury that if they believed appellant willfully, feloniously and not in his necessary self-defense, cut and wounded, Flem Poplin with a knife, a deadly weapon, with intent to kill him, but from which cutting and wounding he did not die, then they should find him guilty of malicious cutting and wounding, and fix his punishment at not less than one year nor more than five years imprisonment in the penitentiary (as authorized by section 1166, Ky. Statutes). The court also instructed the jury that if they believed the cutting was done in sudden heat and passion, and without malice, and that death did not result therefrom, then they should find the accused guilty and fix his punishment as defined by section 1242, of the Kentucky Statutes, at a fine of not less than \$50 nor more than \$500, or confinement in the county jail for not less than six months nor more than twelve months, or both, in the discretion of the jury.

The jury, in their verdict, stated that they found the accused guilty of malicious cutting.

By section 202, of the Criminal Code, upon an indictment for an offense the defendant "may be found guilty of any offense included in that charged in the indictment." By section 263 an offense and the attempt to commit the offense, if the attempt be punishable, may be punished under an indictment for the offense; and, by section 264, if an offense be charged to have been committed with particular circumstances, the offense without the circumstances or with part only is included in the offense; although that charged may be a felony and the offense without the circumstances a misdemeanor only.

The precise question arising in this case was decided by this court in *Bush v. Commonwealth*, 78 Ky., 238. In that case, as here, there was proof tending to show that the death of the deceased was due to another cause. The circuit court refused to instruct the jury as to malicious wounding. For this cause the judgment was reversed. The court, by Judge Hines, said:

"If a new and wholly independent instrumentality interposed and produced death, it cannot be said that the wound was the natural or proximate cause of the death. (14 Gratton, 601, *Livingston v. Commonwealth*). This view of the law was not so presented to the jury as to give the appellant its full benefit. It should have been clearly and definitely presented to the jury, that, if they believed, from the evidence that death would not have resulted from the wound but for the intervention of the disease, they should not find the accused guilty of murder or manslaughter, but that they should find him guilty of willful and malicious shooting and wounding, under section 2, article 6, chapter 29, General Statutes; or of shooting and wounding in sudden affray, or in sudden heat and passion, without malice, under section 1, article 17, chapter 29, General Statutes, section 262, of the Criminal Code, reads:

"Upon an indictment for an offense consisting of different degrees, the defendant may be found guilty of any degree not higher than that charged in the indictment, and may be found guilty of any offense included in that charged in the indictment."

"While the offenses denounced in section 2, article 6, chapter 29, of the General Statutes, and in section 1, article 17, of the same chapter, are not degrees of the offense charged in the indictment, they are, in the language of the section quoted from the Code, 'included' in the offense charged." (See also to same effect *Payne v. Commonwealth*, 20 Ky. Law Rep., 475.)

In the case at bar the circuit court followed the rule laid down in these cases. *Bush v. Commonwealth* was approved in an opinion by Judge Lewis, in *Fenston v. Commonwealth*, 82 Ky., 549, and in *Barnard v. Commonwealth*, 94 Ky., 285, where the court by Judge Bennett, said:

"Here the crime of assaulting with intent to rob can not be made out without establishing an assault or assault and battery with such intent; and if the assault is committed without the additional circumstances of an intention to rob, then the assault is but a mere misdemeanor. But the intent to rob, and a conviction for it, absorbs the misdemeanor, into the higher crime of felony; so likewise the higher crime of murder absorbs the offense of the mere assault and battery. But if the murder be not established, the party may be punished for the assault and battery, and if the person was not convicted of the assault with intent to rob, but committed a common assault and battery, he may be found guilty of a misdemeanor, because it is but a degree of the crime of assault with intent to rob."

These principles were followed in *Fagan v. Commonwealth*, 38 S. W., 430; *Parrott v. Commonwealth*, 47 S. W., 452, and *Commonwealth v. Yarnell*, 68 S. W., 136. The rule thus laid down by this court is approved by the text writers. In Bishop's *New Criminal Law*, volume 1, section 780, the rule is thus stated:

"In felonious homicide, committed by an assault and a beating, there may be a gradation of offenses, the particulars of which will somewhat vary with the laws of the State in which it is committed. The lowest offense will be assault, the next above it will be battery, the next will sometimes be assault with a dangerous weapon with intent to kill, the next manslaughter, the next murder, and the last murder in the first degree. Each one of these, except the last, will be a less crime included in the greater. And where the common law rule that there can be no conviction for misdemeanor on an indictment for felony does not prevail, a person on trial for any higher one of these offenses may be convicted of any lower one which the proofs establish, if the indictment is, as it always may be made, in a form to include the lower."

The statement of the text is fully borne out by the adjudicated cases where the statutes are similar to those in force here. Thus in *State v. Parker*, 66 Iowa, 586, under a statute just the same as ours sustaining a conviction for an assault with intent to commit great bodily injury, under an indictment for murder, the court said:

"It can not be doubted that an assault is included in the crime of murder. Usually an indictment, in express words, charges an assault with felonious intent. Of necessity, an assault must have been literally committed in all cases of murder by direct violence. The intent with which the assault is committed relates to its character and indicates its degree. It is discovered, not in the extent or nature of the violence, but in the animus of the perpetrator. It follows that an assault, whether with an intent to murder, to maim, or to inflict a great bodily injury, is included in the crime of murder."

The same ruling was made under similar statutes in *Alabama*, (*Daughdrill v. State*, 113 Ala., 7; *Thomas v. State*, 27 So., 920; *Letcher v. State*, 39 So., 922; in *Texas*, *Green v. State*, 8 Tex. App., 71; *Bean v. State*, 25 Tex. App., 343; in *Kansas*, *State v. O'Kane*, 23 Kans., 244; in

Nevada, *Ex Parte Curnow*, 21 Nevada, 33; in Vermont, *State v. Scott*, 24 Vermont, 427; in Massachusetts, *Commonwealth v. Goodhue*, 2 Met., 193, in Delaware, *State v. Fleetwood*, 35 A., 775; in Ohio, *State v. Dowell*, 1 Ohio Dec., 38; in Arkansas, *Davis v. State*, 45 Ark., 464; in Tennessee, *Lang v. State*, 16 Lea, 433; in Georgia, *Thomas v. State*, 121 Ga., 331; *Smith v. State*, 126 Ga., 544; *Watson v. State*, 116 Ga., 607; in Arizona, *Mapula v. Territory*, 80 P., 389.) In all of these cases cases the indictments were for murder and the defendant was held punishable for assault. There are a great number of cases applying the same principles to other offenses, but it is deemed unnecessary to cite from other States any but cases of homicide. The decisions, as Mr. Bishop well says in the note to the section quoted, "are not discordant."

The case of *Buckner v. Commonwealth*, 14 Bush, 603, simply follows *Connor v. Commonwealth*, 13 Bush, 722. There is nothing in either of these cases conflicting with those cited above. They were decided by the same court that decided *Bush v. Commonwealth*. *Buckner v. Commonwealth* being also written by Judge Hines who wrote the opinion in *Bush v. Commonwealth*. The rule which was followed in *Bush v. Commonwealth* was pressed upon the court in *Connor v. Commonwealth*, and the court held that the rule did not apply to the case then before it for the reason that an indictment to be good for the statutory offense referred to must negative the exceptions contained in the statute, and this an indictment for murder does not do. The court, on page 721, thus sums up its conclusion:

"The appellant may have been willing to reply that the Commonwealth could not prove either malice or an intention to kill the deceased; and, not having been notified by the indictment that there would be an attempt to prove that the deceased died within six months may have omitted to prepare that he did not. Not only so, but it is a well settled rule of criminal pleading that an indictment for an offense created by statute must describe the offense in the words of the statute, or in words of similar import. (1 Bishop's Crim. Proc., section 360; *Commonwealth v. Turner*, 5 Bush, 317; *Commonwealth v. Tanner*, 8 Bush, 2.) And it is also a rule of such pleading that if the statute creating an offense contains in its enacting clause exceptions, it is necessary to negative such exceptions in the indictment, so as to show that the defendant does not come within any of them."

The rule announced in the *Connor* case was applied in *Commonwealth v. Heath*, 99 Ky., 182, and is also followed harmoniously by the courts of other States. (22 Cys., 467.) The authorities harmoniously support the rule and also as one of the exceptions to it that there can be no conviction for the lesser offense where the allegations of the indictment are not sufficient to sustain a conviction for it. Both the *Connor* case and the *Bush* case are, as to this, in accord with the authorities generally. In a case of willful shooting, if death results, the offense is murder. (*Rapp v. Commonwealth*, 14 B. Mon., 499.) Where, therefore, murder is charged in the indictment and the proof fails to establish the circumstance that the person wounded died of the wound in a year and a day, the case falls literally within the provision of section 264, of the Code, above referred to.

Complaint is made of the argument of counsel for the Commonwealth in closing the case. Much latitude is, of necessity, allowed an attorney in the presentation of his case, the only limitations being such as require him to confine himself to the facts introduced in evidence and the fair and reasonable deductions and conclusions to be drawn therefrom, and the application of the law, as given by the court, to the facts proven. Controlled, regulated, and bounded alone by these limitations an advocate may, with perfect propriety, appeal

to the jury with all of the power, force and persuasiveness which his learning, skill and experience enable him to command, and of this character of argument the accused may not complain, even though he feels that his conviction may be traceable more directly to the argument of counsel than to the facts proven.

Judgment affirmed.

O'BANNION'S ADM'R v. SOUTHERN RAILWAY CO. IN KY.

(Filed May 12, 1908—Not to be reported.)

Edwards & Godson for appellant.

Wallace & Harris and Edward Colston for appellee.

Appeal from Woodford Circuit Court.

Judge Nunn delivered the following dissenting opinion:

I agree, in the main, with the facts stated in the opinion, except it magnifies the size of the train and the down grade on which it was running, and leaves the impression that the train was moving fast upon a down grade and, therefore, was hard to control. The proof shows that it was up grade to the point where the engineer and fireman were first seen on the curve, each looking out of the window on his side; and a witness who saw the train before it reached the curve, testified that it was moving very slowly when it reached that point. The proof also shows, without contradiction, that the train was stopped within the distance of two hundred and fifty-one feet from the place where the alarm whistle was sounded, and from the time those in charge undertook to stop it, which shows that it must not have been running at a rapid rate of speed. The opinion concedes that there was some evidence showing that those in charge of the train must have seen the child, if it was upon the track, for a distance of five hundred and forty-nine feet, and those in charge of the engine could have saved it, but says that there was no evidence showing that the child was upon the track, except at the place and at the moment it was killed. It is true that no eye witness stated to the contrary, but the circumstances proven show that it was reasonably certain that the child was on the track and had moved, after getting on it, a distance of seventy-five feet. The proof shows, without contradiction, that the child left the yard through a hole in the fence and passed down a little path to the track and at that point, and in the center of the track, it left its little red bonnet and moved seventy-five feet in the direction in which the train was going, at which point it was killed. Considering the place where the bonnet was found, and the age of the child, it is reasonable to infer from the proof that the child passed down this little path, got upon the track and tottled down the track in an attempt to follow its mother, who had shortly before left the house, going in that direction, to gather turnip greens. But the court says the bonnet at that place was no evidence that it was dropped at that point by the child; that the wind might have moved it to that place. That might be true, but there is no evidence of any wind blowing that day. The only place the child could have left the yard was through this hole in the fence, which is a strong circumstance that the child passed down this little path and left its bonnet where it got upon the track. It may be that the court, in speaking of wind, had reference to that produced by the train in passing, if so, it would have carried the bonnet in the direc-

tion of the child, and the distance would have been less than seventy-five feet, unless the bonnet had been dropped by the child further back than where the path enters upon the track. From the facts proven indicating the rate of speed of the train, it is clear that the train was not moving fast enough at that point to create a suction sufficient to move the bonnet, which was lying flat in the center of the track.

In view of these facts, I am of the opinion that there was sufficient evidence to authorize the court to submit the case to the jury.

The court says that this two-year-old child was a trespasser, yet it was incapable of any discretion. It is a lamentable fact, for which the court is not in any way responsible, that the General Assembly of the State of Kentucky has enacted a law requiring those in charge of trains to keep a lookout for stock upon the track to keep from killing or injuring it; yet, they have not enacted any law for the protection of children who have not arrived at the age of discretion and accountability. It seems that it felt a greater concern for the protection of property than for human lives. The statute was passed for the protection of stock upon the idea that it could not think and act with reason, therefore, it must be protected by those in charge of trains. Is there not a greater reason for the protection of infants under the age of discretion?

WEBB v. COMMONWEALTH.

(Filed May 12, 1908—Not to be reported.)

1. Homicide—Idiots—Continuance—Affidavit for—It was not error to refuse the continuance asked for on the ground that the absent witness, if present, would testify that defendant was so feeble-minded that he did not know right from wrong, and had always been in that condition. The court properly refused the continuance on the ground that such a fact was susceptible of proof by other witnesses who were easily accessible.

2. Same—Idiocy is a state of mind that any one can distinguish as readily as the ordinary medical man.

3. Instructions—Defense of Another—In an instruction the right of the defense of another was predicated upon the fact that neither such other nor the accused, could have averted the apparent danger to the former by any other reasonably safe means. This is the law.

Harlin & White for appellant.

James Breathitt, Attorney General, and Thos. B. McGregor, Assistant Attorney General, for appellee.

Appeal from Barren Circuit Court.

Opinion of the court by Chief Justice O'Rear, affirming.

Appellant appeals from a judgment convicting him of murder. On the trial, his counsel relied on two defenses: First, that he was an idiot, not knowing right from wrong; second, that one Shirley, indicted with him as an aider and abettor, was in such imminent danger at the hands of the deceased as to make it apparently necessary to slay him to save Shirley; or, to state it differently, the necessary defense of another. The errors relied on for reversal are two. The first is, that the trial court refused appellant a continuance upon his affidavit, showing the absence of Dr. Winlow, a witness who had been

recognized in his behalf, but owing to his illness, could not attend the trial. It it stated that this absent witness was well acquainted with appellant, and would testify that he was so feeble-minded that he did not know right from wrong, and had always been in that condition; and that appellant's father was also an idiot. The court refused the continuance upon the ground, we presume, that such a fact, namely, that the defendant is an idiot, was susceptible of proof by any number of witnesses who were easily accessible; and that it was not shown in the application that the defendant could not establish the fact by any other witness. Unlike lunacy, which may be present in such a subtle form as to require the skilled student of mental diseases to discover it, idiocy is a state of mind that any one can distinguish as readily perhaps as the ordinary medical man. Several witnesses did testify for appellant that he had not a strong mind, and their testimony may be said to cover substantially the point upon which Dr. Winlow was desired to be introduced. In addition, the affidavit for continuance was allowed to be read to the jury as the deposition of Dr. Winlow. We are of opinion that the trial court did not abuse a sound judicial discretion in refusing the continuance. It is true that by virtue of a provision of the Constitution (section 11, Bill of Rights), the accused was entitled to compulsory process for his witness. But, unless it was shown that the witness would testify to some material and relevant fact which could not be established by other evidence accessible to the accused, and equally convincing in its probative value, then he was not entitled to have the trial postponed till he could get such witness. (*Kennedy v. Commonwealth*, 78 Ky., 447; *Robards v. Commonwealth*, 94 Ky., 499.)

The second ground urged for reversal is that the trial judge, in instructing the jury upon the right of defense of another, predicated such right upon the fact that neither such other nor the accused could have averted the apparent danger to the former by any other reasonably safe means. This, we think, is the law. The person put in jeopardy of life or limb by an assailant may strike to the death, even if apparently necessary, to save himself. What he has the right to do, another has the right to do in his behalf. But although the person assailed might not have had any other way of averting the danger to himself, than to kill his assailant, still if his rescuer could, with reasonable safety to himself and him who is assaulted, avert the danger to the latter without taking the life of the assailant, he must do so.

The trial court did not err in the rulings upon either of the grounds relied on.

Judgment affirmed.

SILER v. JONES, &c.

(Filed May 12, 1908—Not to be reported.)

1. Written Instruments—Construction of—The writings or deeds herein considered do not evidence a purchase and sale of the property in controversy, but are testamentary in character, therefore, appellant and his sister should contribute from the shares they received from their mother's estate to their brothers and sisters, so that all would be equal.

2. Limitation—Must be Pleaded—Limitation, to be available, must be pleaded, and can not be reached by demurrer. (80 Ky. Law Rep., 25.)

E. L. Stephens and H. H. Tye for appellant.

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R. L. Pope and Greene & VanWinkle for appellees.

Appeal from Whitley Circuit Court.

Opinion of the court by Judge Lassing, reversing.

Appellant filed suit in the Whitley Circuit Court against appellees, in which he alleged that Emily Siler died in October, 1890, leaving surviving her six children and three grandchildren, only heirs at law of a deceased daughter. That, since the date of her death, Polly Jones, one of her daughters, has died, leaving surviving her Bertha Jones, her only child, and John Jones, her husband. That, shortly prior to her death, Emily Siler was in the possession of and claiming title to a considerable body of land, which she had received from her father, Benjamin Rose. That, in the year 1890, and but a short time before her death, and, while she was in ill health, she undertook to divide among her children her landed estate, and as a means to this end, she executed writings whereby she attempted to convey to her said children the shares or parts which she desired them to have. That the writings by which the said lands were conveyed to her children were testamentary in character, and, while they were executed as and for deeds, they were, in fact, intended to operate as a will. That the clause "And \$100, paid in hand," was placed in the said instruments of writing after their execution and without the knowledge of Emily Siler. That no part of the \$100 mentioned in the writing was in fact paid. It is further alleged that, in 1887, one Wilmer Siley had instituted a suit contesting the right and title of Emily Siler in, and to, two hundred acres of the land which she was claiming and which she conveyed to her children. That, in 1893, this litigation was decided adversely to Emily Siler, so that those of her children to whom she had given the land in question were deprived of the portion of her estate which she had attempted to give them. That, after the determination of this suit, his brothers and sisters, whose land had been taken from them, asserted an interest in the lands which had been conveyed to plaintiff and Polly Jones, which lands were all of the lands not involved in the litigation in question. That thereupon plaintiff, and his sister, Polly Jones, sought the advice of counsel, and, having become satisfied that their brothers and sisters had an interest in the land which their mother had conveyed to them, he and his sister thereupon agreed that he should buy out the interest of the other heirs in and to the land in question. That, acting under this agreement, he had so purchased the shares of all of the children of Emily Siler and of the grandchildren therein. That his sister, Polly, never repaid to him any part of the purchase money so expended by him. That she fully understood and appreciated all that had been done, and that at the date of her death, she only claimed an undivided one-seventh in and to the land in question.

He asked that the deeds be canceled, and that he be adjudged the owner of an undivided six-sevenths interest in the tract of land, and that the appellees, as the only heirs at law of his sister, Polly, be adjudged the owners of the remaining undivided one-seventh interest therein. That, inasmuch as the land could not be divided, he asked that it be ordered sold and the proceeds divided among himself and the appellees, according to their interests. Copies of the deeds from his mother to himself and his sister were filed with, and made part of, the pleadings. To this petition a demurrer was sustained with leave to amend, and plaintiff declining to amend, the petition was dismissed, because of which ruling he appeals.

The first question which we deem it necessary to determine, is the character of the writing by which Emily Siler attempted to invest her children with the title to the land. Was this a sale and conveyance for a valuable consideration, or was it a gift and testamentary in

character? It is alleged, in the petition, and for the purposes of the demurrer, is taken as true, that the recitals set out in the deeds of a consideration of \$100 paid was placed therein after the execution of the papers, and without the knowledge or consent of the grantor. Each of the papers recites that, for and in consideration of "will" the conveyance is made. Each deed contains the provision that the property shall not be disposed of during the life of the grantor except with her consent. Hence, the very language used in drafting the writing shows that the grantor regarded them as testamentary. She was aiming to make an equal division of her estate among her six living children and the heirs at law of her deceased daughter. She executed to each a similar writing. After her death the title to five of the tracts of land which she undertook to give to five of her children proved to be invalid, and the land was taken from them and plaintiff and his sister, Polly, were left possessed of all of the landed estate which their mother owned, while their brothers and sisters and the children of their deceased sister got nothing. When this condition arose, after having consulted with lawyers, it was agreed by himself and his sister, Polly, and the other heirs of his mother, that they were all entitled to share equally in the lands which his mother had deeded to himself and his sister, Polly, and that, by special agreement and arrangement between himself and his sister, Polly, made, the record does not show when, but certainly after 1893, he bought out the interest of the other heirs, with the express understanding and agreement that his sister, Polly, should she desire to do so, could pay one-half of the money so expended by him in purchasing the interest of the other heirs, and retain one-half of the land. That the said sister entered into this agreement with him is admitted by the demurrer, and it is further admitted that, at the date of her death, although still in the possession of the deed which her mother had executed to her, she was claiming but a one-seventh interest in the land, recognizing title in her brother to the remaining six-sevenths.

There is nothing in the record to show when this agreement between plaintiff and his sister, Polly, was consummated, further than that it must have been done at sometime between 1893 and the death of his sister, Polly, and the record is silent as to when this occurred. The agreement between himself and his sister, as set up in the pleading, under which he purchased the interests of his brothers and sisters in the land, is not such an agreement as the law requires to be in writing, and hence, it does not fall within the Statute of Fraud. Nor does it come within the rule laid down by this court in the cases of the Commonwealth v. C & O. R. R. Company, 94 Ky., 16, and Howton v. Gilpin, 24 Ky. Law. Rep., 630; for it was not an agreement on his part to purchase land for her, but was an agreement entered into between them by which he was to purchase the interest of his brothers and sisters in the land in question. It is true that it is alleged that she had the right to pay one-half of the purchase price and take one-half of the land, still, it was not obligatory on her that she do so. She furnished no part of the money, but, having recognized the right of her brothers and sisters to an interest in the land, and having encouraged and induced her brother, the plaintiff, to purchase same, she would be estopped from denying his title under said purchase. Section 2077, Kentucky Statutes, provides as follows:

"When any real or personal estate shall be devised to any one of the heirs at law of the testator, and the title to the same, or any part thereof, shall prove invalid, such devisee shall have contribution from the others unless it shall appear from the will, that such was not the intention of the testator."

Being of opinion that the writings or deeds under consideration do not evidence a purchase and sale of the property, but are testamentary in character, as a matter of equity and right plaintiff and his sister, Polly, should have contributed from the shares which they received

from their mother to their brothers and sisters, so as to make them all equal, and especially should they be permitted to do so, when it is alleged that they had agreed to and wanted to do so. Appellees occupy no better position than Polly Jones would occupy, if living, and if she, by her conduct and agreement, induced her brother, the appellant herein, to purchase five-sevenths of the land, under a statement that she was not claiming same nor asserting title thereto, they are now estopped from denying his right thereto, unless by his own laches he has lost that right. This latter question is not now before us, nor have we in any wise considered the question of limitation herein, for the reason that this court, in the case of *Swinebroad v. Wood*, 30 Ky. Law Rep., 25, has expressly decided that the defense of limitation, to be available, must be pleaded, and cannot be reached by demurrer. Taking the allegations of the petition as true, if appellees do not elect to pay to appellant one-half of the money which he paid out for the five-sevenths of the land so purchased by him, with interest from the date of its payment by him, the land should be sold, and, out of five-sevenths of the proceeds thereof, appellant should be paid his money, with interest. If anything remains, appellant should receive one-half thereof and appellees one-half. Of the remaining two-sevenths of the proceeds of the sale, one part should be paid to appellant and one part to appellees.

For the reasons indicated, the judgment is reversed and remanded, for further proceedings consistent with this opinion.

DUPOYSTER v. TURK.

(Filed May 12, 1908—Not to be reported.)

Lands—Quieting Title—Section 11, of the Kentucky Statutes, authorizes the institution and maintenance of an action to quiet title by one who owns the title and is in the actual possession of the land. As appellant did not have the actual possession of the land at the time he instituted the action, his petition was properly dismissed.

Turner & Turner for appellant.

John E. Kane for appellee.

Appeal from Carlisle Circuit Court.

Opinion of the court by Judge Barker, affirming.

This action was instituted in the Carlisle Circuit Court for the purpose of quieting the plaintiff's (appellant's) title to a tract of land containing nine hundred acres, and known as Cane Island, situated in Carlisle County, on the banks of the Mississippi river. The petition alleges title to the land to be in the plaintiff, and that he had been in the actual, adverse possession of it for fifty years prior to the institution of the action. The appellee (defendant) controverted all the allegations of the petition and pleaded title in himself.

Cane Island ought more properly to be described as a peninsular, it being ordinarily bounded by water on three sides; but when the Mississippi river is high, the back water makes it an island.

The evidence shows, without contradiction, that in 1897 the appellee purchased all of the land in controversy from parties claiming to own it, and that they executed to him a deed therefor, which he placed upon record in the Carlisle county court; that thereupon he took actual possession of the land, constructed a four-strand barbed-wire fence

across the neck of the peninsular, thus enclosing it; erected buildings upon it, and has had the actual possession thereof ever since.

Section 11, of the Kentucky Statutes, authorizes the institution and maintenance of such an action as this by one who owns the title, and is in the actual possession of land. These two facts are essential to its maintenance. As the appellant did not have actual possession of the land at the time he instituted his action, his petition was properly dismissed. (*Cornellison v. Foushee*, 101 Ky., 261; *Smith v. White*, 19 Ky. Law Rep., 802; 41 S. W., 436; *Packard v. Beaver Valley Land & Mineral Co.*, 96 Ky., 252; *Smith v. Lewis*, 21 Ky. Law Rep., 400; 55 S. W., 551; *Armitage v. Wickliffe*, 12 B. Mon., 494; *Smith v. Gatliff*, 9 Ky. Law Rep., 533, 5 S. W., 558; *Moses v. Gatliff*, 11 Ky. Law Rep., 356, 12 S. W., 139.)

Judgment affirmed.

LOUISVILLE & NASHVILLE RAILROAD CO. v. MELTON.

(Filed May 13, 1908—Not to be reported.)

Benjamin D. Warfield and Waddill & Dempsey for appellant.

Clay & Clay and Gordon, Gordon & Cox for appellee.

Appeal from Hopkins Circuit Court.

Judge Hobson delivered the following response to petition for rehearing, overruling same.

We are unable to see that the Indiana Statute, as construed is in violation of the fourteenth amendment to the Constitution of the United States, or that any right guaranteed thereby is denied by the decision in this case. We endeavored to show this in the original opinion. We are also unable to see that the conclusion we reached is not in keeping with the construction of the statute by the Supreme Court of Indiana. Our conclusion is sustained by the following cases in other States under similar statutes; *Georgia, &c., R. R. Co. v. Miller*, 90 Ga., 571; *Railroad Co. v. Kochler*, 37 Kans., 463; *Georgia, &c., R. R. v. Hicks*, 22 S. E., 613; *Campbell v. Cook*, 86 Texas, 630; *Galveston, &c., R. R. v. Mohrman*, 93 S. W., 1090; *Sherman v. Texas, &c., R. R.*, 91 S. W., 561. *Hancock v. Norfolk, &c., R. R.*, 32 S. E., 679; *Rutherford v. Southern R. Co.*, 35 S. E., 136; *Mott v. Southern R. Co.*, 42 S. E., 601; *Sizemore v. Southern R. R. Co.*, 47 S. E., 420; *Nicholson v. Transylvania R. R. Co.*, 51 S. E., 40; *Texas R. R. v. Carlin*, 111 Fed., 777; 189 U. S., 354; *Edge v. R. R. Co.*, 104 S. W., 90.

The petition is overruled.

NOLAND v. STACY.

(Filed May 13, 1908—Not to be reported.)

Under the statutes the children mentioned in this action are barred from taking an appeal from the order probating the will of their father, as more than five years have elapsed from the date of probate in the county court, and they are barred from filing an action to impeach the order as they brought no such action within twelve months after their arrival at age.

Riddell & Friend for appellant.

Clarence Miller for appellee.

Appeal from Estill Circuit Court.

Opinion of the Court by Judge Nunn, affirming.

It appears that appellee, Elizabeth Stacy, is the widow of Alden Stacy, who departed this life in February 1900, leaving a will by which he devised to his widow all of his property in fee. The will was duly probated in the Estill county court in the month of March, 1900, and the order of probate has never been set aside, modified or appealed from.

Appellant, A. D. Noland, purchased from appellee a tract of land, which was devised to her by her husband, at the price of \$4,000.00. He paid \$3,000.00 of it and this suit was brought to recover the balance of \$1,000.00 and to enforce the lien on the land for its payment. Appellant answered, setting up the will of Alden Stacy and the order probating it, and alleged that it had never been appealed from, vacated or modified, and also alleged that deceased, Alden Stacy, had a daughter, Paulina, who married S. M. Tipton and died before her father, leaving Forrest and Bessie Tipton, her only children and heirs at law, they then being infants having no guardian, curator or committee known to him in this state, and that Forrest and Bessie Tipton have now arrived at the age of twenty-four and twenty-two respectively, and that, by reason of their being infants, at the time of the probate of the will, they have the right to appeal from the order probating same, and to have it set aside and that they have an interest by descent from their father, A. Stacy, in this land; and alleged that the title conveyed by appellee to him is imperfect, and asked that these children be brought before the court and required to assert their interest in this land, if any they had. A demurrer was sustained to this answer, and, appellants refusing to plead further, the court rendered judgment against him for the \$1,000.00, enforced the lien and directed the land to be sold to satisfy it.

The only question presented on this appeal is whether or not the will of Alden Stacy, namely, Forrest and Bessie Tipton, are barred by limitation from appealing from the order of the county court probating the will. By section 4850, of the Kentucky Statutes, it is provided that an appeal from an order of the county court probating or rejecting a will to the circuit court shall be within five years after the judgment is rendered probating or rejecting the will, and prosecuted to the Court of Appeals within one year after the final decision in the circuit court. There is no saving clause in this statute for the benefit of infants with reference to appeals to the circuit court from the county court; but by section 481, of the statutes, there is a provision for the benefit of infants, who are not parties to the action in the circuit court and who appeal, providing that such infants shall not be barred from instituting an action in equity for the purpose of impeaching the decision of the circuit court, and having a retrial of the question of probate, provided a petition in equity is filed within twelve months after attaining full age. This court has repeatedly decided that these provisions of the statutes are conclusive of the question; that the other provisions of the statutes with reference to saving the rights of infants do not apply in cases with reference to wills; nor do the provisions of the Civil Code with reference to appeals apply to appeals from orders probating or rejecting wills. (Arterburn's Ex'or v. Young, &c., 14 Bush, 509; Duff, &c. v. Duff, &c., 103 Ky., 348; Bohannon v. Tarbin, &c., 25 Ky. Law Rep., 515; Abbott, &c. v. Taylor, &c., 11 Bush, 335; and Hughey, &c. v. Bidwell's Heirs, 18 B. Monroe, 207.)

Under the statutes and the authorities cited, these children are barred from taking an appeal from the order of the county court probating the will of A'den Stacy, as more than five years have elapsed from the date of probate in the county court, and they are barred from filing an action in equity to impeach the order of probate, even if such an action could be brought to impeach an order of the county court, as they brought no such action within twelve months after their arrival at age.

For these reasons, the judgment of the lower court is affirmed.

CITY OF COVINGTON v. DISTRICT OF HIGHLANDS.

(Filed May 13, 1908—Not to be reported)

1. Taxation—Water Works system—A water works company, owned and operated by a city for the purpose of promoting the comfort, health and inhabitants of the city, is of a governmental and public nature and for that reason exempt from taxation.

2. Res Judicata—This court has repeatedly held that a judgment in behalf of the State, municipality or district, does not prevent the owner thereof from contesting the right of the State, municipality or district to collect taxes on the same property for other and subsequent years.

F. J. Hanlon for appellant.

Samuel C. Bailey and Chas. W. Youngblut for appellee.

Appeal from Campbell Circuit Court.

Opinion of the court by Judge Settle, reversing.

This is an appeal from a judgment of the Campbell Circuit Court whereby appellee, District of Highlands, recovered of appellant, City of Covington, \$2,357.50 tax for the year 1906, assessed against the latter's water plant, situated, in part, in the District of Highlands.

In *Commonwealth v. City of Covington*, 107 S. W., 231, 32 Ky. Law Rep., 837, *Commonwealth v. City of Newport*, 107 S. W., 231, 32 Ky. Law Rep., 820; it was held that a water works system owned and operated by a city for the purpose of promoting the comfort, health and happiness of its inhabitants, is of a governmental and public nature and for that reason exempt from taxation under the State Constitution, section 170, providing that public property used for public purposes shall be exempt from taxation.

These two cases followed and were rested upon the opinion of this court in the case of Board of Councilmen of City of Frankfort v. Commonwealth, 29 Ky. Law Rep., 704, which either overruled or nullified all cases previously decided by this court in which such property had been held subject to taxation.

The three cases, *supra*, decided adversely to appellee's contentions every question involved in the case at bar. It is true counsel for appellee attempts to distinguish this case from those, *supra*, upon the ground that the right of appellee to recover from appellant taxes upon its water works plant was fixed and determined in a suit between the same parties, by judgment of the Campbell Circuit Court rendered March 25, 1902, whereby appellant was held liable to appellee for taxes alleged to be due on the property in question for the years 1899, 1900 and 1901, and that on appeal to this court that judgment was affirmed, (*City of Covington v. District of Highlands*, 24

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Ky. Law Rep., 433.) Upon that judgment appellee rests a plea of res adjudicata, it being contended that it operates as an estoppel to the defense interposed by appellant in this case.

In other words, it is insisted for appellee, that the liability of the City of Covington for taxes assessed against its water works system by the District of Highlands for the years 1899, 1900 and 1901, having been fixed by the former judgment, such liability continued to exist for all taxes assessed against the same property in favor of the District of Highlands for each successive year since the rendition of such judgment; regardless of the later decisions of this court overruling, in effect, the opinion of the case in which the former judgment was rendered. In support of this contention appellee cites the case of *New Orleans v. Citizens Bank of Louisiana*, 167 U. S., 571. Such is not the law in this State, for this court has repeatedly held that a judgment in behalf of the State, a municipality or district, recovering a tax against property for one year, does not prevent the owner thereof from contesting the right of the State, such municipality or district to collect taxes on the same property for other and subsequent years; also that a judgment enjoining the collection of taxes for one year, is not a bar to the taxation of the same property another year. (*Bell County Coke & Improvement Co. v. City of Pineville*, 23 Ky. Law Rep., 923; *Louisville Bridge Co. v. City of Louisville*, 23 Ky. Law Rep., 1658; *Henderson Bridge Co. v. City of Henderson*, 90 Ky., 623; *Henderson Bridge Co. v. Commonwealth*, 99 Ky., 623; *City of Newport v. Commonwealth*, 21 Ky. Law Rep., 42; *Negley v. City of Henderson*, 22 Ky. Law Rep., 922.)

In *First National Bank of Covington v. City of Covington*, 198 U. S., 100, the Supreme Court, in affirming a judgment of the United States District Court for the Eastern District of Kentucky, rejected a plea of res adjudicata in a case involving a question of taxation, similar to the one under consideration, upon the ground that:

"In the State of Kentucky an adjudication involving the taxes for one year can not be pleaded as an estoppel in suits involving taxes for other years."

From what we have said it follows that the judgment of the circuit court, holding appellant's water plant liable for taxes to the District of Highlands, was error. Judgment reversed and cause remanded, with directions to the lower court to dismiss the action.

Whole court sitting.

Chief Justice O'Rear, Judges Nunn and Carroll dissenting.

PRICE V. GATLIFF'S EX'ORS, &c.

(Filed May 13, 1908—Not to be reported.)

Assignment—Bills of Exchange—Purchaser of Notes for Value—Law of State of Iowa—The notes in controversy were executed to an Iowa concern, sent to it and by it assigned to Price who sues on them. The law of that State places such paper upon the footing of a bill of exchange, and being placed upon such footing defenses existing between the antecedent parties can not apply to Price, the purchaser of the notes, if he was in good faith their purchaser for value, and without any notice of infirmity or fraud in obtaining the notes sued on.

C. W. Lester for appellant.

H. H. Tye for appellees.

Appeal from Whitley Circuit Court.

Opinion of the court by Judge Nunn, reversing.

This action was instituted by appellant upon three notes, each of which was dated October 4, 1902, and due, one in nine, one in ten and the other in twelve months from their date, and are exactly alike, except as to date of payment. We copy one of the notes, which is as follows:

"75.00.

Iowa City, Iowa, October 4, 1902.

"Twelve months after date, for value received, we promise to pay to the order of the Equitable Manufacturing Co., at the First National Bank, Iowa City, Iowa, seventy-five dollars.

(Signed) "JOS. GATLIFF & CO."

These notes were executed for the purchase price of a box of jewelry sold and delivered by the Equitable Manufacturing Co., through its agent, to appellees. The company warranted the goods to be as represented. Upon receiving the goods appellees signed the notes sued on, which were sent to them in blank, and returned them to the Equitable Manufacturing Co., by United States mail, in Iowa City.

Appellant claims that the notes were assigned to him in due course, before their maturity, for value and without any notice to him of any want of consideration or fraud in obtaining them, and asked judgment upon them for their full value.

Appellees defended the action, and claimed that the notes were obtained by fraud, covin and misrepresentation on the part of the Equitable Manufacturing Co. and its agent; that they represented and guaranteed the jewelry to be of value and such as represented; when, in fact, the jewelry was of no value, and that they ascertained this fact shortly after the execution and delivery of the notes sued on and offered to return the jewelry, and did eventually turn it over to the attorneys and agents of the Equitable Manufacturing Co. This was denied by reply, and this issue was tried by a properly instructed jury which found in behalf of appellees. There was no error committed by the court in the trial of this issue, and if this was the only question involved, we would affirm the judgment.

Appellant's counsel contends that the court should have given a peremptory instruction to the jury to find in his behalf. For the reason that the notes were made payable at a bank in the State of Iowa, and the law of that State, which he pleaded, places such notes on the footing of a bill of exchange when sold and transferred for value before maturity, and to a person having no knowledge of any infirmity or fraud in the execution and obtaining of the notes, and he files with his petition, and makes a part of it, a copy of what is termed as "The Negotiable Instrument Act of Iowa," which took effect in that State in March, 1902. The act is similar to the Negotiable Instrument Law enacted in this State in 1904, which was after the date of the execution of the notes sued on.

Appellees, in their answer, denied that appellant, Price, was a purchaser of these notes for value without notice of their infirmities, and alleged that the contract, under and by virtue of which the notes sued on were given, was made and entered into in the State of Kentucky; that the notes were executed in the State of Kentucky, and it was the intention of the parties to the contract that the law of Kentucky was to govern the rights of the parties under the contract, and that the law of Kentucky was to control in fixing and determining the validity and effect of the notes; that it was never contemplated by the parties to the contract that the law of the State of Iowa was to govern, or that the validity or effect of the contract was to be tested, construed or interpreted, in any way, under or according to the laws of the State of Iowa; that the contract, under and by virtue of which the notes sued on were executed, arose and first existed in

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the State of Kentucky on the 22d day of September, 1902; that the notes were executed without any reference whatever to the State of Iowa, and the law of that State had nothing whatever to do with the execution of the notes. This answer was not sufficient.

In the case of *Stephens v. Gregg, &c.*, 89 Ky., 461, the action was instituted upon a note similar in language to the note sued on in this action. That note, according to the law of the State of Ohio, was placed upon the footing of a bill of exchange, and the defendant in that action undertook to plead a set-off. This court held in that case that the note was placed upon the footing of a bill of exchange by the law of Ohio, and, consequently, the defense of set-off existing between the antecedent parties could not be allowed against appellees, who were innocent purchasers for value. Under the authority of that case if Price, the appellant, was in good faith the purchaser of the notes sued on for value and without notice of any infirmities or fraud in obtaining the notes sued on, he can recover the amount of them, as they, upon their face, show that they were negotiable and payable at a bank in the State of Iowa, and the law of that State places them upon the footing of a bill of exchange; and this is the only real issue in the case.

It appears that Price was at the head of the Equitable Manufacturing Co. for years. He knew the business methods of that concern and the character of jewelry that it was selling, and it is a little strange that he would credit notes that he held against the manufacturing company, a solvent concern, for the full amount of these notes, and take an assignment thereof without recourse, not knowing at the time the payors of the notes, whether they were solvent or not, they residing in this State and he in the State of Iowa.

On another trial of the case the court will submit this issue to the jury. In giving an instruction on appellees' counterclaim it should not allow them to recover on it any greater sum than the amount of the notes, with interest. The Equitable Manufacturing Co. is not before the court in this action, and appellant, as its assignee, should not be required to lose more than the amount of the notes and their interest in any event. On becoming assignee of the notes he did not assume any liabilities of the manufacturing company to appellees. Appellees can only prevent his recovering the amount of the notes sued on, provided the facts justify them as herein stated.

For these reasons the judgment of the lower court is reversed and remanded, for further proceedings consistent herewith.

While court sitting.

ILLINOIS CENTRAL R. R. CO. v. COMMONWEALTH.

(Filed May 13, 1908—Not to be reported.)

Trabue, Doolan & Cox, Hazelrigg, Chenault & Hazelrigg and J. M. Dickinson for appellant.

T. L. Edelen, C. J. Whittamore and R. B. Franklin for appellee.

Appeal from Franklin Circuit Court.

Judge Hobson delivered the following response to petition for rehearing:

No right of appellant under the fourteenth amendment to the Constitution of the United States is violated by the decision. As shown by the opinions of the court cited in the opinion herein, taxes have been imposed based on the assessments in controversy. All other taxpayers than railroads were taxed and if some railroads escaped

It is no reason that others should go free while all taxpayers of other classes paid their taxes. If any railroads escaped they are still liable for their taxes unless barred by limitation.

When the board made an assessment and sent out the preliminary and the final notices as provided by the statute that the assessment had been made, its action was final and the legal effect of its action must depend on what they did and not on the secret intentions of the Auditor.

The petition for re-hearing is overruled, but the opinion is extended as above indicated.

ATTAY v. KNOX GEM COAL CO., &c.

(Filed May 15, 1908—Not to be reported)

Lands—Liens—Levy of Execution—A. recovered judgment against appellee, execution issued, which he levied on its land, which was sold and bought by A. for his debt. The facts bring the case clearly within the provisions of section 1691, Kentucky Statutes, and the lower court properly held that A. was entitled to a lien on the land for his debt by reason of his execution.

John H. Wilson for appellant.

James D. Black, J. M. Roberson and S. B. Dishman for appellees.

Appeal from Knox Circuit Court.

Opinion of the court by Judge Hobson, affirming.

Richard Attay recovered a judgment in the Knox Circuit Court against the Knox Gem Coal Co. for \$213.75, with interest and costs. On June 23, 1902, an execution was issued on the judgment and levied on a tract of land that was the property of the coal company. The land was sold on July 28, 1902, and was bought by Attay for his debt. The land not having been redeemed, Attay received a sheriff's deed for it and instituted this proceeding by notice, under the statute, to recover possession. The company and W. C. Freeman were made defendants to the motion. On final hearing the circuit court held that Attay acquired a lien on the land by the levy of his execution for his debt, interest and costs, and adjudged a sale of the land for the debt, under section 1691, of the Kentucky Statutes. From this judgment Attay appeals.

Section 1691, of the Kentucky Statutes, which is a part of the act regulating a proceeding of this character, is as follows: "If it appears in the proceedings aforesaid that the title of the defendant in the execution to the land sold was only equitable, or the land encumbered by mortgage or lien, the court shall, if the purchaser required it, subject the land to the payment of the debt of the execution creditor in the same manner it would do if there was a return of no property found, and may cause such pleadings to be filed and parties brought before the court as may be necessary to a final equitable judgment in respect to the rights of all parties interested."

The facts, as shown on the trial, were these: The Knox Gem Coal Co., prior to the year 1902, had become greatly involved, and suits had been brought against it to enforce payment of the debts. It had bought the tract of land in controversy from John A. Black for \$10,000, and owed Black a balance of something over \$3,000 on the purchase money. W. G. Freeman, who was president of the company, had advanced to it money from time to time, and had a claim against

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it for \$16,000, for money which he had advanced. Black sued to enforce his vendor's lien, Freeman sued and took out an attachment lien, and other creditors brought suits with attachments. These suits were consolidated, and, at the January term, 1902, the land was ordered sold in the consolidated actions for the satisfaction of the debts. No sale, however, was made under the judgment, for the reason that Freeman paid off the lien debt of Black and compromised with a number of the creditors under an agreement he had made with the other two stockholders in the company, by which he was to take their stock and assume the debts of the company. This was the situation of the title at the time Attay's execution was issued in June following, and at the time the land was levied on and sold. The land not only cost the company originally \$10,000, but it had spent on it considerable other sums in opening a coal mine.

When Freeman paid Black the balance of his purchase-money lien, as between him and the company he was entitled, by subrogation, to Black's lien on the land, for the debt was the debt of the company. Freeman also held an attachment lien on the land for his own debt, and the judgment ordering a sale of the land had not been executed. It is clear, therefore, that the case falls literally within the provisions of section 1691, Kentucky Statutes, and that the court properly held that Attay was entitled only to a lien on the land for his debt by reason of the levy of his execution. The answer which Freeman filed was sufficient to raise all the questions presented by the proof. The judgment is in accord with the rights of the parties, and does substantial justice.

Judgment affirmed.

OWENSBORO STAVE AND BARREL CO. v. DAUGHERTY, BY
NEXT FRIEND.

(Filed May 19, 1908—Not to be reported.)

1. Master and Servant—Duty of Master to Instruct Servant—The duty of instructing an inexperienced servant in the dangers of his employment is one that rests primarily upon the master, and where such a servant is exposed to dangers that are unknown to him, the servant is not required to show gross negligence on the part of his superior.

2. Same—A servant who is acting under the direction of his superior may properly obey his orders, unless the danger is so obvious and imminent that a servant of ordinary prudence would not take the risk, and the jury could not have been misled by an instruction having in view this principle.

E. B. Anderson for appellant

LaVega Clements and Ben D. Ringo for appellee.

Appeal from Davless Circuit Court.

Opinion of the court by Judge Hobson, affirming.

William Daugherty in the fall of 1906 was working for the Owensboro Stave and Barrel Co. He was eighteen years of age; and had been in the service of the company about two months, but he had been working on the inside of the factory only about two days. He was working at one of the planers bearing off staves. A man named Lewis Evans had charge of the planer and worked at the front end of the machine. The planer contained some knives which cut the staves as they passed through it. There was a metal covering, but

the knives stuck out at the back about an inch beyond the cover. The knives revolved rapidly and when the staves were going through there was a good deal of dust about the back end of the machine. Evans took an oil can and oiled a bearing on the front end of the machine. He then handed the oil can to William Daugherty, indicating to him to oil a bearing on the back of the machine. In oiling this bearing, Daugherty's hand came in contact with the revolving knives and two of his fingers were cut off. He had not been instructed as to the danger and was not aware that the knives protruded beyond the metal covering, or that there was any danger in putting his hand where he did. When he was placed at work at the machine he was told to do what Evans directed him to do. This suit was brought by him to recover for his injuries. The jury found for him and fixed the damages at \$800; and from the judgment entered on the verdict the defendant appeals.

The chief ground for reversal is that the court misinstructed the jury or failed properly to instruct it. The instructions are longer than necessary and more favorable to the defendant than they should have been, in so far as they required gross negligence on the part of Evans, to warrant a recovery. The duty of instructing an inexperienced servant in the dangers of his employment is one that rests primarily upon the master and where such a servant is exposed to dangers which are unknown to him without instruction as to them, the servant is not required to show gross negligence on the part of his superior. The boy had come to the factory from the country, and his inexperience with the machinery was well known. He knew that the knives were revolving because he could hear the noise and he also knew they would cut because he could see that they cut the staves; but he did not know that they protruded beyond the metal covering, or that there was danger of his hand's being cut in oiling the bearing. It was a very dangerous place for one who was ignorant of the danger and the danger was such that an inexperienced boy should not have been put at work without proper instruction and warning. It is insisted that the danger was obvious, and that it is one of the cases where no instruction was necessary; but the dust that came out of the machine would, to some extent, prevent the boy from seeing clearly, and as the knives were revolving rapidly, he would have no intimation of the danger unless his attention was called to it; for the knives could not be seen as they revolved, and it would be a natural conclusion that they were revolving inside of the covering, and did not extend out beyond it. The court, therefore, properly refused to instruct the jury peremptorily to find for the defendant. By its instructions the court substantially told the jury that if the plaintiff was inexperienced in the character of work in which he was engaged, and had not sufficient age or intelligence to understand the danger, and if this was known to the defendant's agent in charge of the machine, and he, knowing the danger, negligently directed the plaintiff to oil the machine without any warning or instruction, and by reason of this, he was injured by using ordinary care for his own safety, they should find for him. The court also told the jury that if the plaintiff was of sufficient age, intelligence and discretion to understand the danger, or if the injuries he received were due to his own want of ordinary care, they should find for the defendant. He also instructed them that if the danger of oiling the planing machine was so patent or obvious that an ordinarily prudent person of his age and experience would not have attempted to do the work, then they should find for the defendant.

While the instructions of the court are more numerous than necessary, we do not see that the defendant was substantially prejudiced by them. Under the instructions the jury must have found for the defendant, if they believed from the evidence that the plaintiff was

of sufficient age, intelligence and discretion to understand the danger in oiling the machine. This is the main ground upon which it is insisted that the verdict should have been for the defendant, and this instruction was so clear that the jury could not have misunderstood it. The instruction as to contributory negligence was also clear. The verdict of the jury is undoubtedly a finding by them that the plaintiff had not capacity to understand the danger, and that he used ordinary care in oiling the machine. It is insisted that the defendant was prejudiced by the instruction in which the jury were told that if the danger was so patent and obvious that an ordinarily prudent person of the plaintiff's experience would not have attempted to do the work, they should find for the defendant. But the meaning of this instruction was obviously to submit to the jury the question of whether the boy was justified in obeying the orders of his superior. A servant, who is acting under the direction of his superior, may properly obey his orders unless the danger is so obvious and imminent that a servant of ordinary prudence would not take the risk. It is this principle that the court had in mind in giving the instruction, and as the law governing the case on other points had been previously given, we do not see how the jury could have been misled by this instruction. On the whole cause it seems to us that the judgment is right and should not be disturbed.

Judgment affirmed.

WILLIAMS AND SANDERS v. COMMONWEALTH.

(Filed May 19, 1908—Not to be reported.)

1. Criminal Law—New Trials—Defendant Tried Without His Knowledge—This case is reversed as to Walter Sanders for the reason that it appears from the record and from his affidavit for a continuance, that he did not know that he was being tried with his co-defendant; that he had no counsel, and that he was under the impression that Williams alone was being tried. The record does not show why he had no counsel. It also appears that the only connection he had with the alleged robbery was in picking up the bill and handing it to Williams.

2. Aiding and Abetting—Instructions—An instruction required the jury to believe that S was present, aiding and abetting W. in the robbery, and the jury may have construed the picking up of the money to be a sufficient aiding and abetting, but he must have aided and abetted with the knowledge that W. was robbing another of the money.

Smith & Smith for appellants.

James Breathitt and Tom B. McGregor for appellee.

Appeal from Madison Circuit Court.

Opinion of the court by Judge Nunn, reversing.

On the 10th day of October, 1906, the grand jury of Madison county returned into court an indictment charging appellants, Roy Williams and Walter Sanders, with the crime of robbery, committed by putting one Jesse Story in fear and forcibly taking from him, against his will, five dollars in money.

In the month of October, of that year, Roy Williams was placed upon trial, and the jury failed to agree upon a verdict. At the February term, 1908, both of the defendants were placed upon trial, and the jury found them guilty and fixed their punishment at confinement in the penitentiary for a term of two years. Their motions

for a new trial were overruled, and they have appealed to this court.

The evidence, as it appears in the record, is very conflicting. It appears that five boys, including appellants, had assembled in a schoolhouse and were playing "craps" and cards, and that they drank two quarts of whisky during the game. It appears that Jesse Story was not engaged in the game of cards, but was banker for his brother, James, and one Casey, who were playing against appellants. Each side accused the other of taking money that they had not won. Finally appellant, Roy Williams, according to the Commonwealth's evidence, drew a pistol and presented it at Jesse Story and demanded a surrender of a five dollar bill. Story threw it upon the floor and said: "There it is," and appellant, Walter Sanders, who was sitting on the floor, picked it up and handed it to Roy Williams without making any remarks. Then the parties separated.

The instructions of the court are correct in as far as they apply to the case of Roy Williams; and there was evidence introduced tending to show his guilt, and, therefore, the judgment against him is affirmed. But we are not satisfied that Walter Sanders has had a trial according to law. The only evidence connecting him with the robbery was the act of picking up the bill and handing it to Williams, and the court, in the instructions, only required the jury to believe that he was present and willfully aided and abetted Williams in the act; and the jury may have construed the instruction as meaning that the picking up the bill and handing it to Williams was sufficient aiding and abetting in the meaning of the instruction. The law requires something more than this. He must have aided and abetted, with the knowledge on his part that Williams was robbing Jesse Story of his money. There must have been a guilty purpose and knowledge on the part of Walter Sanders. Intentionally picking up the bill and handing it to Williams was not sufficient to conclusively show a wrongful or guilty intention on his part.

He filed an affidavit with his motion for a new trial, which was not contradicted in any way, stating that he was tried without any knowledge, on his part, that he was being tried; that he was under the impression that Roy Williams alone was on trial; that he had no attorney representing him; that he did not know his legal rights, and that his case was greatly prejudiced by being tried with Williams. The record does not show that he had counsel, nor why he did not have. Section 11, of the Constitution, provides: "In all criminal prosecutions the accused has the right to be heard by himself and counsel."

The case of *Turner v. Commonwealth*, 89 Ky., 78, was an appeal from a life sentence. The case had been pending in this court for several terms before the appeal was dismissed. The opinion was rendered on a motion to redocket it. One of the grounds presented by appellant to sustain his motion, was that he was not represented by counsel on the appeal in this court, and the court said: "A suggestion that the prisoner is without counsel or unable to employ one would require the interposition of the court in his behalf."

It has been the custom of the courts of this State, as well as most of the States, and is a commendable one, when a prisoner is unable to employ counsel, for the court to designate some one to defend him, and it is the duty of such counsel, which he owes to his profession, when so designated not to withhold his assistance nor spare his best exertions, in the defense of one who has the double misfortune to be stricken by poverty and accused of crime. (Coo'e's Constitutional Limitations, 5 Edition, 407.) We, however, do not understand the provision of the Constitution and the authorities cited to require the court to appoint counsel for a defendant charged with a felony when he does not desire the aid of counsel, and when the court can see that the person charged is a person of, at least, ordi-

nary intelligence and can fully appreciate the position which he occupies; but in a case like this, when the defendant is without education and has not mind enough to know when he was placed in jeopardy, we are of the opinion that it was the court's duty to interpose and see that he was properly represented.

For these reasons the judgment of the lower court against Walter Sanders is reversed and remanded, for another trial, and the judgment against Williams is affirmed.

STEWART v. ROBERTS, &c.

(Filed May 19, 1908—Not to be reported.)

Contracts—Instructions—Evidence—Appellant resisted a claim for commissions for the sale of his land, setting up in a paragraph of his answer that the contract relied on was not the one he made, and that his signature to it was obtained by the fraud of appellee. It was error for the court not to allow him to introduce proof to sustain this plea, and the court erred to his prejudice in an instruction which directed the jury to find for appellees if they believed that they procured a purchaser for the land, when the answer set out that while they brought a purchaser they stated that the contract was at an end and that it was done for an accommodation.

C. C. Williams and Hazelrigg, Chenault & Hazelrigg for appellant.

S. D. Lewis and Bethurum & Bethurum for appellees.

Appeal from Rockcastle Circuit Court.

Opinion of the court by Judge Nunn, reversing.

On May 16, 1906, appellant entered into a contract with appellees by which he authorized them to find him a purchaser who would pay \$32,000 for about 1,600 acres of land. That part of the contract involved in this case is as follows:

"Said party of the first part hereby agrees to pay to the said party of the second part as his commission for finding a purchaser for said real estate the sum of one thousand (\$1,000) dollars. * * *

"This contract may be cancelled by said party of the first part at any time after thirty days from the date hereof, by giving to said party of the second part thirty days' notice, in writing, of his desire to have same cancelled."

This action was instituted upon this contract by appellees to recover the one thousand dollars. Appellant answered the petition, denying the affirmative matter, and by a second paragraph he pleaded as follows:

"The defendant, A. W. Stewart, for further answer and defense says that the contract as set up and described by the plaintiffs, and the same filed in this suit, is not the contract that he made with the plaintiffs."

"He says that at the time said contract was made and entered into, that he did not read said contract, but that the same was read to him by the plaintiff, ——— Roberts, and that said contract did not read, or was not read to the defendant by said R. B. Roberts, with whom it was made, and now set out in said contract.

"The defendant says that the contract he made with the plaintiffs was for only a period of thirty days, and that said contract, as read to him by plaintiff, R. B. Roberts, was not to run longer than thirty days, and that said contract did not provide that it should be can-

celled by the defendant giving to the plaintiffs thirty days' notice, in writing, of his desire to have the said contract cancelled.

"The defendant says that he did sign the contract filed by the plaintiffs in their petition, but that it was falsely and fraudulently represented to him at the time he signed the said contract by the plaintiff, R. B. Roberts, who alone acted for the plaintiffs in making the contract, to be a contract for only thirty days, and that it was read to the defendant, A. W. Stewart, by the said R. B. Roberts, as being a contract for only thirty days, and with the agreement and understanding that said contract was for only thirty days, and should terminate at the expiration of said thirty days, he signed said contract solely and wholly upon the false and fraudulent statement and representations made to him by the plaintiff, R. B. Roberts; that at the time he signed said contract he was unable to read the same and did not read same, and signed it on the statements and representations of the plaintiff, R. B. Roberts, which statements were false and fraudulent as to the contents of said contract.

"The defendant further states that the contract, as set up by the plaintiffs, is, therefore, not the contract that he agreed to sign and did sign.

"The defendant further answers, avers and charges that at the expiration of the said thirty days after the signing of said contract, the plaintiffs told him that said contract had expired, and that he, Stewart, might sell his land if he wished to do so, and that, thereupon, he did sell said land, and that plaintiffs did not assist him in procuring the purchaser for the said land, and had nothing to do with obtaining a purchaser therefor."

Appellees filed a reply controverting the affirmative matter in the answer.

The land was sold by appellant and conveyance made August 3, 1906. One of appellees conducted the purchaser to appellant's home about the 25th of July, and appellant claims that it was done as an accommodation, and that appellee said at the time that he knew that their rights, under the contract, were at an end, which was denied by appellees.

The court gave only one instruction to the jury, and it is as follows: "Gentlemen of the jury, if you believe from the evidence that the plaintiffs, or either of them procured for the defendant a purchaser for the land described in the contract sued on, you will find for them the amount sued for, to-wit, \$1,000; unless you so believe, you will find for the defendant."

The court, on the trial of the case, ignored the second paragraph of appellant's answer, and refused to allow him to prove the allegations therein. He was asked by his counsel whether the contract presented in evidence was the contract that he made with appellees, and whether he read it at the time he signed it, or if it was read to him, and the court sustained objections to all questions upon this subject and avowals were made stating, in effect, that the contract presented was not the contract made with appellees; that the one he made was to expire in thirty days; that it was expressly so agreed, and that when he signed it he believed it was so written in the contract; that it was so read to him, before he signed it, by one of appellees, and he would not have signed it if he had known that it contained a clause requiring him to give thirty days' notice, in writing, to appellees before it could be cancelled; that this language was not read to him, nor anything like it; that one of appellees came to him while he was in a field at work; that he could read but little, and could not read any without his spectacles, which he did not have with him at the time, and he had to rely, and did rely, solely upon appellees in reading it.

The court erred to the prejudice of appellant in refusing this evidence. The jury, under the instructions given by the court, found for appellees \$1,000; and they could not have done otherwise as it amounted to a peremptory instruction in their behalf. The court should have permitted the evidence offered by appellant, and have given an instruction on his defense as set up in the second paragraph of his answer and amendments thereto; for if either one of appellees practiced the fraud mentioned, in obtaining the contract, appellant would not be bound by it for a longer period than thirty days, and as the purchaser was furnished to appellant more than two months after the date of the contract, he would not be responsible to appellees, under the written contract, to pay them the \$1,000 for their services. But would only be responsible for the value of the services, not exceeding \$1,000, performed by them in obtaining a purchaser after the expiration of the written contract. And then only in the event that appellant had reason to believe that appellees were acting in his behalf with the intention of receiving pay for their services, and appellant received their services without, at the time, notifying them that he would not pay them.

For these reasons the judgment of the lower court is reversed and remanded, for further proceedings consistent herewith.

BLACK DIAMOND COAL AND MINING CO. v. PRICE.

(Filed January 30, 1908—Not to be reported.)

1. Master and Servant—Mining—Injury to Servant—Negligence of Master—Explosion of Fire Damp—Evidence—Evidence considered and held to show gross negligence in the owner of a coal mine in suffering fire damp to accumulate therein and in not providing proper ventilation, thereby rendering it a dangerous place in which to work, and by the explosion of which the plaintiff was injured.

2. Evidence—Reports of Mine Inspector—Competency—In an action for damages by an employe against a coal mining company for damages for injury received by the explosion of fire damp negligently permitted to accumulate in the mine, evidence of two reports of the mine inspector made shortly before the explosion, was admissible, showing the existence of conditions calculated to produce fire damp.

3. Duty of Master—Safe Place to Work—Obvious Danger—It is the duty of a mine owner to have his mine in a reasonably safe condition for the performance of the duties of the employes therein, and a failure to do so renders the owner liable for an injury caused thereby "unless a danger incident to the employment is known to the servant, or is an obvious danger, he may rely upon the implied assurance and superior knowledge of his employer that the premises are reasonably safe for the purpose for which they are being used."

4. Evidence—Similar Explosions—Subsequent to Injury—Admissibility—Reversible Error—On the trial of an action for damages to an employe in a mine by the explosion of fire damp, it was a reversible error in the court to allow evidence to be introduced showing that other like explosions had occurred in the same mine after the one by which the plaintiff was injured. Evidence of previous similar accidents were admissible, but subsequent ones are not competent for any purpose.

Gordon, Gordon & Cox for appellant.

R. Y. Thomas, Jr., for appellee.

Appeal from Muhlenburg Circuit Court.

Opinion of the court by Judge Settle, reversing.

Appellee, L. E. Price, an employe of the appellant, Black Diamond Coal and Mining Company, while engaged at work in its mine was injured by an explosion of fire damp or gas which occurred therein. For the injuries thus received, he sued appellant in the court below and recovered a verdict and judgment against it for \$1,000 damages. Appellant was refused a new trial, and by this appeal seeks a reversal of the judgment.

We will discuss the evidence no further than to say that it seemed to have fairly sustained appellee's contention that his injuries were caused by the gross negligence of appellant and its servants, his superiors in the mine, in that it conduced to prove the existence of fire damp in the mine previous to and at the time of the accident, and that its presence was, or ought to have been, known to appellant. It also conduced to prove that the machinery or appliances used by appellant for maintaining ventilation in its mine was insufficient for that purpose, and the want of proper ventilation produced the conditions that created fire damp, and by reason thereof made the mine dangerous.

The evidence further conduced to prove that appellant's mine manager, by whose direction appellee and certain of his fellow servants, approached the place of the explosion, was personally guilty of gross negligence in not making a test of whether there was fire damp in the room into which they were ordered, by causing it to be entered with a safety lamp before they went into it, instead of which he caused one of the servants to enter it with an ordinary miner's lamp or torch, which caused the explosion and consequent injury to appellee and several of his companions.

There was a contrariety of evidence as to the question of whether his injuries were of a permanent character, but there was sufficient evidence on this question to authorize its submission to the jury.

As it was the duty of appellant to provide its employes with a reasonably safe place to work, and especially to warn or protect them against hidden dangers; and its negligence in the particulars named caused appellee's injuries, it is clear that the jury ought to have returned a verdict in his behalf for some amount.

We see no ground for appellant's contention that the lower court erred in overruling the demurrer to the petition. We fail to see that the petition is lacking in any averment of fact essential to a correct statement of appellee's cause of action, hence the demurrer was properly overruled.

Appellant is equally without ground of complaint as to the ruling of the trial court in admitting as evidence the two reports of the mine inspector as to the condition of appellant's mine shortly before the explosion. One of the reports was made about a month and the other nine days before the explosion, both reports showed the existence in the mine of such conditions as were calculated to produce fire damp, liable to explode at any time to the destruction of life as well as property.

Inspection of mines is required by statute, and by the same authority certain duties of a precautionary nature are required of mine owners, the object of which is to protect the lives of their employes.

The two reports in question gave to appellant notice of the dangerous condition of its mine and were sufficient to have impressed it with the necessity of removing the elements of danger, which, if done, would have prevented appellee's injuries.

It is not material whether the reports laid the cause of the bad ventilation obtaining in the mine to a defect in the plan of ventilation in use by appellant or, as claimed by appellant, to the insufficiency of the apparatus for distributing fresh air in the mine, if from either cause the danger was produced, the obligation on the part of appellant to remove it was the same.

The admissibility of such reports of inspection as competent evidence was recognized by this court in the case of *Andricus' Adm'r v. Pineville Coal Co.*, 28 Ky. Law Rep., 704, for the purpose of showing the plan of ventilation, and that such fact was known to the mine owner.

As it is the duty of the mine owner to take every reasonable precaution to have his mine in a reasonably safe condition for the performance of the duties of his employes therein, "unless a danger incident to the employment is known to the servant, or is an obvious danger, he may rely upon the implied assurance and superior knowledge of his employer that the premises are reasonably safe for the purpose for which they are being used."

The reports of the mine inspector being clearly competent, they were properly allowed to be read to the jury.

Notwithstanding the many objections urged by appellant's counsel to the instructions, we are unable to find any error in them. On the contrary they present, with admirable clearness, the law, and, as we think, all the law applicable to the issue involved, and this being true no error could have resulted in refusing the instructions asked by appellant.

There were, however, two errors committed by the lower court on the trial to which we shall now advert. The first being the ruling of the court in requiring to be read to the jury such parts of the affidavit of appellant's chief agent as had reference to the steps taken by appellant to procure the attendance of Garrett as a witness in its behalf. The affidavit was filed to obtain a continuance on account of the absence of Garrett, who was appellant's mine foreman, and present directing the work of appellee and his fellow-servants, at the time of the explosion. Garrett lived at Central City only a few miles from the place of trial. Both a subpoena and attachment had issued against him at appellant's request but neither had been executed upon upon him. In brief, appellant had failed to procure the attendance of Garrett and this fact, together with the steps taken to that end, were set out in the affidavit, as was an expression of appellant's belief that the witness was evading the sheriff and process of the court to avoid giving his testimony in the case. In addition the affidavit set forth with great particularity the facts in respect to Garrett's relations with appellant, and to the mine, the condition of the mine, the explosion and the conduct of appellee in connection therewith, to which it was claimed Garrett would testify. By consent of appellee, the court, to prevent a continuance of the case, permitted appellant to read to the jury, as if it were a deposition, that part of the affidavit containing the facts to which it was expected Garrett would, if present, testify.

Before closing its testimony, appellant's counsel read to the jury only so much of the affidavit as purported to contain the facts claimed to be known to Garrett and expected to be proved by him. But after this was done appellee's counsel in the presence of the jury said to counsel by whom the affidavit had been read, "Did you read all that deposition?" To which appellant's counsel replied: "Yes, sir." Appellee's counsel then said: "You didn't read it all; all this affidavit is filed and I want it all read; want all the affidavit read."

Counsel for appellant objected to the foregoing statements of appellee's counsel and to the reading of the formal, and theretofore omitted, parts of the affidavit, but the court overruled the objection

and required the previously omitted parts of the affidavit to be read; to which appellant at the time excepted.

At the time of the ruling referred to, the court said to the jury:

"Gentlemen of the jury, you understand that this is an affidavit for continuance and there is put into it what the absent witness would swear. Mr. Cox (appellant's counsel) as is the usual case for attorneys, read that part of the affidavit showing what the witness would state; that is usual and that is all that is necessary to read to the jury. There is a part there showing the reasons of the absence of the witness; that is usually addressed to the court in order that he may determine whether they are entitled to read the evidence. That is intended for the ear of the court and not the jury and that is the part omitted, but I think the other party may have that read if he asks it."

The court should not have required to be read that part of the affidavit which had been omitted by appellant's counsel. It related only to the question of diligence on the part of appellant in the matter of attempting to secure the attendance and oral testimony of the absent witness, and the further question whether the testimony was so material and important as that appellant could not safely go into trial without it. These questions should be addressed to the court and are to be determined by the court. The jury are not concerned with them and should not hear them read or be allowed to consider them. (*Lindell v. Commonwealth*, 23 Ky. Law Rep., 1307.)

Probably the statements of the court that appellant's counsel had acted as usual in omitting such parts of the affidavit, prevented the inquiry of opposing counsel as to whether he had read it all and the insistence of the latter that all of it be read, from making the impression on the jury that appellant's counsel had intentionally suppressed some material part or parts of the affidavit because of its being hurtful to his client, but this is doubtful. While it is not clear that the admonition of the court was explicit enough to enable the jury to fully understand his meaning, in view of what was said by the court and its probable effect upon the jury, we would be unwilling on account of the error, in allowing the previously omitted part of the affidavit to be read to the jury, to reverse the judgment.

A more serious error was committed by the trial court, however, in permitting appellee to prove other explosions in the mine since the accident. The testimony was irrelevant, misleading and highly prejudicial. It may and doubtless did impress the jury that appellant was not only negligent, but so wantonly or recklessly disregardful of the safety of its employes that it was unwilling to profit by the lesson given it from the accident causing the injuries of appellee and certain of his fellow-servants and thereafter permitted the same conditions to continue in the mine, at the imminent risk of further similar accidents and probable loss of life to its employes; and, therefore, that such misconduct aggravated appellant's offense in suffering appellee to be injured. Whether this incompetent testimony increased the amount of or otherwise influenced the verdict in appellee's behalf we, of course, cannot say, but that it was reasonably calculated to do so, we have no doubt; at any rate, in view of the manifest incompetency of the evidence, we can not afford to speculate as to its effect upon the jury; nor as to whether or not its effect was removed by the admonition of the court as to the purpose of its admission. Evidence of previous similar accidents from the same cause would have been competent to show the dangerous character of the continuing conditions and that the defendant's attention was called

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thereto, but subsequent similar accidents are never competent for any purpose.

For this error of the court the judgment is reversed and cause remanded, for a new trial and further proceedings consistent with the opinion.

.. Whole court sitting.

**MUTUAL BENEFIT LIFE INSURANCE CO. v: COMMONWEALTH,
&c.**

**NORTHWESTERN MUTUAL LIFE INSURANCE CO. v. COMMON-
WEALTH, &c**

**CONNECTICUT MUTUAL LIFE INSURANCE CO. v. COMMON-
WEALTH, &c.**

(Filed February 18, 1908—To be reported.)

1. Insurance Companies—Taxation—Liability—Premiums on Face of Policy—Under Kentucky Statutes, section 4226, every life insurance company, other than fraternal assessment companies, not organized under the laws of this State, but doing business therein, are required to pay a tax on premiums receipted for on the face of the policy for original insurance, without regard to whether it was paid in cash or otherwise, or not paid at all, but as to renewal premiums the tax is assessed only upon the amount the company receives in cash or by note or in some manner other than cash.

2. Same—Premiums Not Collected—Set Apart for Emergency—Designated as Dividend—Where, however, an insurance company stipulated in its policy for a premium larger than was necessary to carry its risks, but which might be needed in certain conditions, and set aside so much of the first premium as a guarantee against misfortune, and for the succeeding years did not collect the whole amount first stipulated, but designated it as a dividend, the company was not liable to taxation on the premiums stipulated, but only for the amount actually collected.

D. W. Lindsey, W. O. Harris, Humphrey & Humphrey, Tyler Barnett, Barnett & Barnett and William Cromwell for appellants.

N. B. Hays and Chas. H. Morris for appellees.

Appeals from Franklin Circuit Court.

Opinion of the court by Judge Barker, reversing.

These three cases involve precisely the same questions, and were heard together. In deciding them, we shall use, for the purpose of illustrating the principles of law involved, the data furnished by the record in Mutual Benefit Life Insurance Co. v. Commonwealth of Kentucky, &c.

In this action the appellee charges the appellant with having received, and with failing to report for taxation, in each of the years respectively ending June 30th, 1900, to June 30th, 1904, inclusive, certain sums of money as premiums on business done in this State.

It is not claimed that it failed to make a regular report, for each of the years, of premiums received; but the contention on the part of the appellee is that such reports did not embrace all of the premiums received by appellant, but on the contrary omitted premiums to the extent of the amounts alleged in the petition for the years respectively mentioned.

The following table will show the dates of the reports made for each year ending June 30th; the amount of the premiums reported for each year, as received in this State or out of this State, on business done in this State; the amounts of such premiums appellee claims should have been reported, the alleged deficits in the reports, and the tax claimed by appellee to be due on such deficit:

Date of Report.	Amt. Prens. Reported.	Amt. Prens. Claimed.	Alleged Deficit.	Tax Claimed.
July 1, 1900	\$497,587.25	\$563,582.03	\$65,994.78	\$1,319.89
July 1, 1901	545,024.89	607,440.89	62,416.00	1,248.32
July 1, 1902	561,681.78	626,397.74	64,715.96	1,294.32
July 1, 1903	578,399.48	642,093.00	63,693.52	1,273.87
July 1, 1904	601,962.28	666,802.53	64,840.25	1,296.80

It is clearly shown by the evidence, and conceded by counsel for the State, that the reports as made by the appellant company embrace all first, or original, premiums—the premiums receipted for on the face of the policies—and also the subsequent, or renewal premiums, except to the extent that such renewal premiums were reduced by what is termed “dividends.” It is the contention of the appellee that such renewal premiums should have been reported without such reduction or abatement, as having been received by the company “in cash or otherwise;” while the appellant company contends that the reduction for the nominal, or stated, premium as made was a contract right of the policy holder, and constituted no premium or part of premium received by the company “in cash or otherwise.” And these opposing contentions present the question in this case.

The case turns upon what shall be the construction given to section 4226, of the present Kentucky Statutes, which is the revenue law of 1902, as carried into these statutes. This section, 4226, in our present Kentucky Statutes, is a revision of section 4227, of the Kentucky Statutes, prior to the revenue law of 1902. Section 4227, of the tucky Statutes, prior to 1902, reads as follows:

“Every life insurance company, other than assessment life insurance companies, not organized under the laws of this State, but doing business therein, shall, on the first day of July in each year, or within thirty days thereafter, return to the Auditor of Public Accounts, for deposit in the insurance department, a statement, under oath, of all premiums received in cash or otherwise in this State, or out of the State, on business done in this State during the year ending the 30th day of June last preceding, or since the last returns were made, and shall, at the same time pay into the State treasury a tax of two dollars upon each one hundred dollars of said premiums as ascertained and upon payment, file a statement thereof with the Secretary of State.”

The present section, 4226, reads as follows:

“Every life insurance company, other than fraternal assessment life insurance companies, not organized under the laws of this State, but doing business therein, shall, on the first day of July, in each year, or within thirty days thereafter, return to the Auditor of Public Accounts, for deposit in the Insurance Department, a statement, under oath, of all premiums receipted for on the face of the policy for original insurance, and all renewal premiums received in cash or otherwise in this State, or out of this State, on business done in this State during the year ending the 30th day of June, last preceding, or since the last returns were made, and shall at the same time pay into the State treasury a tax of two dollars upon each one hundred dollars of said premiums as ascertained.”

The language of section 4227 is: * * * “all the premiums received in cash or otherwise in this State or out of the State, on busi-

ness done in this State during the year ending the 30th day of June last preceding." * * *

The present statute reads: * * * "all premiums receipted for on the face of the policy for original insurance and all renewal premiums received in cash or otherwise in this State or out of this State on business done in this State during the year ending the 30th day of June, last preceding." * * *

This difference will be observed. The original statute was: "All premiums received in cash or otherwise in this State." The present statute is: "All premiums receipted for on the face of the policy for original insurance, and all renewal premiums received in cash or otherwise in this State." The significance of this change is apparent when we come to consider the facts. A policy of insurance stipulates for a certain annual premium. It acknowledges the receipt of the first annual premium. This first annual premium may or may not be received in full by the insurance company, but under our present statute it matters not whether the original premium is or is not paid in full by the policy holders. The present statute requires a tax on premiums receipted for on the face of the policy for original insurance. The old statute simply provided for all premiums received in cash or otherwise, making no distinction between first premium and subsequent premiums. The present statute does make a distinction, requiring the tax to be paid upon the full premium receipted for on the face of the policy for original insurance, without regard to whether it was paid in cash or otherwise, or not paid at all. The present statute provides, however, in regard to the other premiums as follows: "All renewal premiums, received in cash or otherwise in this State."

The appellant, every year before a premium falls due, determines how much of the stipulated premium it will exact from the insured. The diminution, whether it be called a "dividend" or a "surplus," goes in abatement of the renewal premium, and the insured pays only the difference. The insurance company, therefore, receives not the full renewal premium, but the difference between the stipulated premium and this dividend or portion of surplus. All that the insurance company receives in cash or otherwise is this difference. The old statute taxed the insurance company upon the amount which it received in cash or otherwise on the original premium, as well as upon what the insurance company received in cash or otherwise upon subsequent premiums. The present statute taxes the insurance company upon the full amount of the original premium without regard to whether the insurance company receives it or not; but in reference to renewal premiums, taxes the company simply upon the amount it receives of these renewal premiums in cash or otherwise. It is obvious that the word "otherwise" means payment by note or payment in some manner other than cash.

The Commonwealth is claiming to tax the appellant upon money which it never received at all. The appellant says that it is only required to pay upon money which it receives in cash or otherwise, except that it admits that it is bound to pay the full tax on the original premium receipted for on the face of the policy, without regard to whether it in fact received such premium or not.

The answer sets out the course of business of the appellant, and shows what money it has received and what money it has not received, and shows that the difference between it and the Commonwealth is that the Commonwealth is attempting to charge it with the full amount of premiums stipulated for in the face of the policy, although it does not exact and has not the right to exact such full amount, being required to give to the policy holder the advantage

of the dividend or surplus, or whatever it may be called, in diminution of the nominal premium.

We will now examine some of the adjudications of other courts on similar or analogous questions.

The case of *The German Insurance Co. v. Van Cleave*, 191 Ill., 410, involved the question, whether premiums rebated to the insured upon the cancellation of the policies should be included in the words "gross amount of premiums received," as used in a taxing statute. The court said:

"In the construction of the act, effect is to be given to the intention of the Legislature, and that intention appears to be to levy a tax on the gross income of foreign fire insurance companies. The object is to require such companies to pay, at designated times, a tax of two per cent. on the gross receipts of their business for the previous calendar year." * * *

"According to the argument which would include premiums returned on canceled policies, if an insurance company should issue a policy and receive a premium and at once cancel the policy and return the premium it would have done the amount of business represented by the policy and the amount received would be a premium for insurance business done. We do not think the language used will bear that construction. The merchant would not think of including in the gross receipts of his business any sales of goods with the privilege of return, on the part of the purchaser, where they are in fact returned. In such a case there is, in the end, no sale and no business done, in any proper sense." * * *

"The apparent purpose of the act is to levy a tax on gross income, and not upon money which is in no sense revenue to the insurance company."

In *People v. Miller*, 177 N. Y., 515, it was held:

"Premiums unearned by a domestic insurance company, and paid in advance, but refunded upon cancellation of policies, should not be included in the 'gross amount of premiums received' for business done, in this State, for the purpose of taxation, and this, notwithstanding the statute declares the term 'gross premiums' shall include, in addition to all other premiums, such premiums as are collected from policies subsequently canceled and from reinsurance, since no 'business is done' after the cancellation of a policy."

In *State v. Hibernia Insurance Co.*, 38 La. Ann Rep., 465, the statute provided for an insurance license "based on the gross amount of premium, provided the gross amount of annual premiums shall not include unearned or returned premiums and re-insurances." The insurance companies deducted as "unearned and returned premiums and re-insurance" the rebate allowed to insurers. It does not appear clearly in the opinion what this rebate was. The State contended that rebates were not to be deducted. The court said:

"But we think it very clear that, in using the term 'gross amount of premiums' the law refers to premiums actually received or earned; and as, by the terms of their contracts, the companies allowing such rebates only receive the difference between the premium stipulated and the rebate, it seems clear that such difference only constitutes the gross premiums earned. The contracts are made with the full knowledge and understanding that such rebates are to be allowed, and it is a mistake for the State to say that they are mere voluntary returns by the company."

Metropolitan Life Insurance Co. v. Durenkamp, 23 Ky. Law Rep., 2249, grew out of an ordinance of the city of Covington requiring insurance companies to pay one and one-half per cent. on premiums "received on business done in the city of Covington from a named

date to another named date." The court held that this meant premiums on new policies issued between those dates; as otherwise no meaning would be attached to the words "on business done." The court said:

"There is no clearer or more reasonable rule of construction than that every clause or word of an ordinance should be presumed to have been intended to have some force and effect. And 'ordinances levying taxes and imposing duties on citizens are to be construed most strongly against the government, and in favor of the citizen, and their provisions are not to be extended by implication beyond the clear import of the language used, or to enlarge their operation so as to embrace matters not specifically pointed out, although standing upon a close analogy;' (Sutherland on Statutory Construction, section 361; *United States v. Wigglesworth*, 2 Story, 369;) and 'statutes regulating trade and the conduct of merchants ought to be perfectly clear and intelligible to persons of their description.' (Dwaris on Statutes, 742.)"

The case of *Commonwealth v. Penn Mutual Life Insurance Co.*, decided by the appellate branch of the Court of Common Pleas of Pennsylvania, and reported in 1 Dauphin Co. Rep., 233, involved the precise question we have here. In their opinion the question for adjudication is stated as follows:

"This case was, by consent of the parties, tried by the court without a jury.

"It is an appeal by the defendant from the settlement of an account by the Auditor General, approved by the State Treasurer, for a tax on net earnings or income for the years 1873 to 1887, inclusive, with interest and penalties for failure to report and pay. From the evidence we obtain the following finding of facts:

"1. The defendant is a mutual life insurance company, incorporated by the act of assembly of the State of Pennsylvania, approved February 24, 1847 (P. L., 159), and several supplements thereto, only one of which, approved March 11, 1870 (P. L., 384), need be specifically mentioned.

"2. During the years for which this tax is claimed, and for many years previous, the business of the defendant was that of mutual life insurance, on the level premium plan. Each policy issued, stipulated for the payment of an annual premium graduated for a given amount of risk, according to the age of the insured at the date of the policy. The rate of premium was fixed at a figure higher than that which experience had shown to be sufficient to meet the risk. The insured could not be called upon to pay more than the rate so fixed; he might not be called upon to pay so much. In fact, he never was called upon, after the first year, to pay it at all, but an abatement was made at the beginning of each year, the amount of which depended upon the calculations of the actuary applied to the treasurer's statement of the business of the preceding year; and in making this statement, the treasurer always included in his figures, as though it had been received by the company, the amount of this abatement, which had been made from the premiums of the preceding year, and which had not actually been received by the company. The amount of the abatement, thus ascertained by the calculations of the actuary, applicable to the premiums of each policy holder, was then deducted from the amount of the premium stipulated for in the policy, and the balance only was collected and received by the company. These abatements are called, on the books of the company, and in its annual statements and its reports to the Insurance Commissioner, 'dividends to policy holders' or 'surplus to policy holders.' But they are, in fact, just what we have stated above."

And then, among other things, it is said:

"But we think the so-called 'dividends to policy holders' are not 'net earnings or income,' and do not represent such earnings, and that defendant is not liable to tax in respect to them. Notwithstanding the mass of testimony and exhibits on this point, including the ingenious questions of the able counsel on either side, followed by answers from the officers of the company, called as witnesses, not always as clear or intelligent as might have been expected, the facts are few and simple, as we have found them above.

"It is strenuously contended by the able special counsel for the Commonwealth, that, because these abatements are entered on the books of the company as 'dividends to policy holders' or 'surplus to policy holders,' they, therefore, represent net earnings or income, and furnish a measure of the liability of the company to taxation. Whatever these statements may be called, they are, in reality, what we have stated in the finding of facts. The amounts they represent are mere negative quantities, abstract statements not of what is, or is to be received or to 'come in,' but of what is not to be received. The calculations are made for the express purpose of determining how much of the amount which the company might receive shall not be received, and one of the items which make up the apparent amount upon the basis of which this calculation is made, is the sum which was abated and not received during the preceding year. In short, the whole proceeding is merely a method by which the books of the company are made to show what would be the actual gross debtor and creditor account of the company, if the whole amount of the premiums was collected and a part was afterwards returned to the policy holders, while in fact, it is neither collected nor returned. The reason for fixing the premium stipulated for at a higher rate than sufficient, under ordinary circumstances, to cover the risk is, of course, that the company may be strong enough to stand in case of extraordinary mortality among its members.

"It is a fallacy to suppose that the real nature of the transaction is, that the policy holder pays his whole stipulated premium, and receives his share of the dividend or distribution of surplus. The relation between him and the company is not that suggested to one of the witnesses by the counsel for the Commonwealth. This witness was both a salaried officer of the company and a policy holder, and he was asked by counsel, 'if you owe \$130 annual premium and the company pay you the amount of your salary less this sum, and give you a receipt for this, is it not the same to you as if it pay your salary in full and you pay the \$130?' The answer must be, of course, 'it is.' But it is the same only because he happens to unite two characters in the same person—officer and policy holder. The transaction is really and essentially double. The officer gets his whole salary, and the policy holder pays his premium. And if the salary were subject to an income tax, honesty would require that it be all returned for taxation, and not the amount less the premium paid.

"The mutual debts are of a different nature, one from the other, and if on suit for one, the other was set up in defense, it must be as a set-off. But if the policyholder were sued for his annual premium, and used the dividends as a defense, pro tanto, it would be by way of recoupment simply; not as independent claim to balance in part the claim against him, but part of the data to show the amount which he really owed. This shows that the transaction here is essentially simple."

The difficulty which surrounds the appellant in this case, grows out of his method or bookkeeping, and its use of terms out of their ordinary signification. What really happened in every case was

that the stipulated premium was much larger than the company actually needed to carry the risk under ordinary conditions; but if extraordinary conditions should arise, the whole might be needed. Thus, if an epidemic swept over the country, the losses among its policy holders would, perhaps, be abnormal, and then the company would need the full amount of the contract premium. Now, in order to prepare in advance against such untoward contingencies of the future, the company collected the first year, the full amount of the premium, and set aside so much of it as was over-payment, as a guaranty against misfortune; and then said to its policy holders: "You need not pay hereafter, the full amount of the stipulated premium, but may omit the overplus, because we have already collected from you more than you should have paid, under ordinary circumstances, and we are holding that as protection against extraordinary losses. This overplus thus far, is still on hand, and, as long as it remains, you will not have to pay the full amount of the premium." The company, on its books, calls this a "dividend," and pretends to credit the annual premium with it.

Now, the truth is, that this over-payment is not a dividend in any sense of the term; nor is the failure of the company to collect the full amount of the premium in after years a credit in any sense of the term. A sum of money applied as a credit can never be used for the same purpose again. If I owe "A" fifty dollars and he owes me five notes of one hundred and fifty dollars each, when I credit him on the first note with the fifty dollars I owe him, he can not require me to credit that same sum on the remaining four notes as they fall due. But that is just what the State is insisting on being done in this case. The policy holder makes the over-payment of premium technically called "loading," and the company holds this sum and calls it a "dividend," and the State says that this is a crediting of this same sum on each of the after accruing premiums, and should be considered as so much collected each year by the company, and as having been paid "otherwise" than as cash.

In order to bring this matter before our minds distinctly, let us assume that in 1900 "A" takes out a policy in the appellant company, in which the stipulated premium is one hundred and fifty dollars per annum; that of this sum one hundred dollars would be sufficient to carry the risk in ordinary times, and that fifty dollars is what is called "loading" collected in order to meet the contingencies of the future. Now, in 1900, the policy holder pays the full amount of the premium—one hundred and fifty dollars. After that the company says to him, "You need only pay one hundred dollars per annum; and as long as the fifty dollars of over-payment, you made in 1900, remains unexhausted, your annual premium will be really one hundred dollars, instead of one hundred and fifty dollars as stated in the policy." The account in five years would be stated as follows:

1900. Beginning of the insurance period—premium paid,	\$150 00
1901. Premium paid	100 00
1902. Premium paid	100 00
1903. Premium paid.....	100 00
1904. Premium paid	100 00
1905. Premium paid	100 00

Total	\$650.00
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Obviously, the total amount of money paid by the policy holder, and received by the insurance company, is six hundred and fifty dollars, and it has received no more, either in cash or otherwise; and on the sum so received it is conceded that appellant has paid

the tax due. Now, to tax the company on the fifty dollars per year, which it did not collect, but left in the pockets of its policy holders, is to tax it on money that it never received, either in cash or in any other manner.

To consider the over-payment of fifty dollars, made at the beginning of the contract period, as money belonging to the policy holder, and a credit to be made each year on the annual premium, is to make the same sum of fifty dollars pay in credits a debt equal to itself each year, during the life of the policy. If the policy continued for twenty years, then, one sum of fifty dollars would pay off and extinguish a thousand dollars of debt due for premiums; i. e., each year it would be credited on the contract premium of one hundred and fifty dollars, and reduce it to one hundred. So that, as said before, one sum could be credited on annually accruing debts ad infinitum.

If we look only at the method of bookkeeping of the appellant and have regard only to the terms it uses, there is much in the appearance of the case thus presented to warrant the position of the Commonwealth as to its right to tax the so-called "dividends" said to be annually credited on the premiums due from policy holders; but the law looks below the mere appearance of things, and has regard to the reality; and thus looking, it sees that the appellant misuses the terms "dividend" and "credit," and, as shown above, pays no dividend and allows no credit; but that, in reality, all that it does is to collect on the first premium a sum sufficient to meet the contingencies of any given year of the future, and then abstains from collecting any further over-payments while the first remains on hand.

If it were permissible to extend our investigation from the law of the case, into the realm of economic policy, much might be said in favor of encouraging these so-called "annual dividend paying" companies, who manage their affairs economically and leave in the pockets of the people these misnamed "dividends" rather than, as is done by the deferred dividend companies, collect unnecessary premiums and hold them for long periods of time; thus piling up gigantic sums of money in our financial centers with which, it is charged, politicians are corrupted, speculation is engendered, and the fair prospect of legitimate commerce is one day paralyzed by the unnatural stringency of the money market, and on another maddened with the intoxication of an equally unnatural inflation of capital; all in the interest of the speculators and brokers, and detrimental to that of the people at large. But with this phase of the question, we have nothing to do; our duty is wholly performed by construing the statute so as to require the corporation to pay taxes on every dollar it actually receives either in "cash or otherwise," but not extending its terms so as to make it pay on what it does not receive, but leaves in the pockets of its policy holders.

For these reasons, the judgments are reversed with directions to dismiss the petitions.

Whole court sitting.

Chief Justice O'Rear and Judge Nunn dissenting.

LOUISVILLE & NASHVILLE RAILROAD CO., &c. v. SCHMIDT, TRUSTEE, &c.

(Filed February 21, 1908—To be reported.)

Railroads — Mortgages — Trustee — Authority — Action—Reimbursement—Persons Liable—Where an unfinished railroad executed to another road a lease upon its road and also a mortgage, in order to obtain funds to complete the road, and the lessee executed a mortgage on its earnings to the trustee for the bondholders, the three writings which were executed simultaneously, must be considered as one contract, though the mortgage of the earnings considered alone, created merely a dry, naked trust, where by the other mortgage, the trustee was authorized to take possession of the road, which, under the law then in force, he could not do, his only remedy was to bring a suit in equity as trustee against the lessee road for the benefit of his trust, and was entitled to be reimbursed by the bondholders for the expenditure he was required, in the prosecution of such suit, for which the lessee road, as one of the bondholders, was liable for its proportional share, although the suit was against its wishes and not for its benefit.

Helm & Helm, Helm Bruce & Helm and Benj. D. Warfield for appellants.

Trabue, Doolan & Cox for appellees.

Appeal from Jefferson Circuit Court, Chancery Branch, Second Division.

Opinion of the court by Judge Settle, affirming.

After many years' litigation and great expense, A. L. Schmidt, as trustee for various holders of bonds of the Northern Division of the Cumberland and Ohio Railroad Company, appellants' lessor, financially compelled of appellants an accounting for the earnings it received from its lease of that company's road, accrued to July 1st, 1890, and for the amount thereof, to-wit: \$90.053.34, appellee obtained judgment against appellant as of March 21st, 1898. The recovery was had under certain mortgages upon the road bed and property of the Northern Division of the Cumberland and Ohio Railroad Company, and its earnings, received by appellant as lessee of the road.

The sum thus recovered, less a credit for 250 coupons and 24 bonds of the Northern Division of the Cumberland and Ohio Railroad Company which appellant then claimed to own, was paid by it under rule into court, and subsequently distributed.

The order awarding the rule under which appellant paid the money into court, is as follows:

"But the allowance of the said credit on account of the 250 coupons, and on account of the 24 bonds, shall not be taken and held as an adjudication by the court herein that the said Louisville and Nashville Railroad Company, as beneficiary under the trust held by plaintiff, is exempt from or liable for any part of the charges and expenses of the plaintiff trustee and said trust. If it shall hereafter appear, upon the distribution of the fund herein, that said coupons should not have been paid in full, but should have been paid pro rata with other coupons, or that the amount allowed the Louisville and Nashville Railroad Company on said 24 bonds is more than the pro rata share of said bonds, then the amount of excessive payment

made upon said coupons or upon said bonds, shall be adjusted in the distribution of the fund herein whenever the same shall be made, so as to equalize the beneficiaries under the said trust with the Louisville and Nashville Railroad Company as the owner of the 250 coupons and said 24 bonds."

By a subsequent ruling of the court, an accounting for earnings from the same source was required of appellant from the year 1890 down to the year 1898, and after much delay in the lower court, and an appeal to this court (*Schmidt v. L. & N. R. R. Co.*, 37 Ky. Law Rep., 21) appellee obtained judgment against appellant on March 1st, 1905, for \$128,431.75, with six per cent. interest from February 21st, 1903. When appellant was called upon to settle this judgment it amounted to \$144,371.36, and in addition, there was due appellee as ordinary costs in the action, \$523.10.

In settling this judgment, appellant claimed the right to retain and did retain \$11,549.70 on account of 20 bonds of the Northern Division of the Cumberland and Ohio Railroad Company it owned and which it insisted should be paid out of appellee's recovery. These bonds amounted to 20-250 of the amount recovered and after deducting the \$11,549.70, appellant paid appellee \$133,344.76.

When the payment was made the lower court entered the following order:

"The plaintiff claims that the amount of \$133,344.76, this day paid in by the Louisville and Nashville Railroad Company, is not in full of plaintiff's claim under the judgment herein rendered on March 1st, 1905, and this action is retained on the docket for the purpose of hereinafter, by proper proceedings, determining that question and any other questions not heretofore finally disposed of."

Later appellee filed in the court below his affidavit setting forth the items and amounts of extraordinary costs, in the matter of attorney fees, commissioners' fees, and other necessary expenses, he was compelled to incur in the prosecution of the claims of his cestuis que trust, and asked a rule against appellant, requiring it to pay into court the amount it retained when it paid over the \$133,344.76, or enough thereof to pay its (appellant's) proportion of the extraordinary costs and expenses set forth in appellee's affidavit. By its response to the rule, appellant denied any liability on its part for the costs and expenses sought to be recovered and presented various reasons for its unwillingness to pay them; the principal ones being that appellee, Schmidt, was given no authority express or implied, by the instrument making him a trustee, to bring or maintain the action in which such costs were incurred; that the interests of the trustee and his co-plaintiffs all the while were adverse to those of appellant, and that throughout the litigation appellant was represented by counsel of its own choosing.

The response of appellant was held insufficient, the rule made absolute and judgment entered compelling appellant to pay the costs claimed under the rule, amounting, altogether to \$8,901, with six per cent interest on \$6,670 thereof from June 30th, 1900, and like interest on \$2,231 thereof from March 1st, 1905. Appellant complains of that judgment and by this appeal seeks its reversal.

The several items embraced in the aggregate of costs for which appellee was given judgment, appear to be correct charges and such in amount as should be apportioned to and accounted for by appellant.

We find in the record an opinion written by the judge of the circuit court, which sets forth his views upon the questions of law arising on the rule and response supported by abundant authority. A careful reading of the opinion convinces us of the soundness of

the conclusions therein expressed; for which reason, and because it aptly expresses our views upon the questions involved, we adopt and make it a part of this opinion. The opinion is as follows:

"In support of defendant's response to the rule, it is earnestly contended that the mortgage of the earnings does not impose any duty upon the trustee and under it he had no authority to sue as trustee alone, and that the instrument merely created a naked or dry trust. From this viewpoint it is urged that the action was maintained by the bondholders and by Schmidt in his individual right as a bondholder, associated with other bondholders, and as the proceeding was not for the benefit of the defendant, and was contrary to its wishes, the rule underlying the case of *Thirwell v. Campbell*, 11 Bush, is here applicable. Counsel in this contention has fallen into the error of considering the mortgage of the earnings by itself and not in connection with the other contracts and deeds made by the parties contemporaneously. The mortgage of the earnings standing alone would indeed create only a naked trust in Speed, or Schmidt, his successor, but the Court of Appeals has said in *L. & N. R. R. Co. v. Schmidt*, 112 Ky., 721, 23 Ky. Law Rep., 2097:

"It has been held by this court several times that these papers executed contemporaneously not only for the benefit of the lessor and lessee, but also for the benefit of the bondholders, must be read together as one contract citing four previous decisions of the court upon these same contracts to the same effect.' (*Phillips v. C. & O. Ry. Co.*, 110 Ky., 33.)

"Looking, therefore, to the other instruments and particularly to the other mortgage made to the same trustee, dated July 2nd, 1879, we find many important duties devolving upon the trustees in the event of a default in the payment of the interest upon the bonds. By that instrument, the trustee is authorized, after such default in the mortgagor, to enter upon and take possession of the railroad, and its franchises and property and operate the road, or, under certain circumstances, to sell the property. Under the law of this State, existing at that time and now in force, the mortgagee could not take possession, but was compelled to enforce his lien by a suit in equity. A fair construction of that instrument made the trustee the active and responsible representative of the bondholders, and he was under said deed, by implication, clothed with authority to institute and conduct any suit for or on behalf of his trust as might become necessary for the preservation of the estate committed to him or for the benefit of his cestuis que trust, the bondholders. The mortgage of the earnings was an addenda to the original mortgage, and gave the bondholders additional security, and must be read with the mortgage of July 2nd, 1879.

"An examination of this record shows that, although the trustee, Schmidt, formally associated with him some of the holders of the bonds in the institution of the proceedings and sued alone in his own right as a bondholder, he has, nevertheless, throughout this long litigation, prosecuted the action as trustee and recovered as such. The bondholders associated with him formally in the petition, have not been seen or heard from so far as the record before me shows, since the filing of the petition, and from start to finish the trustee has borne the heat and burden of the contest.

"The respondent or defendant resisted the efforts of the trustee as lessee of the mortgagor, and not as bondholder. If this controversy had been between the trustee and a bondholder for an adjustment of some difference between them, then the action would have been what is characterized in equity practice as litigious, and only ordinary costs would have been allowed, but the controversy was not between the trustee and a bondholder. It was between the trustee, seeking to carry out the provisions of the trust, against one in open

hostility to the trust, seeking to defeat its provisions, although itself a small holder of bonds and interest coupons.

"The entire question at bar seems to have been thoroughly gone into and disposed of by the Court of Appeals in the case of Phillips v. The Southern Division of the C. & O. Ry. Co., 110 Ky., 33. The defendant in this proceeding was a defendant owning all the issue of bonds, amounting to three thousand dollars, except five hundred dollars thereof, and one of the contentions made was, that the action should not be allowed, as 'It will put the C & O. or L. & N. to a great expense in the matter of fees to the trustee and his attorney.'"

Answering this the court said:

"That certainly is no argument against the sufficiency of the petition, or in favor of the right of appellee to maintain its plea in abatement. The parties to the lease and mortgage contemplated that it was possible that just such a condition would arise, which would render this action necessary; and that to administer the trust and to enforce the provisions of the contract the trustees would be entitled to compensation, and likewise the attorneys which it might be necessary to employ. Hence it was expressly agreed by the parties that this expense was to be paid before anything else, out of the proceeds of the mortgaged property. The parties to that contract should not complain of the expense which may be incurred, for they had reason to believe such might be incurred, and provided for its liquidation. It is likewise without reason to complain of the trustee proceeding to do the very thing which the contracting parties made it his duty to do, to-wit: to look to the collection of the fund to pay the bonds, receive the net income for operating the road under the lease, to cancel the bonds when paid, and, if there was default in their payment, to forthwith institute a proceeding like this one.

"The only difference between this case and the case there decided was, that in that mortgage, it was expressly provided for compensation to the trustee and for his costs; in this case, the deed is silent as to the compensation for the trustee or the re-imbusement of costs and expenses. When the contract creating the trust was executed there arose an implied obligation on the part of the holders of bonds that the trustee should be re-imbursed any necessary expenditures he might be required to make in the discharge of the duties cast upon him as such trustee. It formed a part of the consideration between the trustee and his cestuis que trust, and bound the holder of each bond or interest coupon.

"The recovery was by the trustee and for the trust estate, and the money withheld by the respondent, as the owner of the bonds, was a part of the recovery, and it should bear its proportion of the costs. The response is adjudged insufficient and rule made absolute."

Judgment affirmed.

Whole court, except Judge Barker, sitting.

O'BRYAN, &c. v. HIGHLAND APARTMENT CO.

(Filed February 28, 1908—To be reported.)

1. Municipalities—City Ordinances—Building Permits—Reasonable Regulations—Avoiding Fires—The courts recognize the right of cities, under the police power, to make rules and regulations necessary to protect the health and morals of the city, and such as may be necessary to prevent the spreading of fires; the only restriction being that in passing such ordinances is that they shall be reasonable. The use of one's property, under the law, means such use and enjoyment as will not unnecessarily endanger or destroy the property of others.

2. Same—Property Owner—Injunction—A property owner may sue and enjoin the erection of a building in violation of the reasonable building regulations of the city required by its ordinances.

3. Same—Reasonable Regulations—An ordinance of a city denying the right to erect a frame building therein, without a written permit from the building inspector, and within the fire limits of the city, held to be a reasonable regulation.

4. Building Permits—Revocation by Inspector—A permit to erect a building, given by the building inspector under a misstatement or misconception of the facts may be withdrawn or revoked by the inspector.

5. Building Inspector—Control of Board of Safety—Right to Cancel Permits—Under Kentucky Statutes 1903, section 2861, the building inspector of a city is subject to the order of the Board of Public Safety, and where complaint is made to such board, it may decide that the inspector had no right to issue such certificate because in violation of the building ordinances, and such board may cancel the certificate, though the work on the building may have commenced.

Gibson, Marshall & Gibson for plaintiffs.

J. W. S. Clements for defendant.

Appeal from Jefferson Circuit Court, Chancery Branch, First Division.

Opinion of the court by Judge Lassing. (In Chambers.) Refusing to dissolve injunction.

The appellee is the owner of a large stone and brick building, used as an apartment house, situated on Cherokee road, in Louisville. The building occupies practically the entire lot owned by appellee, and runs from the street back to an alley. On the west of this building appellants own a lot which likewise runs from the street back to the alley. Upon a portion of their lot, fronting on the street, is a residence, in the rear of which is a frame stable. There is a vacant space or lot between appellants' residence and appellee's building. This space is thirty or more feet in width. Sometime prior to December 6, 1907, appellants made application to the building inspector of Louisville, for a permit to build a stable upon this vacant lot owned by her, and the permit granting her the right to erect a frame stable thereon was issued to her. Upon learning that such a permit had been issued appellee protested and sought to have the building inspector revoke the permit. When his attention was called to the fact that the stable, as proposed to be erected, would be within less than sixty feet of appellee's apartment house, the inspector ordered that the work on the stable should be suspended pending investigation. Following the issuing of this order, appellants applied for, and secured, a permit to erect a dwelling upon the vacant lot fronting on the street. Having secured a permit to erect a dwelling, appellants proceeded to build the stable, and appellee applied for, and was granted a temporary restraining order, enjoining appellants from building the stable. Following the granting of this restraining order the Board of Public Safety, on application by appellee, took the matter up, and after hearing, directed the inspector to cancel the permit to build the stable, and, acting under this order, the permit was canceled by the inspector and appellants notified of this fact. The temporary restraining order was, upon hearing, continued in force, and the case is now brought before me, seeking to have the injunction dissolved.

Four questions are raised. First, that the ordinances, upon which appellee bas' its contention, are unconstitutional; second, that if

the ordinances are not unconstitutional, appellee has no right to maintain the action, but that it must be prosecuted in the name of the city; third, that the permit to erect the stable having been granted, and work having been begun, it can not thereafter be revoked; and, fourth, that the ordinances upon which appellee relies do not govern or regulate the character of building which appellants contemplated erecting.

Courts of last resort generally recognize the right of municipalities to pass all reasonable rules and regulations that may be necessary to protect the health and morals of the city, and to make such regulations as may be necessary to prevent the spreading of fires, and protect property within the corporate limits. The exercise of these functions, on the part of the municipality, is under the police power, and the only restriction and limitation thrown around the act of the municipality in passing such ordinances, is that they shall be reasonable. This principle was distinctly recognized by this court in the late case of *Tilford, Building Inspector v. Belknap*, 31 Ky. Law Rep., 662, in which Judge Settle, speaking for the court, said:

"It goes without saying that, in the exercise of its governmental functions and under the police power, a municipality may enact ordinances for the safety of the public. * * *

"This includes the right to establish, by ordinance, rules and regulations to prevent the spreading of fires, and for the protection of property within the corporate limits, but such rules and regulations must be reasonable."

In 8 "Cyc.," page 1062, this right of the city to pass such reasonable rules and regulations as are necessary for the protection of property, is thus stated:

"A city may, by ordinance, forbid the erection, alteration, or repair of buildings within certain districts or boundaries without denying the equal protection of the law, as such regulations are within the police power."

This right, qualified only to the extent that the rules and regulations shall be reasonable, is now recognized by courts of last resort with such a degree of uniformity as to justify the conclusion that it is general.

In determining whether or not the ordinances under consideration are constitutional the only proper and legitimate subject of inquiry is, are they reasonable? If they are reasonable, then the municipality clearly had the right, in the exercise of its police power, to pass them, and the wisdom of its so doing, is not a subject of judicial investigation. The law presumes that in the enactment of public ordinances the municipality, through its legislative boards, acts in good faith and for the best interests of its citizens, and, therefore, so long as the ordinances are reasonable a citizen may not complain even though by reason thereof his unlimited and unrestrained use and enjoyment of his property is, to some extent, abridged or denied. The idea of absolutism in the use and enjoyment of our property has long since been exploded, and the now well recognized doctrine is that, the use and enjoyment of our property guaranteed by the Constitutions, State and Federal, means such use and enjoyment as will not unnecessarily endanger or destroy the property of others. The ordinances involved in this controversy are sections 15, 64, 65 and 70. Section 15 provides:

"That no excavation shall be commenced, no wall, structure, building, part or parts thereof, or sign board exceeding ten feet in height, shall be built, constructed, altered, repaired or removed in said city until a permit has been issued for the proposed work by the building inspector."

Section 64 provides: "No frame dwelling, building, or structure shall be erected in the city of Louisville without a written permit

from the building inspector; and it is further provided that no frame dwelling, building or structure shall be erected within the 'fire limits' of the city of Louisville."

Section 65 provides: "No frame, veneered, iron clad or any building, the enclosing walls of which are constructed of combustible material, shall be erected, moved or remodeled within the 'fire limits' of the city of Louisville, or repaired when damaged to the extent of 50 per cent., exclusive of the foundation, of its value by fire or decay, and no such building shall be erected, or moved without the 'fire limits' of the city of Louisville within sixty feet of any permanent brick, stone, concrete or iron building, and no frame, veneered, or iron clad building erected beyond the fire limits of the city of Louisville prior to the enactment of this ordinance, and situated within sixty feet of any permanent brick, stone, concrete or iron building shall be enlarged, remodeled, moved or repaired, when damaged by fire or decay, to the extent of 50 per cent., exclusive of the foundation, of its value, without the written permission of the inspector of buildings."

Section 70 provides: "That wooden structures not more than two stories high, the highest point of the roof not exceeding twenty-eight feet above the grade of the public alley, and not more than twenty-five feet square on the ground floor, may be erected on the rear of a lot at a point where such lot abuts the public alley and used only for servants' quarters, privy, stable, coal house, laundry, &c., without the fire limits of the city of Louisville."

It is conceded that the proposed building is located without the "fire limits," but within the city limits of the city of Louisville. In order that these four sections of the ordinances of the city of Louisville, governing and controlling the erection of buildings within the city limits, may be thoroughly understood, they must be read and construed together, for it is only in this way that the purpose, aim and intent of the city government, in their enactment, can be arrived at. It will be observed that section 64 denies to the property holder, unqualifiedly, the right to erect any frame dwelling, building or structure within the city of Louisville, without the written permission of the building inspector so to do, and denies absolutely the right to erect any frame dwelling, building or structure within that portion of the city embraced within what is known as the "fire limits."

Section 15 denies the right of the owner to build, alter or remove any building or sign board, exceeding ten feet in height, anywhere within the city limits until a permit has been applied for and issued by the building inspector.

Section 65 provides, among other things, that no frame, veneered, iron clad, or any building, the enclosing walls of which are constructed of combustible material, shall be erected or moved without the "fire limits" of the city of Louisville, within sixty feet of any permanent brick, stone, concrete or iron building without the written permission of the building inspector.

Section 70 provides for the erection of wooden structures for certain designated purposes on the rear of lots without the fire limits, and, when considered by itself, this section would support the contention of appellants, but, when read in connection with sections 15, 64 and 65, the purpose and meaning of section 70 is clear. It is the duty of the building inspector to see to it that all proposed buildings within the city limits conform to the requirements of these ordinances, the first one of which is that no building, other than a sign board, not exceeding ten feet in height, shall be erected within the city limits unless a permit is first procured authorizing same. This, I take it, is not an unreasonable regulation. When we consider that in the growth and development of a city covering, as in this case, a large territory, many buildings are necessarily at all times, during

seasonable weather, in process of erection or construction, and in order that the city may be enabled to protect its citizens against the ravages of fire it is absolutely indispensable that the city authorities should know in advance the character of the building which any lot holder may propose to erect upon his premises. Now when section 70 is read in connection with section 15, it is unnecessary, and would be surplusage, to have added thereto the provisions of section 15, for, as above stated, they must be read together, and, when it is stated in section 15 that no building or structure shall be erected in the city until a permit is first procured so to do, it is wholly unnecessary to have this same subject-matter incorporated in each following section. Under section 70 a lot owner may, having first complied with the provisions of section 15, erect on the rear of his lot, a frame building, provided his right to do so is not denied by section 65, which must be read in connection with sections 15 and 70. Reading these three sections together, and uniting them the one with the other, as they must be in order to determine appellants' rights, we have the following: A property owner, living within the city of Louisville, and without the "fire limits," having first procured a permit allowing him to do so, may erect on the rear of his lot, where said lot abuts on the public alley, a wooden structure not more than two stories high, the highest point of the roof not exceeding twenty-eight feet above the grade of the public alley, and not more than twenty-five feet square on the ground floor, to be used for servants' quarters, privy, stable, coal house, laundry, &c., provided said proposed structure is not within sixty feet of any permanent brick, stone, concrete or iron building.

By section 64 it will be observed that the property owner is denied absolutely the right to build any frame building or structure of whatever kind or nature within what is known as the "fire limits." This regulation is for the protection of the public—for the general good of the city—and is based upon the past experience of municipal authorities that, in the more thickly settled portions of a city, which are the parts embraced within the "fire limits," fires are prevented and controlled only by the exercise of the most rigid rules and regulations; the most important of which is that which requires that all buildings and structures within such territory be constructed, as far as possible, out of incombustible material. When these requirements are strictly observed and enforced, and an adequate fire department is maintained, the danger from fire, though still great, is reduced to its minimum. Now, in the out-lying districts of a city the danger from fire is not so great for the reason that the buildings are not so close together, and as long as they are kept separated, the one from the other, the danger of a conflagration in case of fire is lessened, but as the city grows and develops these out-lying districts become built up and more thickly settled; structures of a more permanent character, built of more durable material, gradually take the place of temporary or wooden structures, and hence, section 65 provides that no wooden structure shall be built, even upon the rear of a lot within less than sixty feet of a permanent structure, the walls of which are constructed of some non-inflammable material, such as brick, stone, concrete or iron. I am of opinion that such regulations are not only not unreasonable, but are wise and highly beneficial to the general welfare and protection of the property and lives of the citizens of the municipality. Similar provisions have been approved and upheld in the cases of *Eureka City v. Wilson*, 15 Utah, 67; *Lemon v. Guthrie Center*, 113 Iowa, 36; *Fire Department of New York v. Gilmore*, 149 N. Y., 453; *Coffman v. Stein*, 138 Ind., 49, and the *First National Bank of Mt. Vernon v. Sarrls*, 129 Ind., 201.

The next question is, has appellee the right to maintain this suit? Under the general principle that for every wrong there is a

remedy, one, feeling himself aggrieved, has a right to go into court and have it determined whether or not he has cause for redress. Our court, so far as I am advised, has not passed upon this direct question, but it has been many times passed upon by courts of last resort in other States. In the case of the First National Bank of Mt. Vernon v. Sarrls (Ind.), 28 Am. St., 185, it was held that an injunction would lie at the suit of a property holder to prevent the rebuilding or repairing of wooden buildings in violation of a municipal ordinance establishing "fire limits," &c., and, in the case of Coffman v. Stein (Ind.), 46 Am. St., 368, it was held that a property owner has a right to enjoin the removal of a wooden building to a place within the "fire limits" in violation of a city ordinance forbidding it. In the case of Griswold v. Brega (Ill.), 52 Am. St., 350, it was held that neighboring property owners might enjoin one from moving a wooden building to a point within the "fire limits" in violation of an ordinance regulating such removal. In this last case it was held that property owners might enjoin not only the one seeking to so remove the building, but might enjoin the city from issuing a permit authorizing it to be removed. These are all well considered cases, and there is good reason and common sense in the rule which permits a property owner, who feels that his property is about to be injured and that its danger and risk from loss by fire will be materially increased by the erection of the proposed frame building, to take such steps as are necessary to compel the one seeking to erect the building to do so in strict conformity with the reasonable rules and regulations of the city, applicable thereto.

The contention of appellants that the permit to build, having once been issued, can not be revoked, is not well taken. It is evident from the facts in this case that, at the time the permit was issued, either the building inspector was not thoroughly familiar with his duties in the premises, or else he issued the permit under a mis-statement or misconception of the facts; I am inclined to the opinion that the latter is the correct theory, for as soon as he was notified that the proposed building was within sixty feet of a permanent structure, and, therefore, came within the inhibition of section 65, above quoted, he at once notified appellants to discontinue the work until an investigation could be made. Therefore, the permit was issued without right or authority in law, and was in direct conflict with and a violation of the plain provision of the law, as set out in section 65, and being so issued, if appellants procured the permit without giving to the building inspector a full exhibit of the facts, they can not now complain because it is withdrawn or revoked. However, it appears in the record that this permit was ordered revoked and canceled by the Board of Public Safety. Under section 2861, of the Kentucky Statutes, this board, among other duties, has exclusive control of the department of buildings and the building inspector is, therefore, subject to the order and direction of the Board of Public Safety, and this board, complaint having been lodged with it, heard the right of the building inspector to issue the permit in question, and after a hearing, that he had no such right and directed the permit canceled. The Board of Public Safety, having exclusive control of this department of the city government, being clothed with full power and authority to see that the ordinances governing and controlling and regulating the department of buildings were carried into effect, determined that this permit was improperly granted, and, directed it to be canceled. I am of opinion that the Board of Public Safety, in so doing, acted clearly within the line of its duty, and aside from this, I am of opinion that if the building inspector himself, on his own initiative, had canceled this permit, appellants could not complain, for if he had a discretion in the matter, which he could exercise in granting the permit, if he had exercised this discretion upon a mistake of fact,

upon discovering that he had done so, he would clearly have a right to revoke the permit.

The fourth objection urged by appellants has already been answered in passing upon the first, wherein it is held that no building of any character, other than the erection of sign boards, not exceeding ten feet in height, can be conducted or carried on within the city limits unless a permit has first been procured so to do.

On the whole case, I am of opinion that the injunction should be not dissolved. In this conclusion I am joined by all my associates on the bench, except Judge O'Rear, who was not present, and Judge Settle, who, for personal reasons, did not sit in the case.

BRUMMETT v. COMMONWEALTH.

(Filed March 19, 1908—Not to be reported.)

1. Homicide—Joint Indictment—Separate Trial—Proof of Conspiracy—Declaration of Co-conspirator—Competency—In the trial of B., jointly indicted with H., for the murder of W., in which a conspiracy is charged, evidence of a statement made by B. to witness A., prior to the killing of deceased that "if he had such men as me and M., that he already had H. in with him, who was not afraid of hell, that sometime when W. came ranting around on the ridge, we would uncap his head and leave him for his friends to carry home," Held—To be competent to show a conspiracy between B. and H. to kill W., and hence the declaration of H., in the absence of B., was properly admitted to the jury as evidence against B.

2. Same—Evidence—Statements Made by Wife of Accused—Competency—On the trial of B., indicted with H. for killing W., in which it was claimed that the killing was done because of some real or fancied insult by W. to B.'s wife, it was incompetent to prove statements made by B.'s wife to a witness in the presence of H. in reference to the time that her husband intended to go to the town of M. with a load of melons (on one of which trips he was killed), as the effect of such evidence was to make the wife an unwilling witness against her husband without giving her a chance to deny it.

J. Bertram, T. A. Wallace and Edwin P. Morrow for appellant.

James Breathitt, T. B. McGregor, Harrison & Harrison and Charles H. Morris for appellee.

Appeal from Wayne Circuit Court.

Opinion of the court by Judge Lassing, reversing.

Appellant, Marshall Hall, and others, were jointly indicted for the murder of Levia Woolridge. A detailed statement of the evidence concerning this homicide, may be found in the records of the two appeals of Hall v. Commonwealth, before this court, in 29 Ky. Law Rep., 435, and 31 Ky. Law Rep., 464. On the first appeal in the case of Hall v. Commonwealth, the judgment of conviction was reversed because certain statements of appellant, not made in Hall's presence, were admitted in evidence against Hall when there had not been any testimony introduced which showed, or tended to show, the existence of a conspiracy. Upon the return of the case for trial the Commonwealth introduced a witness, Burch, whose testimony made out a prima facie case of conspiracy, and, this having been done, the testimony of appellant, offered on the first trial, was again offered in

evidence. The second trial resulted in Hall's conviction, and, upon appeal to this court, the judgment of the lower court was affirmed.

When the case of the Commonwealth against appellant was called for trial, the witness, Burch, had left the State and his testimony was not procured, and, it is insisted for appellant that the statements of the witness, Hall, which were not made in the presence of appellant, should not have been permitted to go to the jury as evidence against him, in the absence of a showing on the part of the Commonwealth, that there was a conspiracy. The Commonwealth introduced two witnesses who testified to conversations which they had with appellant, and it is insisted that these conversations show conclusively that appellant had conspired with Hall to kill Woolridge. The declarations and statements which appellant is credited with having made are as follows:

The witness, Henry Miller, testified that sometime in the spring of the year, before Woolridge was killed, "appellant said to me if he could get such men as me and Owen Adkins in with him, to keep the dogs off, that they would uncap Woolridge's head sometime when he came over the hill ranting around, that he already had Hall with him."

Owen Adkins testified that in January of the year that Woolridge was killed, he heard some shots fired down at appellant's house and sometime after the shooting, when appellant and others were going to town with a load of lumber, he had a conversation with appellant, in which appellant said to him:

"If he had such men as me and Henry Miller, that he already had Hall, in with him, who was not afraid of hell, that sometime when Woolridge came ranting around on the ridge, we would uncap his head and leave him for his friends to carry home."

Hall was not present at either of these conversations and for that reason it is urged that this testimony does not tend to show a conspiracy, because only one of the men was present. This is undoubtedly true, if the testimony were offered against Hall. Hall was certainly not bound by any statement made by appellant in his absence, unless a conspiracy was first proven, but this evidence was offered for the purpose of showing that appellant had said, in substance, that he and Hall had conspired together for the purpose of killing Woolridge. This is not a new question, for, in the case of *Allen v. Commonwealth*, 26 Ky. Law Rep., 807, where four brothers had been jointly indicted for the assassination of Dulaney Peters from ambush, a witness was introduced on the trial of two of these brothers, who testified to statements made by them to him, which tended to show that they had conspired with the others to kill Peters. Upon review here it was held that this was competent evidence against the brothers who made the statements to the witness, but not against the other brothers. That case is decisive of the question under consideration. We are of opinion that this evidence, as against appellant, made out a prima facie case of conspiracy between appellant and Hall to kill Woolridge, and, hence, the declarations made by Hall, in the absence of appellant, were properly admitted to the jury as evidence against appellant.

Counsel for appellant also complains that the court erred in permitting the witness, Bob Sullivan, to detail a conversation which he had with appellant's wife sometime before.

The conversation complained of is as follows:

"I was at appellant's house one day, some time before the killing of Woolridge, and appellant's wife said to me that her husband might get me a job in the Steubenville oil field, running a gas engine, or something of the kind, and for me to go down and find out when Woolridge was going to Monticello again, as he was hauling water-

melons there, and that I could ride that far with him on the wagon, as I went to the oil field, and she said for me to come by and spend the night with her before I went, as she wanted to send a letter by me to her husband in the oil field. Hall was present at this conversation, but took no part in it, further than to say that he would show me the way to the oil field."

Appellant was not at home at the time. Clearly this testimony detailing the conversation with and statements of the wife was incompetent, but, it is insisted for the Commonwealth, that this was not prejudicial to him nor an error for which the case should be reversed.

Section 606 of the Code, expressly provides that neither the husband nor the wife shall testify for or against the other, except in certain designated cases, and this is not one of the exceptions. To permit the witness to detail a conversation with her is, in effect, making her an unwilling witness against her husband without giving her the right to say whether or not she made the statements attributed to her. We can not say that this testimony was not prejudicial for, when considered in the light of the facts and circumstances as developed by the testimony in this case, it undoubtedly weighed heavily against appellant in the minds of the jury. When it is remembered that appellant was charged with having conspired with Hall and others to kill Woolridge, because of some real or fancied insult or indignity which Woolridge had offered appellant's wife, it is easy to see how the minds of the jury might be influenced by these statements attributed to her, for, if this conversation was believed, it showed that she was taking notice of the movements of Woolridge and was arranging for this witness to notify her when Woolridge was next going to town with a load of watermelons, and when she received this notice, she was preparing to send a letter or note to her husband by this witness. Hall was present and heard all these arrangements. It later developed, in the testimony, that Woolridge was assassinated when returning from town, where he had been to dispose of a load of watermelons, and thus the testimony of the alleged conversation of the wife is made to dovetail in with and connect the statements, which the husband is alleged to have made sometime before the killing, as to how Woolridge could be killed, with the actual manner in which he was killed, and in this way this alleged conversation might be, and no doubt was, made an important link in the chain which the Commonwealth was forging to show appellant's guilt, although when the deed was actually done, he was some fifteen or twenty miles away. When considered in this light, it will readily be seen that the admission of this testimony was an error which might result in total miscarriage of justice. No such conversation may have taken place. The witness, actuated by improper motives, may have manufactured the conversation out of the whole cloth, and yet appellant would be helpless, for his wife not being permitted to testify, he would have no way of refuting it. In this way a conviction could be secured by perjured or trumped up testimony, supposed to come from the lips of his wife, carrying with it all the force, effect and conviction which such statements, if true, would and should carry. It was because of the wife that the trouble between appellant and Woolridge originated. It would be but natural to presume that she took an active interest in the plans of her husband, if he had any, by which he proposed to avenge the wrong done her, or the insult offered her. Interwoven throughout the testimony in this case, is the one idea that it was to satisfy a feeling of hatred against the deceased, growing out of some insult offered the family or wife of appellant, that caused Hall and appellant to enter into the foul conspiracy to kill him.

Hall was a member of appellant's family and had been for sometime prior thereto. He was charged with having actually committed the murder and it will not do to say that statements which purport to come from the lips of appellant's wife, which even tend to show the existence of a conspiracy, would fall lightly or without weight upon the ears of the jury. It will not do to speculate as to what effect this testimony had. It is true an awful crime has been committed; a man has been foully assassinated; and the ends of justice will be satisfied only when the guilty one or ones have been punished therefor. Appellant may or may not be guilty; he might have been convicted without the introduction of the evidence complained of, but this is not for us to say; our province is to see that he has a fair trial, conducted according to the forms of law, and that upon his trial only legal and competent evidence is produced against him.

Because of the introduction of this incompetent testimony, the judgment is reversed and remanded, for another trial consistent with this opinion.

JONES v. PREWITT.

(Filed March 19, 1908—To be reported.)

Land—Sale of—Encumbrance—Price of Land Covered by Right of Way—Executory Contract—Refusal of Purchaser to Accept Deed—Although the rule in this State, as announced in certain cases is, that when a purchaser accepts a conveyance, with knowledge of the existence of a highway or railroad thereon, he can not obtain an abatement of the purchase price or a cancellation of the contract on account of the incumbrance, this principle will not be applied to railway rights of way against a purchaser under an executory contract, in the absence of evidence showing that it was the intention of the purchaser to pay for the land enclosed in the right of way, where he objects in a reasonable time to accept a conveyance of the property that would require him to pay for the right of way.

Jouett, Byrd & Jouett for appellant.

Pendleton, Bush & Bush for appellee.

Appeal from Clark Circuit Court.

Opinion of the court by Judge Carroll, reversing.

On March 13, 1906, the parties to this controversy entered into the following contract:

"This contract witnesseth: I have this day bought of Lizzie T. Prewitt all of that part of her Weathers farm that lies north of the line that we have agreed upon, said line begins at a point on the Clintonville pike a little north of where three locust trees stand, and runs in an easterly direction to a point a little south of a walnut tree in Van Meter's line. I agree to pay for said land at the rate of one hundred dollars per acre—the whole amount to be paid when the deed is made. I am to have possession of the land as soon as it is paid for, and of the house as soon as Mrs. Prewitt can get her part of the line fence built and the house repaired that Mr. Connor is to move into.

"W. Y. JONES."

On March 20, they had the land surveyed, when it was found to contain 184 acres. In 1889, the Kentucky Union Railway Company condemned, under the statute, a right of way through this tract of land. The right of way contained 5.28 acres, and the company was required by the judgment of the court to pay Mrs. Prewitt, who then owned the land, \$396, for the land actually taken, \$2,062 for fencing, and \$1,542, for damages to her adjacent lands. Soon after the condemnation proceedings, the railroad company took possession of the land condemned, and were in the possession and use of it, and the same was enclosed by a fence at the time the contract, before mentioned, was entered into. At the time and before the contract was made, Jones knew of the existence of the right of way through the land he contemplated purchasing, but nothing was said by either party before or at the time the contract was entered into, about the title or ownership of the right of way. After the survey was made, Mrs. Prewitt tendered to Jones a deed for the entire tract, including the land embraced in the right of way, and demanded of him payment in accordance with the contract. Jones declined to accept or pay for the land covered by the right of way. The question at issue between the parties, as stated in the agreed case, is: "Whether or not under the terms of the contract of sale, Mrs. Prewitt is entitled to be paid for the land covered by the right of way, at the rate of one hundred dollars per acre, amounting to 5.28 acres, and whether or not, under the terms of said contract of sale, Jones should be required to accept said land covered by said right of way as a part of the land purchased by him under the contract and to pay plaintiff therefor at the above price per acre fixed by the contract."

The lower court adjudged in favor of Mrs. Prewitt, and Jones appeals.

To support the judgment, appellee depends upon the following cases decided by this court:

In *Butt v. Riffe*, 78 Ky., 352, Butt purchased of Riffe, a tract of land which was conveyed to him, Riffe retaining a lien for the unpaid purchase money. In the deed, Riffe warranted the title generally, and stipulated that he would give Butt free and full possession of the land on a day named in the conveyance. After Butt took possession under the conveyance, Napier instituted an action in the Lincoln Circuit Court, asserting a right of way over the land. A trial resulted in a judgment decreeing that Napier was entitled to a passway, embracing a strip of land 25 feet wide and one-half a mile long through the land. After this judgment was entered, Riffe instituted an action on the notes for the unpaid purchase money. In defense to this action, Butt asserted as a counterclaim the damage he had sustained by reason of the recovery of the passway by Napier—alleging that, at the time of sale and conveyance, he was ignorant of any claim that Napier had a passway and that Riffe had concealed from him the existence of such a right. The lower court sustained a demurrer to the answer and counterclaim. On appeal this court, although holding that the passway obtained by Napier was a breach of the covenant of warranty in the deed for which he was entitled to recover damages, said in the course of the opinion:

"It is further argued by counsel for Riffe that, if the facts pleaded constituted a breach, Riffe is also liable on his covenant for that part of the land embraced by the public highway, that constitutes a part of one of the tracts. We think not. No more than if the Commonwealth had entered upon the land, after the purchase by Butt and condemned a part of the tract for a public road. Such covenants have never been held to embrace an entry by the State in the exercise of the right of eminent domain. It is no eviction for which the grantor can be made liable when the land is taken for public

use and the purchaser, when a public highway is on land at the date of his purchase, must be held to know of its existence and to have made his bargain with a knowledge of the inconvenience resulting from it."

In *Bird v. Bank of Williamstown*, 11 Ky. Law Rep., 868, Northcut sold a tract of land to Bird by the acre, conveying the same to him by a deed with covenant of warranty. In a suit by the bank as assignee of the notes executed for the purchase price, Bird set up as a defense that there was a deficit of 3.7-8 acres in the quantity of land, as Northcut had previously conveyed it to the Cincinnati Southern Railway, that was in possession at the time Bird purchased. It is stated in the opinion that Bird knew that the railway run through the land at the time he purchased, and he agreed that its right of way was to be counted as a part of the purchase. In disposing of the case, the court said:

"It is true a covenant of warranty in a deed binds the grantor for quiet enjoyment by the grantee, and protects the latter against encumbrances affecting the title, or that he may be compelled to remove to possess and enjoy the estate. But if a public highway be upon land at the time of the purchase, the purchaser should be presumed to know of its existence and to buy with an expectation and knowledge of any inconvenience arising from its existence. It is perfectly evident, from Bird's own testimony, that he knew when he made the purchase that the railway company had the right of way through the land. The railroad was then being operated over it, and aside even from the understanding when the verbal purchase of a part of the land was made, that the land embraced by the right of way of the railroad should be surveyed to him, it should be counted, because he knew of the existence of such right when he purchased and could as well be heard to complain of the then existence of an ordinary public road over the land."

In *Weller v. Fidelity Trust & Safety Vault Company*, 23 Ky. Law Rep., 1136, one Nesbitt conveyed to the trustees of the Walnut street Baptist Church of Louisville, a certain parcel of land situated at the corner of 26th and Market streets, described as follows:

"Beginning at a point in the center of 26th street, where it is intersected by the south line of Market street, and running thence eastwardly 4 with the south line of Market street 115 feet; thence southwardly, and parallel with said 26th street, 177 feet, more or less, to Congress street, if extended; thence westwardly with said Congress street 115 feet to the center line of 26th street; thence northwardly with the center line of 26th street to the point of beginning."

The purchase money notes were assigned to the Fidelity Trust and Safety Vault Co., and in a suit upon them it was insisted that no recovery should be had, because a strip of 15 feet wide was in the adverse possession of the city of Louisville at the time the conveyance was made, and that there should be either a cancellation of the contract or an abatement of the notes to the extent of the value of the strip of land so held adversely. It appeared that the strip of land in question was a part of 26th street, and was used as a part of the street at the time the conveyance was made, and that the trustees, when they accepted the deed, knew that this strip of land was occupied and used by the city as a street and that it could not be taken from it. In disposing of the case, the court said: "The street was an open and notorious highway upon the land at the time of the purchase. The occupancy and use of the strip as part of the street is not a breach of the warranty. It was not only open and visible, but the vendees were acquainted with all the facts and knew that it was a public street of the city of Louisville." Citing

with approval the Riffe and Bird cases, *supra*, the judgment of the lower court rejecting the defense, was affirmed.

In the two last named cases the vendees accepted deeds with actual knowledge of the existence of the encumbrances upon the land. In the Riffe case it is held that there is no eviction for which the grantor can be made liable when the land is taken for a public use, and that a purchaser, when a public highway is on the land at the date of his purchase, must be held to know of its existence and to have made his bargain with knowledge of the inconvenience resulting from it. In that case, the point here in controversy was not directly involved, but in the other two cases and particularly in the Bird case, it was. There is, we think, a sound distinction between the cases cited and the one at bar. The case at bar is in effect an action for the specific performance of a contract. Mrs. Prewitt asks the chancellor to adjudge that she is entitled to be paid for land actually in the enclosed possession of the railroad company, and that it is reasonably certain it will continue to hold indefinitely or forever. She has heretofore received compensation for the land and is now demanding that she be paid again for it. In other words, she asks the chancellor to compel Jones to pay one hundred dollars an acre for land, the use or possession of which he will never, in reasonable probability, enjoy, and that she has parted with all her right, title and interest in, except exceedingly remote reversion, contingent upon it being abandoned by the railroad company. The enforcement of this contract would be manifestly unjust and inequitable. It is such a contract as the specific performance of will not be adjudged. It can not fairly be said that it was in the contemplation of the parties when the contract was entered into that Jones should be required to pay for this land. It seems evident that if the matter had been discussed or it had been suggested that he would be required to pay for it, that he would have declined to do so—especially as he was buying the land at so much per acre, and expected, under the terms of the contract, to be placed in the possession of.

In 26 Am. & Eng. Ency. of Law, 67, the principle is announced, supported by numerous authorities, that:

"Before the discretion of a court of equity will be exercised in favor of the specific performance of a contract, it must appear that the contract is fair, just and equitable in all its parts. If, therefore, a decree of specific performance would work a hardship or injustice upon the defendant, or operate oppressively upon him, a court of equity will decline to interfere."

In Story's Equity, section 750, the author says:

"Indeed the proposition may be more generally stated that courts of equity will not interfere to decree a specific performance except in cases where it would be strictly equitable to make such a decree."

Our own court, in *Woolums v. Horsely*, 93 Ky., 582, said:

"There is a distinction between the case of a plaintiff asking a specific performance of a contract in equity and that of a defendant resisting such a performance. Its specific execution is not a matter of absolute right in a party, out of sound discretion in the court. * * * Thus, a hard or unconscionable bargain will not be specifically enforced, nor if the decree will produce injustice or under all the circumstances, be inequitable it will be rendered. In other words, a court of equity will not exercise its power in this direction to enforce a claim that is not, under all the circumstances, just as between the parties, and it will allow a defendant to resist a decree where the plaintiff will not also be allowed relief upon the same evidence. A contract ought not to be carried into a specific performance unless it be just and fair in all respects. When this relief is sought, ethics are considered, and a court of equity will sometimes refuse to

set aside a contract and yet refuse its specific performance." The same doctrine is announced in *Ratterman v. Campbell*, 26 Ky. Law Rep., 173; *McCutchen v. Rawleigh*, 25 Ky. Law Rep., 549.

If Jones, after entering into the contract, had, after the land was surveyed and the quantity ascertained, accepted a deed in which he obligated himself to pay for the whole number of acres, with knowledge of the encumbrance, it might reasonably be said that, in entering into the contract, he consented to pay for the land included in the right of way; and we conclude that the fact that the vendees in the cases cited had accepted deeds was a potent factor in inducing the court to hold that they could not have an abatement of the purchase price. Whatever the reason for the opinions, we are not disposed to extend the doctrine laid down in these cases so as to embrace an executory contract like the one before us. In other jurisdictions there is irreconcilable conflict of authority upon the question we are considering—some of the courts making a distinction between railroad rights of way and public highways—holding that the existence of a right of way for a railroad might be a breach of the covenant for quiet enjoyment and possession when the existence of a public highway would not be. The cases upon this question are collected in 8 Am. & Eng. Ency. of Law, page 124, and 11 Cyc., 1124. Although the rule in this State, as announced in the foregoing cases, is that, when the purchaser accepts a conveyance with knowledge of the existence of a highway or railway, he can not thereafter obtain an abatement of the purchase price or a cancellation of the contract on account of the encumbrance, this principle will not be applied to railway rights of way, as against a purchaser under an executory contract, in the absence of evidence showing that it was the intention of the purchaser to pay for the land enclosed in the right of way, when he objects in seasonable time to accepting a conveyance of the property that would require him to pay for the right of way.

Wherefore, the judgment of the lower court is reversed, with directions to proceed in conformity with this opinion.

SPALDING v. THORNBURY.

(Filed March 24, 1908.—To be reported.)

1. County Attorneys—Duties—Compensation—Sections 126, 127, 128, 129 and 131 prescribe the duties of the county attorney, and sec. 132 prescribes his compensation. This must necessarily include his compensation for all services rendered, where other compensation is not allowed therefor.

2. Same—All services rendered under section 127 must stand alike. The statute makes it his duty to institute or defend actions and proceedings when "directed" by the county or fiscal court. If the statute had contemplated an employment the word "employed" would have been used instead of "directed."

3. Additional Duties Imposed by Statute—Commission Provided—Where, by statute, duties are imposed upon the county attorney and compensation, by way of commission is provided, he is entitled to such compensation in addition to his salary. The salary named in section 132 only covers the services required of him by law and for which no other compensation is provided.

4. Salary—Contingent Fees—The salary of the county attorney is part of the current expenses of the county and must be paid out of the general fund provided for that purpose. It can not be paid

by way of contingent fees out of other fund, nor is it contemplated by the statute that his salary shall be contingent and not fixed by the fiscal court.

Wm. C. McChord, Wm. W. Spalding, T. L. Edelen and Chinn & Edelen for appellant.

H. W. Rives and Jno. M. McChord for appellee.

Appeal from Marion Circuit Court.

Response to petition for re-hearing by Judge Hobson, overruling.

Since the opinion was delivered, oral argument has been had upon the petition for re-hearing, and we have again carefully considered the questions raised. It is insisted for the appellant that the annual salary provided by sec. 132, Kentucky Statutes, covers only the services required of the county attorney absolutely by the preceding sections, without any direction from the county or fiscal court; but that it does not include services which are only to be rendered by him when directed by the county or fiscal court. We can not concur in this construction of the statute. Sections 126, 127, 128, 129, 130, and 131, prescribe the duties of the county attorney; and section 132, which immediately follows, prescribes his compensation. We think this must necessarily include his compensation for all services required of him by the preceding sections, where other compensation is not allowed therefor. We can not see how it can include part of the services rendered under section 127 and not include the others, there being nothing in the statute to justify the court in making a distinction. All the services rendered under section 127 must stand alike, there being nothing in the statute to show the contrary. Not only so, but the words of the statute refute the idea that an employment of the county attorney is contemplated by that section. The language of the section is that "when so directed by the county or fiscal court" he shall institute or defend actions and proceedings of every character, before any of the courts of the Commonwealth in which the county is interested. The statute makes it his duty to institute or defend the actions when directed by the county or fiscal court. It leaves him no discretion. If an employment had been contemplated, he would not be required to act unless the proposed compensation was satisfactory to him. If the statute had contemplated an employment of the county attorney, the word "employed" would have been used instead of the word "directed." The county court is without authority, except in a very limited degree, to make contracts for the county, but by the terms of this statute it is the duty of the county attorney to attend to any action when directed by the county court. This shows that the Legislature did not have in mind an employment of the county attorney and that it contemplated that such services as he rendered, when directed by the county court, should be included in his official duties and covered by his annual salary. Where by statute duties are imposed upon the county attorney and compensation by way of commissions or otherwise is provided by the statute, he is entitled to such compensation in addition to his salary allowed by the fiscal court under section 132, Kentucky Statutes. The salary named in that section only covers the services required of the county attorney by law and for which no other compensation is provided.

It is also insisted for appellant that the annual salary provided for by section 132, need not necessarily be a fixed sum, but may be made to depend upon contingent fees. The word "salary" may be defined generally as a fixed annual or periodical payment for services de-

pending upon the time and not upon the amount of the services rendered. (24 Am. & Eng. Cyc., 1015.)

It is true that sometimes, to give a statute effect, the word will be given a broader construction, but this will not be done where the language of the statute forbids this construction. Sec. 132, Kentucky Statutes, not only provides that the county attorney shall be allowed annually, a reasonable salary, but it adds "to be paid out of the county levy." Claims against the county are allowed by the fiscal court and are payable out of the county levy. To make an allowance payable out of the county levy, must necessarily mean that a certain sum is to be allowed, so that the county treasurer will have a definite order of the fiscal court to direct him in the payment of the claim. By section 1072, Kentucky Statutes, the county judge shall receive an annual salary payable in quarterly installments by the county. Manifestly this refers to a certain sum to be allowed by the fiscal court and paid quarterly. While the allowance to the county attorney is not required to be paid quarterly, the sense is evidently the same. The salary of the county attorney is a part of the current expenses of the county and must be paid, like other current expenses, out of the general fund provided for that purpose. It can not be paid by way of contingent fees out of other funds. Nor is it contemplated by the statute that the salary of the county attorney shall be contingent and not fixed by the fiscal court.

In the case at bar appellant's salary had not been fixed before his election. After his election, the fiscal court made the two orders quoted in the opinion. If it was the intention of the fiscal court by these two orders, to fix his salary, and if the annual salary was fixed lower than it would have been but for the previous order allowing him contingent compensation in certain cases, a case of mutual mistake is presented and the fiscal court may, in its discretion, when it sets aside the order as to the attorney's contingent compensation, make an order fixing the annual salary for all of the attorney's services at such a sum as it deems just. We do not determine that the fiscal court did make a mistake. We only determine that if it did make a mistake, and if it desires to correct this mistake, it may correct it as any other mistake may be corrected, by making now an order for such an annual salary as it deems just to cover all of the attorney's services.

The petition for re-hearing is overruled, but the opinion is extended as above indicated.

TERRELL v. TRIMBLE COUNTY.

(Filed March 24, 1908—To be reported.)

1. County Attorneys—Fixed Salary—Additional Compensation—Proceeding to Collect Taxes—Where the fiscal court, by a previous order, had fixed the salary of the county attorney, it had no authority to make him an additional allowance for bringing a suit, or for his services in collecting certain taxes due from a distilling company, as it was his duty to render such service, when directed by the fiscal court, by virtue of his office as county attorney.

2. Same—Duties—Compensation—When the fiscal court has fixed the compensation of the county attorney, it has no power to increase or diminish it during his term. And it is his duty to perform all his official duties for the compensation fixed.

3. Same—Employing Additional Counsel—Expenses Incurred—Allowance Therefor—But where a county attorney is directed by the

fiscal court to institute proceedings to collect certain taxes and to employ other counsel to assist him therein, the county should bear his reasonable expenses incurred in the prosecution of the work and any sums paid in securing other counsel in the necessary prosecution of the work.

William Carroll and Claude B. Terrell for appellant.

G. W. Peak, Jr., for appellee.

Appeal from Trimble Circuit Court.

Opinion of the court by Judge Hobson, reversing.

At the regular November election, 1901, Claude B. Terrell was elected County Attorney of Trimble county. He qualified and entered upon the discharge of the duties of the office January 6, 1902. By an order made at the October term, 1902, the salary of the County Attorney was fixed at \$400 per year. On January 23, 1905, the fiscal court entered the following order:

"It appearing to the satisfaction of the court, that Harry M. Levy, owner and proprietor of the Richwood Distillery, of Trimble county, Kentucky, is indebted to Trimble county for interest due on taxes due on whisky during the bonded period, or until withdrawn from bond, and the tax paid thereon. It is therefore ordered, all the justices voting in the affirmative, that Claude B. Terrell, county attorney, be, and he is hereby, empowered to collect said interest due and to institute suit for the same against the said Richwood Distillery, or the proprietor thereof, if necessary to recover the amount due thereon, and he is empowered to employ such counsel as he may deem necessary to assist him in the prosecution of said suit."

Terrell proceeded under the order and collected taxes to the amount of \$1,351.96, and on November 13, 1905, the fiscal court made this order:

"It appearing to the satisfaction of the court that Claude B. Terrell, has collected of the Richwood Distillery Company the sum of \$1,351.96, as interest on whisky tax, it is now ordered that he be, and he is hereby allowed 25 per cent. of the amount so collected, said per cent. to be retained by him out of the sum collected by him, and it is further ordered that he be allowed a like sum per cent. for any other back taxes collected by him."

Terrell retained twenty-five per cent. of the amount he had collected, amounting to \$337.99, and paid over the balance to the county. On October 5, 1906, the fiscal court made an order directing the county attorney, then in office to collect from the former county attorney, Claude B. Terrell, the money which he had retained under the order of the former fiscal court, there having been a change of magistrates in the meantime. Thereupon this suit was brought in the name of Trimble county against Claude B. Terrell to recover the money. He answered, setting up all of the facts as above stated, and also alleged that, in discharging the duties required of him by the fiscal court, he had expended, in his necessary expenses, a sum in excess of \$100, as he had to make trips to Louisville, Covington, Frankfort, and other places, to obtain the necessary information and attend to the matter. He further alleged that the sum allowed to him was only a reasonable compensation for the services which he had rendered, and that he had paid his expenses out of his own means. The circuit court sustained a demurrer to the answer and Terrell appeals.

It is not material that Terrell did not bring a suit to collect the taxes. The fact that the taxpayer paid over the taxes without suit gives him no right to compensation which he would not have, if he had brought a suit against the taxpayer, which had been prosecuted to judgment or settled before trial. The ascertainment of the amount of taxes due was preliminary to a suit, and it was the duty of the county attorney to conduct a proceeding of this character, when directed by the fiscal court, under section 127 of the Kentucky Statutes. The fiscal court had fixed, by a previous order, the reasonable salary to be paid annually to the county attorney for his services, under section 132, of the Kentucky Statutes, and this allowance was in full of all his official services as county attorney, including both those required of him expressly by the statute, or which he rendered upon direction of the fiscal court or the county court, under section 127 of the Kentucky Statutes. When the fiscal court had fixed his compensation, it was without power to increase or diminish his compensation during the term for which he was elected, under section 161 of the Constitution. And, it was his duty to perform all his official duties for the compensation so fixed. The fiscal court was without authority to allow him other compensation for his official services, for this would be to increase his compensation during his term of office. The order of the fiscal court, therefore, allowing him to retain the twenty-five per cent. of the amount which he had collected, was in violation of the Constitution and void. The money which he retained under that order was the money of the county, as the fiscal court has no authority to dispose of the money of the county, except as may be provided by law. (*Spalding v. Thornberry*, 103 S. W., 291, 31 Ky. Law Rep., 738; *McNew v. Commonwealth*, 93 S. W., 1047, 29 Ky. Law Rep., 540; *McNew v. Nicholas County*, 100 S. W., 324, 30 Ky. Law Rep., 1147; and, *Butler v. James*, 116 Ky., 575, 25 Ky. Law Rep., 801.)

But, while it was the duty of Terrell, when directed by the fiscal court, to institute proceedings to collect the taxes referred to in any court of the Commonwealth, it was not incumbent upon him to pay his own expenses, necessarily incurred in discharging the duties required of him by the fiscal court. The county was entitled to his personal time and attention, but when it required him to leave his county and attend to its business, like any other client who sends his attorney off to attend to his business, it should bear his reasonable expenses incurred in the prosecution of the business. This should include not only his personal expenses, but any sums paid in securing other counsel, or in the necessary prosecution of the work.

The court erred in sustaining the demurrer to the answer in so far as it set up the expenses incurred by Terrell. To the extent of his reasonable expenses he was entitled to retain the money in his hands, and was only liable for the balance over and above the reasonable expenses. When the fiscal court directs the county attorney to proceed with the case and authorizes him to employ counsel to assist him, and acquiesces in such employment, or ratifies it, the compensation of such additional counsel is a proper charge against the county, and such sums as may be paid to the counsel thus employed by the authority of the fiscal court, and with its acquiescence, are properly paid.

The judgment is reversed and cause remanded, for further proceedings consistent herewith.

ALBIN CO. v. COMMONWEALTH.

(Filed March 3, 1908—To be reported.)

1. Contract—Hiring Convicts—Bond of Indemnity—Construction of Contract—A bond was given by B. to the prison commissioners of the Kentucky penitentiary for hire of convicts with the F. & D. Company as surety. The contract was finally made by B. & M. but the bond was not changed. By consent, the contract was sold to appellant company on condition that it give a bond for its faithful performance. The F. & D. company agreed to sign the bond if provision was made to pay a certain indebtedness of B. & M. to the State for the hire of the convicts, which was done by paying cash in part, and giving notes for the balance to be held in trust by the agent of F. & D. Company. Held—That the deposit of the notes was not only for indemnity, but was also for the purpose of paying the indebtedness of B. & M. to the State and was enforceable under sec. 18, Civil Code.

2. Same—Board of Prison Commissioners—False Statement By One Member—Effect on Contract—In a contract made with the prison commissioners, for the hire of convicts, a false statement made by one of the commissioners as to the value of the business, the contractor was to engage in, was not the statement of the board and the State is not responsible for such false representations, if made.

3. Corporation—Authority to Contract—Plea of Ultra Vires—A corporation, having power to purchase and sell real estate and to engage in trading in general merchandise, after buying a business and giving its notes for the price can not, in an action on said notes, plead that its act was ultra vires in bar of said action.

Kohn, Baird, Sloss & Kohn and Moses Pulverman for appellant.

N. B. Hays, C. H. Morris and W. M. Smith for appellee.

Appeal from Franklin Circuit Court.

Opinion of the court by Judge Barker, affirming.

William Preston Bybee, about the 6th day of February, 1899, was negotiating with the prison commissioners of the Eddyville penitentiary, for a contract by which he was to lease or hire the services of not less than fifty, nor more than one hundred of the convicts, to be used for the manufacture of brushes for a period of four years from the 1st day of January, 1899, with the privilege of extending the contract for four more years, and for which he was to pay the Commonwealth thirty-five cents per day for each convict hired to him; the payments to be made on the 10th day of each month for the labor of the preceding month.

The prison commissioners required, as a condition precedent to the proposed contract, the execution by the lessee, of a bond conditioned in the sum of three thousand dollars for the faithful performance of the contract on the part of the lessee and the prompt payment of the contract price for the hired convicts. In order to meet the requirements of the commissioners, Bybee had prepared a bond conditioned as required, with the Fidelity and Deposit Company of Maryland as his surety, for which he paid to its general agent, Willis S. Mullen, the fee charged by the company for becoming surety on the bond in question.

The prison commissioners did not make a contract with William Preston Bybee, but afterwards entered into a contract with Bybee and McClelland in all respects similar to that above described, which William Preston Bybee anticipated would be made with him alone.

The prison commissioners, however, seem to have been under the impression, and to have claimed, that the bond prepared by William Preston Bybee, and on which the Fidelity and Deposit Company of Maryland was surety, was a good and sufficient bond to cover the contract made with Bybee and McClelland. The latter firm took charge of the convicts, installed the necessary machinery, and proceeded with the manufacture of brushes, under their contract, until the 8th day of January, 1900, when, with the consent of a majority of the prison commissioners, they sold out their machinery, stock on hand and lease contract to the Albin Company, which took charge of the business and proceeded with the manufacture of brushes.

Before the prison commissioners would consent to the assignment of the contract of Bybee and McClelland to the Albin Company, they required of the assignee, a bond conditioned for the faithful performance of its contract. In order to meet this requirement, the assignee applied to the Fidelity and Deposit Company of Maryland to go on its bond, but its general agent, Willis S. Mullen, declined to do so, unless some provision was made for the payment of the indebtedness of Bybee and McClelland to the State of Kentucky, which, at that time, amounted to two thousand four hundred and ninety-two dollars and seventy-two cents. Mullen did not admit that his company was surety on the bond of Bybee and McClelland, but he recognized the fact that the State claimed that it was the surety for them by reason of its being the surety on the individual bond of William Preston Bybee, before mentioned; and being uncertain as to what would be the outcome of this question, he declined to become surety on the Albin Company's bond unless some provision was made, as before said, looking to the final extinguishment of the indebtedness of Bybee and McClelland to the State. There is a good deal of contrariety of opinion between the parties litigant here, as to what was the legal effect of the acts done in reference to securing the indebtedness of Bybee and McClelland, and these various opinions will be noticed more at length hereafter; but there is no dispute that the following receipt was executed by Willis S. Mullen, as general agent of the Fidelity and Deposit Company of Maryland:

"Received of the Albin Company check for eleven hundred and seven dollars and seventy-two cents (\$1,107.72), made payable to Willis S. Mullen, General Agent of the Fidelity & Deposit Company of Maryland, for payment to the Auditor of Public Accounts of the State of Kentucky, for the account of Bybee & McClelland, also fourteen (14) one hundred (\$100) dollar notes made by the Albin Company to Bybee & McClelland, said notes to be endorsed by Willis S. Mullen, General Agent, proceeds of which notes, if collected by said Willis S. Mullen, to be applied to the account of Bybee & McClelland, with the State of Kentucky; said notes to be held in trust by said Willis S. Mullen, General Agent, until they became due, or until said Bybee & McClelland have settled their indebtedness to the State.

"WILLIS S. MULLEN, Gen Agt."

There is no dispute that the trustee, Mullen, paid over to the Commonwealth of Kentucky, the amount of cash—one thousand one hundred and seven dollars and seventy-two cents—received by him at the time he executed the above receipt. This cash payment reduced the indebtedness of Bybee and McClelland to one thousand three hundred and eighty-five dollars.

Mullen having failed to pay over to the Commonwealth any of the proceeds of the fourteen notes, mentioned in the above receipt, the Commonwealth instituted this action against the Albin Company, W. P. Bybee, F. A. McClelland, the Fidelity and Deposit

Company of Maryland and W. S. Mullen, and in the petition set out the foregoing facts, praying a judgment against all of the defendants for the sum of one thousand three hundred and eighty-five dollars due to it from the firm of Bybee and McClelland.

Mullen filed an answer admitting that he held the notes mentioned in the receipt, and that he had collected two of them, and offered to pay over the amount collected and to make such disposition of the notes as the court should direct.

The Fidelity and Deposit Company of Maryland denied that any contract was ever made between William Preston Bybee and the prison commissioners of the Eddyville penitentiary; denied being surety on the contract of Bybee and McClelland; and also denied being indebted as surety or otherwise to the Commonwealth for the sum of one thousand three hundred and eighty-five dollars sued for, or any part of it.

The Albin Company alleged that the fourteen notes in question were deposited with Willis S. Mullen as indemnity merely against any lawful claim which the Commonwealth might have against it by reason of its suretyship on the bond of William Preston Bybee, and alleged that the prison commissioners did not make a contract with Bybee, and that he owed it nothing; that the contract of the prison commissioners was with Bybee and McClelland, and, therefore, its co-defendant, the Fidelity and Deposit Company of Maryland owed the Commonwealth nothing; that it had been defrauded by Bybee and McClelland and the prison commissioners into buying out that firm, and it had been damaged in the sum of eleven thousand dollars, which it made a counterclaim against the State of Kentucky, and a cross-petition against its co-defendants Bybee and McClelland. It also set up an indebtedness of Bybee and McClelland of five hundred dollars for borrowed money, which it made a cross-petition against them. In addition it pleaded that under its charter it had no authority to embark in the business of manufacturing brushes, and that all of its acts and doings with reference to the purchase of the contract of Bybee and McClelland and their machinery and stock on hand, were ultra vires and void.

Upon the trial of the case the circuit judge held that the Fidelity and Deposit Company of Maryland was not a surety on the bond of Bybee and McClelland, and dismissed the petition as to it, and awarded a judgment in favor of the Commonwealth against the Albin Company for one thousand three hundred and eighty-five dollars. This judgment it now seeks to reverse on this appeal.

The first question with which we are confronted is the legal effect of what was done at the time of the assignment by Bybee and McClelland to the Albin Company towards securing the payment to the State of the amount admitted to have been due to it from Bybee and McClelland. If, as is contended by the Albin Company, the deposit of the notes with Willis S. Mullen was alone, to indemnify the surety company against the claim of the Commonwealth, as surety for the money due by Bybee and McClelland, then the State's claim to this fund falls to the ground, because the trial court dismissed the petition as to the Fidelity and Deposit Company of Maryland, and the State is not complaining of this ruling. But if the deposit was made for the purpose of paying off the admitted indebtedness of Bybee and McClelland, then the Commonwealth, under section 18 of the Code of Practice, is entitled to enforcement of the contract made for its benefit, although it was not a party to it. (*Allen v. Thomas*, 3 Met., 198; *Smith v. Smith*, 5 Bush, 625; *Paducah Lumber Co. v. Paducah Water Co.*, 89 Ky., 340, 11 Ky. Law Rep., 738; *Louisville & Nashville Railroad Co. v. Schmidt*, 112 Ky., 717, 23 Ky. Law

Rep., 2097.) Willis S. Mullen testified positively that he demanded the payment to himself of the cash and the deposit of the notes as indemnity to his company, and we do not at all doubt his candor on this subject. That he had in mind only the indemnification of his company against a disputed claim of the Commonwealth may be readily believed; but what the other parties to the transaction had in mind is a different question. It must not be overlooked that the Albin Company was purchasing the contract with the State, and the machinery and stock on hand of Bybee and McClelland, and for the purchase price it was to pay them one thousand one hundred and seven dollars and seventy-two cents in cash, and to deliver to them fourteen notes of one hundred dollars each. These were the property of Bybee and McClelland, and two things could be accomplished by the action which was taken in regard to them; primarily the Fidelity and Deposit Company of Maryland was to obtain indemnification against the claim which it did not admit; but, secondarily, the debt of the State against Bybee and McClelland, admitted to be due and owing, was to be paid off and discharged, and in so doing the indemnification of the Fidelity and Deposit Company would be made perfect; for the assertion of this claim was what it feared. The receipt, itself, clearly shows that both of these things were to be done. By its language it is specially provided that the one thousand one hundred and seven dollars and seventy-two cents cash turned over to Willis S. Mullen, was to be paid to the Auditor of Public Accounts of the State of Kentucky for the account of Bybee and McClelland. There is, therefore, no doubt as to what the parties meant to be done with the cash paid. Nor is there much doubt as to what was meant to be done with the notes. The proceeds of these, if collected by Willis S. Mullen, were to be applied to the account of Bybee and McClelland with the State of Kentucky. In short, it is plain that the parties meant that what the Albin Company was to pay to Bybee and McClelland for their contract with the State, their machinery and stock on hand, was to be put in the hands of Willis S. Mullen to pay off and discharge the indebtedness of Bybee and McClelland to the Commonwealth. No other meaning can be obtained from the language used in the receipt; and this receipt constitutes the written understanding of all the parties in interest as to what was to be done with the trust fund of cash and notes placed in the hands of Willis S. Mullen.

It would be difficult to show a reason for making a distinction between the purposes for which the cash and the notes were placed in the hands of Mullen. Nobody disputes that all of the cash paid over to the trustee was to be by him turned over to the State in payment of the debt due by Bybee and McClelland, and nobody disputes that as fast as the notes were collected (if collected at all) the money was to be paid over at once to the State. Now, if the cash was to be paid to the State, why is it that the notes were only held for indemnification? The notes were to be turned into cash, and when so converted, the cash was to be paid to the State; and this being true, we are bound to conclude that the notes, like the cash, were placed in the hands of the trustee for collection, and when collected, to be paid on the debt due by Bybee and McClelland to the State.

Herman Albin, the president of the Albin Company, himself deposed on the subject in hand, and gave this account of what transpired between himself, McClelland and Mullen as to the notes:

"A. Well, we went to see Mr. Mullen—Mr. McClelland and I—and we asked Mr. Mullen, of the Fidelity and Deposit Company of Maryland, to go on our bond, as we understood they were on the bond for the brush company, and Mr. Mullen said he would not go on the

bond unless the Bybee Brush Company or William Preston Bybee—I don't know which the contract was in, but whichever it was—would first clear up matters with the State; and Mr. McClelland then said they had outstanding, owing them from the different parties they had sold brushes to, and they hadn't collected for, that were due, some of them, and on the other hand they themselves owed money; that they wanted to use this money to pay off, and part would go to the State, and Mr. Mullen said: 'You let me hold some of these notes, and that will be security, and I will pay part to the State.' Mr. Mullen wanted it understood that while he was not liable, still he wanted to be sure that he was not on the bond."

"Q. Mr. Mullen was acting as agent of the Fidelity and Deposit Company of Maryland?"

"A. Yes, sir; he was acting for the Fidelity and Deposit Company of Maryland; he was their general agent in Kentucky. He then said, 'Mr. McClelland, you let me have those notes, and when they are collected, I will turn them over to the State.'"

This shows that McClelland and Mullen, as well as the Albin Company, understood that the notes were to be collected and the proceeds turned over to the State, and in this way the Fidelity and Deposit Company of Maryland would be fully indemnified by the payment to the State of what was due it. The fact that it subsequently transpired that the State did not have a just claim against the Fidelity and Deposit Company of Maryland is immaterial. All of the parties in interest agreed that the cash and notes deposited with Mullen by McClelland and the Albin Company were for the purpose of using the property of Bybee and McClelland to pay their just debt to the State.

The Albin Company, through its president, having consented that the notes executed and delivered by it to Bybee and McClelland should be assigned to Willis S. Mullen, as trustee for the payment of the State's debt, no offset or discount which it afterwards had could affect the State's claim to the proceeds of the notes. Herman Albin, its president, was present when the assignment was made, and not only knew of it, but consented to it; for this was in large part in the interest of his company, because the Fidelity and Deposit Company would not agree to become its surety until the debt of the State against Bybee and McClelland was secured: so that it may be truly said the Albin Company had a beneficial interest in the assignment made to Mullen.

The counterclaim for damages against the State for the alleged fraud of its commissioner in falsely representing the value of the plant which Bybee and McClelland desired to sell, was not sustained by the evidence. Herman Albin, who alone, deposed upon this question, claims that J. M. Richardson, one of the commissioners, made false statements to him as to what Bybee and McClelland were making out of their contract; but it is difficult to understand upon what principle the State can be bound by the individual acts of one commissioner out of three. The board of commissioners act as a body, and assuming it to be true (which we do not decide, however) that Richardson made false statements to Albin as to the value of the plant of Bybee and McClelland, the Commonwealth can not be made responsible in damages for these false representations.

We are of opinion that the plea of ultra vires is not sustained. The incorporators and stockholders of the Albin Company are Herman Albin, his wife, and a man by the name of Sales, all living in Louisville, Kentucky. Herman Albin is shown to be the dominant spirit and controller of the corporation. It was incorporated under chapter 56, of the General Statutes of Kentucky, and by its articles of incorporation has the power to make contracts and acquire, by pur-

chase or otherwise, property, both real and personal, and sell, convey and transfer the same; possessing the same powers as private individuals enjoy. The general nature of the corporation was to sell or trade in merchandise, principally furniture, carpets, personal and house furnishings and such other wares that may be deemed advisable to be carried. Whether or not this corporation had the power to enter into a contract with the State and lease from it convicts, and carry on the business of manufacturing brushes, we need not now stop to inquire, for that question is not before us. The notes in question were given for the purchase from Bybee and McClelland of their machinery, stock on hand, and their contract with the State. Certainly the purchase of the machinery and the stock on hand was clearly within the purview of this trading corporation, which was authorized to buy both real and personal property, and to sell and convey it as individuals may. Moreover, the corporation has, by its act, obtained possession of all the property of Bybee and McClelland, and thus deprived the State of all opportunity to make its debt out of them. It can not now plead *ultra vires* in bar of the State's claim for the notes delivered to Bybee and McClelland in payment for their property.

In the case of *Underwood, &c. v. The Newport Lyceum*, 5 B. Mon., 129, 41 Am. Dec., 260, it was held that the Newport Lyceum, although it had no authority, under its charter, to issue bank bills or to do a banking business, yet it could not escape, under the plea of *ultra vires*, from paying a debt incurred in having bank bills and other material for carrying on the business of banking prepared and printed. The court said that, although to carry on the business of banking was *ultra vires*, yet the defendant corporation had general power to purchase the articles named, and would have to pay for them, although it could not use them after they were purchased. So in the case at bar, the Albin Company had a general right to buy the machinery and stock on hand and the contract from Bybee and McClelland, and can not escape paying the purchase price therefor, although it might be conceded that to carry on the business of broom-making in the penitentiary, would be beyond its power under its charter.

In *Bigelow on Estoppel*, page 467, it is said: "However, if a contract with a corporation has been performed in good faith by the other party, and the corporation has received the benefits thereof, it probably can not interpose against its duties assumed thereunder the defense of *ultra vires*."

In *Am. & Eng. Encyc. of Law*, 2nd edition, volume 29, title 'Ultra Vires,' page 50, it is said: "It is now very well settled that a corporation can not avail itself of the defense of *ultra vires* when the contract has been in good faith fully performed by the other party, and the corporation has had the full benefit of the performance and of the contract."

In *Green's Brice's Ultra Vires*, page 721, the law is thus stated: "There seems to be no substantial reason whatever for not extending the principle here involved to all analogous cases. If liable in one case, why should not a corporation be always liable to refund the money or property of a person which it has obtained improperly and without consideration, or if unable to return it, to pay for the benefit obtained thereby? To say that a corporation can not sue or be sued upon an *ultra vires* arrangement is one thing. To say that it may retain the proceeds thereof which have come into its possession without making any compensation whatever to the person from whom it has obtained them, is something very different, and savors very much of an inducement to fraud." In Note A, Id. 729, the author has collated and discussed at great length many

cases bearing upon the subject in hand, and it is there said: "In the United States the defense of ultra vires interposed against a contract wholly or in part executed, has very generally been looked upon with disfavor." And this principle is upheld by *Louisville Tobacco Warehouse Co. v. Stewart*, 24 Ky. Law Rep., 934.

Upon the whole case, we are clearly of opinion that the judgment of the trial court in awarding the Commonwealth a judgment against the Albin Company for the amount of the notes and cash in the hands of the trustee, Willis S. Mullen, was correct, and it is, therefore, affirmed.

POOLE, &c. v. SLAYTON, FOR USE, &c.

(Filed March 19, 1903—To be reported.)

Road supervisors—Appointment—Salary—Taxation—Maintenance of Roads and Bridges—Where a sum as large as \$7,000 per annum is actually collected from the taxpayers of a county and expended for road and bridge purposes by the fiscal court, it is a sufficient maintenance by taxation to authorize the employment of a road supervisor at a reasonable salary, under Ky. Statutes, 1903, sec. 4314, authorizing the appointment of a road supervisor when the roads are worked by taxation.

Belcher and Sparks for appellants.

Willis and Meredith for appellees.

Appeal from Muhlenburg Circuit Court.

Opinion of the court by William Rogers Clay, Commissioner, reversing.

Appellee, T. J. Slayton, suing for himself and other tax-payers of Muhlenburg county, instituted this action to recover of appellant, D. U. Poole, the sum of \$1,200.00, \$600.00 of which was allowed him as salary for services rendered as road and bridge supervisor of Muhlenburg county for the year 1904, and the remaining \$600.00 for his services in the same capacity for the year 1905. It is claimed by appellee that appellant's appointment was illegal and void, and the allowance of his salary was unwarranted by law for the reason that the roads and bridges of Muhlenburg county were not maintained by taxation, and that the right to elect a road and bridge supervisor exists only in case the roads and bridges are maintained by taxation.

It appears that, on the 10th day of November, 1903, the fiscal court of Muhlenburg county levied an ad valorem tax of fifty cents on each one hundred dollars worth of property, and also a poll tax of one dollar and a half on each and every male inhabitant of said county over the age of twenty-one years, "for the purpose of paying off the existing indebtedness of said county, and to defray the current and necessary expenses of same."

On November 15th, 1904, a similar levy was made for the same purpose. On the 16th day of November, 1904, an order was entered by the fiscal court appropriating twenty-five cents on each one hundred dollar's worth of property in the county for road and bridge purposes. There was expended for road and bridge purposes by the county of Muhlenburg for the year 1904, \$7,841.76; for the year 1905, \$7,560.15. In the county clerk's office there is a record called "claims allowed by the fiscal court of Muhlenburg county," which has a column in which are placed the amounts allowed on county roads and bridges.

The above amounts are shown by this record to have been expended for the two years referred to.

Appellant was elected road and bridge supervisor of Muhlenburg county on April 4th, 1904. He entered upon his duties on April 20th, 1904, and served two years. On November 15th, 1904, he was allowed his first year's salary of \$600.00. On April 12th, 1905, his second year's salary was allowed.

The only question in this case is, whether or not the roads were maintained by taxation, for, under section 4314, Ky. Statutes, the power to appoint a supervisor of roads exists only when the roads are worked by taxation. Section 4306 provides that "public roads shall be maintained, either by taxation or by hands allotted to work thereon," or both in the discretion of the fiscal court. It is contended by counsel for appellee that no tax for road and bridge purposes pursuant to section 4307 was specifically levied, and that the appropriation by the fiscal court of the funds collected by the county levy for the years 1904 and 1905 did not, therefore, constitute a maintaining of the roads by taxation. While it is true that no specific levy was made for road purposes for the years in question, it is equally true that no specific levy was made for any other purposes. The county did levy an ad valorem tax of fifty cents, but under no circumstances could it go beyond this limit; no additional levy for road and bridge purposes could have been made. As shown above, the levy for each of the years in question was made to defray the current and necessary expenses of the county. The validity of the levy is not now before us. The money has been collected from the taxpayers, and they can not recover it back.

Was the expenditure for road and bridge purposes a current and necessary expense, as defined in section 1882, Ky. Statutes? In *Combs, &c., v. Letcher county, &c.*, 21 Ky. Law Rep., 1057, this court said: "Moreover, we should not hesitate to hold that the creation of a courthouse fund by levies, of course within lawful limits, is a 'necessary expense' within the meaning of section 1882, supra, which is the section relied on by appellants." Manifestly, therefore, if the creation of a courthouse fund by levies is a "necessary expense" within the meaning of section 1882, the maintenance of the roads and bridges of the county is likewise a "necessary expense." Indeed, their maintenance is just as necessary an expense as any other expense that can be incurred by the county. Furthermore, as the levies for the years in question did not specify the particular purposes for which they were made, the appropriation of funds for road and bridge purposes did not constitute an appropriation of money for purposes other than those for which it was collected, as prohibited by section 180 of the Constitution. It does not appear that any donations were made to the county for the years in question. The only funds that it had available were collected under the county levies for these years. These funds were paid by the tax-payers. The appropriations for road and bridge purposes were made out of the funds collected from the taxpayers, and it seems to us, therefore, unreasonable to say that where about \$7,000.00 for each of the years mentioned was expended for road and bridge purposes, which sums were levied by the fiscal court and collected by taxation, the roads and bridges were not maintained by taxation. Where a sum as large as \$7,000.00 per annum is actually collected from the tax-payers and expended for road and bridge purposes, we think it a sufficient maintenance by taxation to authorize the employment of a road supervisor at a reasonable salary.

We, therefore, conclude that the payment of appellant's salary was not unauthorized by law.

For the reasons given, the judgment is reversed and cause remanded, with directions to dismiss appellees' petition.

CITY OF OWENSBORO v. HOPE.

(Filed March 24, 1908—To be reported.)

1. Municipalities—Street Improvement—Discretion of City—Review—Absence of Negligence—A city authorized to establish, grade and regrade the streets thereof, assumes a certain public duty with respect thereto, and its judgment or discretion as to the time when and the manner in which they shall be improved, is beyond review unless in making and maintaining the improvements it acts with culpable negligence.

2. Same—Dedicating Land for Street—Compensation to Owner—Award by Jury—Presumption—When a strip of land is dedicated for a street, it is implied that it may be graded so far as may be necessary to fit it for such purpose, and it will be presumed that the jury, in awarding compensation under the writ of *ad quod damnum* have estimated the inconvenience of the owner and injury to his remaining property likely to ensue from the necessary grading of the surface. And until the city has once exercised its right to grade the street, the adjacent lot owners have notice that its surface is subject to such change as the city may order in its discretion, when it sees proper to improve the highway.

3. Original Construction—Consequential Damages—For such consequential damages as result to an adjacent lot because of the original construction of the grade of a street, when not done negligently, the lot owner is not entitled to recover from the city; the street having been previously dedicated, or acquired by the city for that purpose.

4. Right to Grade Street—Passage of Ordinance—Subsequent Acts of Lot Owner—Damages Therefor—The right of a city to have a street graded attaches at the time the ordinance authorizing it passed, and a lot owner can not abridge this right by erecting a house or fences or setting out trees along the property line. In so improving his property he took the chances of sustaining a loss by the proper construction of the street when that event happened.

George W. Jolly for appellant.

Wilfred Carico, Watkins & Birkhead for appellee.

Appeal from Daviess Circuit Court.

Opinion of the court by Chief Justice O'Rear, reversing.

This action at law was filed in the Daviess Circuit Court by appellee, Hope, against the City of Owensboro, for the recovery of damages alleged to have been sustained by him by the lowering of the established grade in constructing a macadam roadway opposite his property. The plaintiff's lot fronts on the east side of Clay street, and fronts forty feet extending back east, and was used as a residence.

In building the new street, on the new grade, it is alleged the street was lowered three and a half feet, and that he had shade trees in front of his house on his lot which would be destroyed.

The petition states:

"He further states that the defendant city, by an ordinance duly enacted, approved and published, ordered and directed this plaintiff to lower his said sidewalk from its present position to the grade established aforesaid. To do this he says he will be required to excavate the whole of the front of his said lot to a depth of three and one-half feet, which will necessitate a new concrete sidewalk, a retaining wall of at least three and a half feet in height, and steps or a stairway to enable him and others to get from Clay street to his said lot and residence.

"The said excavation will destroy his said shade trees in front of his said property. He says all of this has been made necessary by the excavation and changing of the grade of the said street in front of his said property.

"He further states that the said excavation on said street has destroyed his ingress to and egress from his said property, and that he is by reason of said excavation of said street and lowering of its grade, the plaintiff has been damaged in the sum of at least seven hundred and fifty dollars."

Prior to the improvement of the street, by having it graded, macadamized, curbed and paved, as recited, it appears to have been laid out as a street, its natural surface being used for such travel as had occasion to traverse it. It is gathered from the record that the locality in that vicinity was but sparsely settled, and not until the work now in question was ordered by the council, had the city taken any steps to establish the permanent grade of the street or of its sidewalks. Notwithstanding, appellee and others saw proper to erect buildings and fencing, and to set out shade trees adjacent to the street, upon the assumption that the city would never alter the natural grade of the street, or that if it did, appellee and other property holders could claim compensation for damages thereby inflicted upon their abutting property.

A city authorized to establish, grade and regrade the streets within its territory, assumes a certain public duty with respect to these highways. Its judgment or discretion as to the time when and as to the manner in which the highway shall be improved is generally beyond review, and absolutely so unless in the plan or manner of making or maintaining the improvements it acts with culpable negligence.

When a strip of land is dedicated, or is acquired by condemnation, for the purposes of a highway, it is implied that it may be graded so far as may be necessary to fit it for the purposes for which it was set apart; and in either case, it will be presumed that the dedicator, or the jury, in awarding compensation under the writ of *ad quod damnum*, have estimated the inconvenience of the owner and injury to his remaining property likely to ensue from the necessary and proper grading of the surface. And until the municipality has once exercised its right to grade the street, the adjacent lot owners have notice that its surface is subject to such change as the municipality may order in the fair exercise of its discretion when it sees proper to improve the highway.

Some authorities hold that the duty of a municipality to grade its streets as may be necessary is a continuing one, and when the power is granted by the Legislature, can not be abrogated by contract or act of estoppel. (Smith's Modern Law of Municipal Corporations, section 318; Elliott Streets and Roads, 343, et seq.; Dillon Municipal Corporations, section 686; *Gozzle v. Georgetown*, 6 Wheat., U. S., 593.) But a distinction is recognized between the rights of abutting owners where no grade has before been fixed, and where one has been made. The reason is not far to seek. As already pointed out, the owner is presumed to have been compensated for the injury done by a proper grading of the adjacent highway when he accepted the price for the dedicated strip, or considered the benefits and disadvantages that would accrue from the opening of the road when graded for use. On the other hand, if the damages were awarded by a jury, they must have been instructed and considered the inconvenience that would result to the adjacent remaining lot, and as such damages must all be recovered in one action, such improvements in their nature being deemed permanent, the presumption arises that such grade, when fixed and constructed, and its consequences were alike permanent and inseparable. The adjacent owner may then erect buildings with respect to the permanent structure of the

street. It is true the town has the right to change the grade, as it ought to do when the public good demands. But in that event, if it takes or injures the adjacent property, that is a taking for the public, and the public should pay for it. It was to meet that precise condition in part that section 242, of the present Constitution of this State, was adopted, reading:

"Municipal and other corporations, and individuals invested with the privilege of taking private property for public use, shall make just compensation for property taken, injured or destroyed by them; which compensation shall be paid before such taking, or paid or secured, at the election of such corporation or individual, before such injury or destruction. The General Assembly shall not deprive any person of an appeal from any preliminary assessment of damages against any such corporation or individual, made by commissioners, or otherwise; and upon appeal from such preliminary assessment, the amount of such damages shall, in all cases, be determined by a jury, according to the course of the common law."

Before this Constitution it was held by this court that the municipality had the right to alter a grade once established, without liability to adjacent lot owners, provided in doing so no private property rights of theirs was invaded, such as obstruction of light, air, or ingress and egress. (*Louisville v. Louisville Rolling Mill Co.*, 3 Bush, 416; *Keasy v. Louisville*, 4 Dana, 154.) But construing section 242, Constitution, *supra*, this court, in *City of Henderson v. McClain*, 102 Ky., 402, 19 Ky. Law Rep., 1450; *City of Mt. Sterling v. Jephson*, 21 Ky. Law Rep., 1028; *City of Ludlow v. Detweller*, 20 Ky. Law Rep., 894, and *Barfield v. Gleason*, 23 Ky. Law Rep., 128, held that the former rule was changed, the language of the section indicating a purpose to give the property holders compensation for injury to property as well as for property actually taken in public improvements. But the question here presented has never before arisen in this court, and in *Henderson v. McClain*, *supra*, was expressly reserved. It was there said: "But it is argued on behalf of appellant that there is no legal right or equity in a person who dedicates land for street purposes, or in his assignee, to compensation for the original establishment of a grade line and the reduction of the natural surface of the street for street purposes to such line, for the reason that, when dedicated unconditionally, the dedicator must be supposed to have contemplated and consented that a grade should be established and the inequalities of the surface brought to some proper level, and to have embraced in his grant or dedication the right to establish such a grade. This question, however, is not presented by the record. If the law be that consequential damages are not recoverable for the original establishment of the grade of a street which has been dedicated (and this question is expressly not here decided), the fact that such establishment is original is matter of defense, and such fact does not appear in this record."

This record, however, does raise and present the question for decision. We hold, that, for such consequential damages as result to the adjacent lot, because of the original construction of the street's grade, when not done negligently, the lot owner is not entitled to recover from the city, the street having been previously dedicated, or acquired by the city for that purpose.

Another question is presented: Appellee and his vendors had maintained their improvements on the lot in question made with reference to the natural grade of the street for more than fifteen years. It is argued from this fact that the city had thereby, by a kind of acquiescence, established the natural grade as the permanent grade of the street. But we think there is a wide and essential difference between a municipality's acquiring a right of way for a street by prescription, and being estopped by lapse of time from improving the right of way

or street. Laches of public officers are not generally accounted against the public. Particularly ought it not in this matter. For concededly it was within the discretion of the municipal council when the public welfare demanded, and its resources would admit of, such an improvement. If it could be held that a failure of the council for fifteen years to order a certain kind of improvement worked an estoppel on the public in the matter so that it could not thereafter be exercised, it would result that it was not the judgment of the municipal council that would determine when such improvement should be made. The public does not lose the right to have its proper officials exercise such a question although previous boards declined or deemed it inexpedient to make the improvement.

We think the right of the city to have the street graded was, when the ordinance complained of was passed, precisely as it was when the strip of ground occupied by the street was first dedicated for that purpose. It follows that appellee could not abridge this right by erecting a house, or fences or setting out trees along the property line. In so improving his property he took the chances of sustaining a loss by the proper construction of the street when that event happened.

Other objections to the judgment assigned as errors by appellant need not be noticed, as it follows from what has been said, that there can be no recovery by appellee in this case in any event.

Judgment reversed, remanded for proceedings consistent herewith. Whole court sitting.

PHILLIPS v. HOSKINS, &c.

(Filed March 12, 1908—To be reported.)

1. Husband and Wife—Infancy of Husband—Deed for Sale of Land—Disaffirmance by Husband—Where a husband, while an infant, joined his wife in a deed of trust on her land, and after becoming of age joined her in a mortgage on the same land for another purpose, the mortgage operated as a disaffirmance of his deed.

2. Same—Under Kentucky Statutes 1903, section 2129, providing that the husband must join in a deed conveying his wife's land, the wife is not bound by a deed made by her and her husband while he was an infant, which deed he disaffirmed after becoming of age.

Charles M. Lindsay for appellant.

R. C. & J. J. Davis and Chas. F. Taylor for appellees.

Appeal from Jefferson Circuit Court, Chancery Branch, First Division.

Opinion of the court by Judge Hobson, affirming.

Bettle Williams and J. C. Hoskins contracted, in writing, to sell and convey to C. M. Phillips a tract of land in Jefferson county, containing about twenty acres. They tendered Phillips a deed in execution of the contract, which he declined to accept on the ground that there was a defect in the title. This suit was thereupon filed to compel an execution of the contract. The circuit court held the title good, and Phillips appeals.

It is undisputed that Mrs. Williams owned the land in 1895. She was then the wife of T. D. Williams from whom she has since been divorced. On October 31, 1895, she and her husband made a deed to R. H. Hoskins, by which they conveyed to him the land in question

and some other property in trust for her sole and separate use, and for the use and benefit of the children of her body. At the time this deed was made Mrs. Williams was of age, but her husband, T. D. Williams, was not of age. She had, at the time, one child, who is an infant and still living. After the execution of the deed, the Farmers and Drovers Bank brought suits against her and took out attachments, which were levied on the land. The circuit court sustained the attachments and gave judgments against Mrs. Williams amounting to \$10,000. She superseded the judgments, with R. H. Hoskins as her surety, and he also signed as her surety certain bonds to secure the discharge of some attachments. To secure Hoskins she and her husband, T. D. Williams, on July 23, 1896, and after her husband became of age, executed a mortgage to Hoskins, by which they mortgaged the property to him to secure him as surety on the bonds referred to. After this had been done, John C. Lewis Co. brought an action upon a return of no property found, in which it sought to subject the property to its debt. Hoskins in that action set up his mortgage. The case progressed to judgment; the court ordered the land sold and the proceeds of the sale to remain subject to the order of the court. The land was sold and brought something over \$10,000. It was bought in for Mrs. Williams, and she paid the purchase money bonds. After all this, the judgments against Mrs. Williams were affirmed by this court. In these proceedings the infant child of Mrs. Williams was not made a party, and it is insisted that Mrs. Williams' title to the land is not perfect.

By section 2128, Kentucky Statutes, a wife may make contracts as a single woman, except that she may not make any executory contract to sell or convey or mortgage her real estate unless her husband join in the contract. By section 2129, the husband and wife may sell and convey her lands, but the conveyance must be acknowledged and recorded in the manner required by section 506, Kentucky Statutes, which is in these words: "The conveyance may be by the joint deed of husband and wife or by separate instrument; but in the latter case the husband must first convey, or have theretofore conveyed. The deed as to the husband may be acknowledged or proved, and recorded as heretofore provided."

The purpose of the statute in requiring that the husband must join in conveyances of the wife's land is not only to protect the husband in his rights, but to protect the wife by giving her the counsel and guidance of her husband. In the case at bar, the husband was an infant when the deed of trust to Hoskins was executed. The deed was not void as to him, but it was voidable. He had the right to ratify it when he became of age, or to disaffirm it if he saw proper. After he became of age, he united with his wife in the mortgage of the property to Hoskins. This instrument made an entirely different disposition of the property from that made by the deed of trust. The deed of trust set apart the property for one purpose; the deed of mortgage applied it to another. The latter instrument was inconsistent with the former, and, being inconsistent, operated as a disaffirmance by the husband, of the deed which he had executed during his infancy. The purpose of the statute regulating the conveyance of the wife's land would be entirely defeated if she was held bound by the deed made when her husband was an infant and after he had, upon becoming of age, disaffirmed it.

Under the statute the wife's land may be conveyed by the joint deed of the husband and wife. Her powers are from the statute and she can not convey her land except in the manner provided by it. To be a conveyance of the wife's land under the statute, the deed must be the valid act of the husband, otherwise he has not conveyed. To hold her bound by a deed not binding on the husband or valid as to him would be to allow her to convey her land without the con-

currence of the husband. This would be to deny to the statute the fair meaning and effect of the words used. Her land may be conveyed by the joint deed of herself and her husband, but when the instrument is of no effect as to the husband, it is not the joint deed of himself and wife. It is only her deed, and she can not, by her deed alone, convey her land.

We, therefore, conclude that Mrs. Williams was not bound by the deed of trust executed to R. H. Hoskins in 1895, and that the title to the property remained in her notwithstanding the execution of this instrument. This being true, her son has no interest in the property and her title to it is the same as it was before this deed was executed. Judgment affirmed.

BITTIER, &c. v. MYERS' G'D'N.

(Filed April 29th, 1908—Not to be reported.)

Divorce and Alimony—Agreed Order—Title to Real Estate—Divesting Husband of Title—Validity of Order—Parties to Action—Under Kentucky Statutes, section 2123, providing for the making of orders for the care and custody of the children in a divorce proceeding between the parents, it was error in the court to enter an order purporting to be an agreed order, by which the husband was divested of the fee-simple title to a house and lot for the benefit of infant children who were not parties to the action.

C. L. Raison, Jr., for appellants.

John W. Rodman, guardian ad litem.

Appeal from Kenton Circuit Court.

Opinion of the court by Judge Nunn, reversing.

Appellant, Maggie Bittier, purchased from her co-appellant, Carry Myers, a house and lot in the city of Covington, Kentucky, of the value of six or seven thousand dollars. Mrs. Bittier paid part of the purchase price, and executed to Mrs. Myers her notes for the remainder. Appellee and others were giving it out in speech that she owned an interest in the property, which had the effect to cause appellant, Bittier, to become doubtful of her title to the property, and she brought this action, under section 11, of the Kentucky Statutes, to quiet her title, Mrs. Myers joining in the action with her. The controversy grew out of the following facts:

In the year 1903, Mrs. Myers sued her husband for a divorce and alimony. On December 30th, 1903, the court rendered a judgment granting her a divorce and adjudging her alimony. We copy that part of the judgment which applies to the question before us:

"It is established by this record that the defendant, Harvey Myers, is the owner of an estate not exceeding \$18,000 in value. It is adjudged that the defendant, Harvey Myers, convey by warranty deed to the plaintiff, Carry W. Myers, for her natural life, with remainder in fee simple to the children of plaintiff and defendant, to-wit, Ethel, Amella and Elsie Myers and Adela Harvey, the residence property described in the pleadings as follows: (Here follows the description which we omit.) Said property shall be used as a home for the plaintiff and such of the children as may remain with her; but with the consent of both parties hereto, may be sold for reinvestment, and any purchaser at said sale, need not look to the application of the proceeds. Defendant shall also transfer absolutely to plain-

tiff the household goods in said residence, excepting his library and his other personal belongings which he may remove at any reasonable time. The defendant will also pay plaintiff the sum of \$500 on or before January 10th, 1904; \$500 on or before June 30, 1904; \$500 on or before January 10, 1905; \$500 on or before June 30, 1905; the defendant will also maintain \$3,000 of his insurance on his life for the benefit of plaintiff and their children. The defendant will also provide suitable wearing apparel for his unmarried children, and pay for their tuition. These conveyances, transfers, payments and insurance shall be in full satisfaction of all claims of plaintiff against defendant for alimony, dower, support, insurance, maintenance and all other claims now or hereafter, vested or contingent and in full of all her other interest in, or claims upon or against, his estate, or any part thereof. The dwelling house so ordered to be conveyed is of the value of \$6,000. The household goods in said residence are of the value of \$2,000, and it therefore follows that the conveyance and payments to be made by defendant to plaintiff aggregate \$10,000.'

Thereafter, and in the same action at a term of court six or seven months after the first judgment was rendered, the parties in that action, by their attorneys, appeared in court and by agreement entered the following order:

"Came plaintiff by her attorney, C. L. Ralson, Esq., and defendant by his attorney, Ulie J. Howard, Esq., and on the joint motion of both parties the judgment herein as to alimony is now corrected and modified as follows: The real estate to be conveyed by defendant to plaintiff was misdescribed in the original judgment and should have been and is described as follows: (Here the right description is given, which we omit.) Said judgment is further amended by providing and it is now ordered and adjudged that defendant shall convey to plaintiff a fee-simple title to said property without limitation or entailment and plaintiff releases and cancels all her right in and claim to the life insurance on defendant's life and he agrees to maintain at least \$3,000 thereof for the benefit of the children of plaintiff and defendant. In all other respects the judgment shall stand.

The defendant in that action, Harvey Myers, did not convey this house and lot to his wife and children as provided in the first judgment, but conveyed to Carry W. Myers the fee-simple title as provided in the last judgment. The first three children named in the judgment are of age, and consented to the last, or second judgment, but Adela Harvey is an infant and is unable to consent to it, and it is claimed for her that she has an interest in this house and lot by reason of the provisions of the first judgment copied above; and that the court and the parties had no right to divest her of that interest after the term of court at which the judgment was rendered, and for this reason the last agreed judgment, by which her mother, Carry W. Myers, is given the fee-simple title to the house and lot, is void as to her. We are of the opinion that this is error. Appellee and her sisters were not parties to that proceeding; they were not bound by the judgment rendered therein, whether upon the court's own motion or by agreement of the parties thereto. Both parents were and are under legal obligations to maintain and support their infant children; but the court, in such an action, did not have the power to make an order allowing the wife alimony or for the care and maintenance of their infant children, which, in effect, would divest Harvey W. Myers of the fee simple title to this house and lot. Section 2123 of the Kentucky Statutes, is as follows:

"Pending an application for divorce, or on final judgment, the court may make orders for the care, custody and maintenance of the minor children of the parties, or children of unsound mind, or any of them,

and at any time afterwards, upon the petition of either party, revise and alter the same, having in all such cases of care and custody the interest and welfare of the children principally in view; but no such order for maintenance of children or allotment in favor of the wife shall divest either party of the fee-simple title to real estate."

But it is contended that the first judgment fixing alimony was agreed to by the parties. It does not so appear upon the face, except possibly by inference, but a person can not be divested of the title to real estate by mere inference. The second judgment does appear to be an agreed judgment; and it also appears that Myers made the conveyance in conformity thereto, and in our opinion passed the fee simple title in the house and lot to Carry W. Myers.

Appellee, by the first judgment, did not receive a vested interest in the property. Her father is still legally bound, and, we have no doubt, will support her. In addition to this, the first judgment gives appellee a greater interest in the insurance policy, which about equals the interest she claims in the house and lot, and the change of the judgment better secured the support and maintenance of Carry W. Myers, which was equitable and just, as by the judgment Harvey W. Myers was thereafter released from any further support of her.

For these reasons the judgment of the lower court is reversed and remanded, for further proceedings consistent herewith.

THORNTON V. LAYLE.

(Filed April 22, 1908—Not to be reported.)

1. Actions—Injury by Vicious Cow—In this action for an injury by a vicious cow, it was error to peremptorily instruct the jury to find for the defendant where the evidence showed that plaintiff was asked to milk defendant's cow while he was away from home, the latter assuring him that the cow was perfectly gentle. The plaintiff knew nothing about the cow and relied upon the representations as to her gentleness.

2. Res Gestae—The rule that excludes the declarations of witnesses after the happening of an event because not a part of the res gestae, has no application to the acts of unreasoning animals.

W. B. Moody and H. G. Botts for appellant.

John W. Douglass and Clore, Dickinson & Clayton for appellee.

Appeal from Owen Circuit Court.

Opinion of the court by Judge Barker, reversing.

The appellant (plaintiff) was gored by the appellee's (defendant's) cow while he was trying to milk her; and to recover damages for the injuries received he instituted this action. Upon the trial before a jury, the court, after the evidence for the plaintiff was in, awarded a peremptory instruction requiring the jury to find for the defendant. This appeal questions the correctness of that ruling.

The evidence showed that the defendant, an old man of about seventy years of age, was the owner of two jersey cows, which he had raised and which he had theretofore habitually milked himself. On the occasion involved here, the defendant wished to be absent from his home for several days, and, that his cows might be regularly

milked during his absence, he employed the plaintiff, his neighbor, to perform this service for him.

The plaintiff, in his testimony, deposed, substantially, that, when the plaintiff was negotiating with him to do the milking, he (defendant) told him (plaintiff) that the cows were perfectly gentle; that he (plaintiff) knew nothing of them himself; that relying upon the assurance of the defendant, he went to the latter's home and tried to milk the cows; that when he went into the stall where one of them was it immediately turned on plaintiff and fiercely gored him in the stomach or bowels, inflicting very serious wounds, the direct effect of which was to necessitate a very painful surgical operation to be performed, and from which he was permanently injured. It is not necessary to set forth the evidence of the extent of plaintiff's injuries on this appeal, as there can be no doubt that it establishes the infliction of very painful wounds, and, perhaps, permanent impairment of his power to earn money.

James Brown testified for the plaintiff, that some time before plaintiff was hurt, he went to Layle's house to return a wagon he had borrowed from him, and was told to put it in the barn lot. He did so, but when he drove into the lot the cows threw down their heads and bellowed, and their actions were such that he told the defendant he thought they were wild and spiteful, but the defendant said: "You are a stranger to them; they are afraid of strangers and act that way."

Everett Raiser testified that he was called in by the plaintiff after he was hurt, and, among other things, said:

"We tried to get the cows in the stalls by taking a gate and holding it in front of us, but we had no sooner gotten in view of the cows than they made at us and we had to run and drop the gate."

S. S. Thornton testified that he was present when Mr. Layle employed the plaintiff to milk the cows for him, and in part said: "George (plaintiff) asked him (defendant) if the cows were gentle, and Mr. Layle said they were perfectly gentle."

In addition to the foregoing evidence, it was shown that the next morning after the plaintiff was gored, he sent for James Samford, a son-in-law of the defendant, who lived nearby, and the witness was asked this question: "If you saw the plaintiff, George Thornton, and James Samford the next day after the plaintiff was hurt by the cow of the defendant, state all that you saw?" The answer to this question was excepted to, and the exception sustained, whereupon the following avowal was made: "I saw the plaintiff and James Samford in the barn lot and they had just gotten in the lot when I saw Mr. Samford run to a road wagon that was in the lot and climb in it. He was in a big hurry, and George Thornton run to a fence and climbed over it. He was in a hurry too. The cows were after them. They showed fight and were vicious." This evidence was ruled incompetent by the court, because, it is said in the briefs, it was not a part of the *res gestae*. We do not think this principle applies to the question in hand. The rule that excludes the declarations of witnesses after the happening of an event because not a part of the *res gestae* has no application to the acts of unreasoning animals. Declarations of witnesses are admitted as a part of the *res gestae* because they are supposed to be natural exclamations or statements made as a part of the thing done when the witness has not had time to concoct a self-serving story. The lower animals act according to their natural instinct, and do not make evidence to suit the occasion. The cow that is vicious in the morning was vicious the night before, there not having been time in the interim to spoil its natural temperament by cruelty or abuse. Of course, a perfectly gentle cow may be made wild or vicious by a long series of abuse

and mistreatment; but this was not the case here. Nothing was done to the cows between the time they gored the plaintiff, in the evening, and the next morning when they viciously attacked (according to the avowal) the plaintiff and Samford.

With this evidence in, clearly the plaintiff was entitled to have the merits of his case passed on by the jury. He showed that he knew nothing of the disposition of the cows at the time of the employment; that he asked the owner, who did know them, and was assured that they were perfectly gentle. On the contrary, they were vicious and savagely attacked the plaintiff, goring him as before stated. It is true, that in actions of this character, the plaintiff must introduce some evidence tending to bring home to the owner knowledge of the vicious disposition of the cattle (Thompson on Negligence, sections 842-877; Adams v. Simpson, 31 Ky. Law Rep., 604; Nisbet v. Well, 25 Ky. Law Rep., 511; Stewart v. East Jellico Coal Co., 24 Ky. Law Rep., 420); but with this principle in mind, there was no element of a meritorious cause of action on the part of the plaintiff lacking, assuming his evidence to have been true; and the court should have overruled the motion for a peremptory instruction, and allowed the case to be tried out before the jury on its merits.

Judgment reversed for another trial under principles consistent with this opinion.

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6. Same—To hold that the men who sell the pools may not be punished, but that those who buy them may be punished, would be to give no effect to that part of the act which limits the selling of the pools on regular race tracks during the races thereon. The object of the exception was not to protect those who sell the pools, but what the Legislature had in mind was to protect the regular race tracks during the races thereon. Manifestly the Legislature intended that the selling of combination or French pools on any regular track, during the races thereon, should not be illegal. Idem	287

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7. Trial for Murder—Death from Wound—Doubtful Proof—Conviction for Malicious Cutting—Legality of Instruction—On the trial of one indicted for murder by willfully cutting and wounding another with a knife, where the deceased lived for some time after the difficulty, and the proof was conflicting as to whether he died of the wound inflicted or from improper treatment, it was proper for the court to instruct the jury under section 1166, Kentucky Statutes, for malicious cutting and wounding, and also under section 1242 for cutting in sudden heat and passion, and a verdict for malicious cutting was properly rendered. <i>Housman v. Commonwealth</i>	311
8. Misconduct of Commonwealth's Attorney—Argument to Jury—Limitations Allowable—Much latitude is allowed the Commonwealth's attorney in the presentation of his case to the jury, the only limitation being such as required him to confine himself to the facts introduced in evidence, and the fair and reasonable deductions and conclusions to be drawn therefrom, and, bounded alone by these limitations, he may, with propriety, appeal to the jury with all the power, force and persuasiveness which his learning, skill and experience enable him to command, and of this character of argument the accused can not complain. <i>Idem</i>	311
9. Homicide—Idiots—Continuance—Affidavit for—It was not error to refuse the continuance asked for on the ground that the absent witness, if present, would testify that defendant was so feeble-minded that he did not know right from wrong, and had always been in that condition. The court properly refused the continuance on the ground that such a fact was susceptible of proof by other witnesses who were easily accessible. <i>Webb v. Commonwealth</i>	316
10. Same—Idiocy is a state of mind that any one can distinguish as readily as the ordinary medical man. <i>Idem</i>	316
11. Instructions—Defense of Another—In an instruction the right of the defense of another was predicated upon the fact that neither such other nor the accused, could have averted the apparent danger to the former by other reasonably safe means. This is the law. <i>Idem</i>	316
12. New Trials—Defendant Tried Without His Knowledge—This case is reversed as to Walter Sanders for the reason that it appears from the record and from his affidavit for a continuance, that he did not know that he was being tried with his co-defendant; that he had no counsel, and that he was under the impression that Williams alone was being tried. The record does not show why he had no counsel. It also appears that the only connection he had with the alleged robbery was in picking up the bill and handing it to Williams. <i>Williams & Saunders v. Commonwealth</i>	330
13. Aiding and Abetting—Instructions—An instruction required the jury to believe that S. was present, aiding and abetting W. in the robbery, and the jury may have construed the picking up of the money to be a sufficient aiding and abetting, but he must have aided and abetted with the knowledge that W. was robbing another of the money. <i>Idem</i>	330
14. Homicide—Joint Indictment—Separate Trial—Proof of Conspiracy—Declaration of Co-conspirator—Competency	

CRIMINAL LAW—Continued—

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—In the trial of B., jointly indicted with H., for the murder of W., in which a conspiracy is charged, evidence of a statement made by B. to witness A., prior to the killing of deceased that "if he had such men as me and M., that he already had H. in with him, who was not afraid of hell, that sometime when W. came ranting around on the ridge, we would uncap his head and leave him for his friends to carry home," Held—To be competent to show a conspiracy between B. and H. to kill W., and hence the declaration of H., in the absence of B., was properly admitted to the jury as evidence against B. *Brummett v. Commonwealth*

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15. Same—Evidence—Statements Made by Wife of Accused—Competency—On the trial of B., indicted with H. for killing W., in which it was claimed that the killing was done because of some real or fancied insult by W. to B.'s wife, it was incompetent to prove statements made by B.'s wife to a witness in the presence of H. in reference to the time that her husband intended to go to the town of M. with a load of melons (on one of which trips he was killed), as the effect of such evidence was to make the wife an unwilling witness against her husband without giving her a chance to deny it. *Idem*

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COUNTY ATTORNEYS—

1. Prosecuting Suits by Auditor's Agent—In prosecuting suits instituted by the auditor's agent, as the law provided, in May, 1904, the time the proceeding was instituted, the county attorney discharged an official duty which was covered by his annual salary allowed him by the fiscal court, and he was not entitled to special compensation. *Bingham v. Hager, Auditor, &c.* 278
2. Duties—Compensation—Sections 126, 127, 128, 129 and 131 prescribe the duties of the county attorney, and section 132 prescribes his compensation. This must necessarily include his compensation for all services rendered, where other compensation is not allowed therefor. *Spalding v. Thornbury* 362
3. Same—All services rendered under section 127 must stand alike. The statute makes it his duty to institute or defend actions and proceedings when "directed" by the county or fiscal court. If the statute had contemplated an employment the word "employed" would have been used instead of "directed." *Idem* 362
4. Additional Duties Imposed by Statute—Commission Provided—Where, by statute, duties are imposed upon the county attorney and compensation, by way of commission is provided, he is entitled to such compensation in addition to his salary. The salary named in section 132 only covers the services required of him by law and for which no other compensation is provided. *Idem* 362
5. Salary—Contingent Fees—The salary of the county attorney is part of the current expenses of the county and must be paid out of the general fund provided for that purpose. It can not be paid by way of contingent fees out of other fund, nor is it contemplated by the statute that his salary shall be contingent and not fixed by the fiscal court. *Idem* 362

COUNTY ATTORNEYS—Continued—	Page.
6. Fixed Salary—Additional Compensation—Proceeding to Collect Taxes—Where the fiscal court, by a previous order, had fixed the salary of the county attorney, it had no authority to make him an additional allowance for bringing a suit, or for his services in collecting certain taxes due from a distilling company, as it was his duty to render such service, when directed by the fiscal court, by virtue of his office as county attorney. <i>Terrill v. Trimble County</i>	364
7. Same—Duties—Compensation—When the fiscal court has fixed the compensation of the county attorney, it has no power to increase or diminish it during his term. And it is his duty to perform all his official duties for the compensation fixed. <i>Idem</i>	364
8. Same—Employing Additional Counsel—Expenses Incurred—Allowance Therefor—But where a county attorney is directed by the fiscal court to institute proceedings to collect certain taxes and to employ other counsel to assist him therein, the county should bear his reasonable expenses incurred in the prosecution of the work and any sums paid in securing other counsel in the necessary prosecution of the work. <i>Idem</i>	364

DEBTOR AND CREDITOR—

1. Pleading—Failure to Ask Personal Judgment—Refusal to Render Judgment—In an action in which Moss was made a party by Brackett's Adm'r, it no where appearing that a personal judgment was sought against Moss for land sold by Brackett to Boreing, the lower court did not err in refusing to render a personal judgment against Moss. <i>Brackett's Adm'r v. Boreing's Adm'r, &c.</i>	292
2. Offset by Debtor—Debts Owning by Creditor—In the absence of a contract to that effect, a debtor is never a trustee for his creditor. The law is well settled that a debtor may purchase debts due from his creditor to others, at less than their value, and demand a settlement for the full amount of the debt so purchased. <i>Idem</i>	292
3. Evidence—Exceptions Not Acted On—Waiver—Exceptions to the competency of testimony filed in an action, that are not acted on by the trial court, are, on appeal, deemed to have been waived. <i>Idem</i>	292
4. Settlement—Unsatisfactory Evidence—Judgment Not Disturbed—Where the evidence on a question of settlement is so vague and unsatisfactory as to leave the mind in doubt, the judgment of the chancellor thereon will not be disturbed. <i>Idem</i>	292
5. Attachments—Notice—Effect—In this case Boreing was in debt to Brackett; Hendrickson had attached the money due from Boreing to Brackett in Boreing's hands, which was sustained, and so much of the money due to Brackett by Boreing as equalled the Hendrickson judgments was then due, not to Brackett, but to Hendrickson. At the same time the bank's assignee attached in Boreing's hands the money thus due to Hendrickson. Held—That Boreing was holding money or property in which Hendrickson had an interest, and the service of the attachment on him was notice that it was the purpose of the bank to attach the funds so held by him. <i>Idem</i>	292

- DEEDS**—See Husband and Wife, 1, 2— Page.
1. Construction of—Exemption of Building Pavement—The sole question, in this case, is whether the condition in the deed that the grantor should never be required to build a pavement, was a personal exemption, or went with the land to the heirs and assigns of the grantor. The language of the deed shows that it was intended as a personal exemption. To consider it a covenant running with the land would have to be done by inference, and this is not allowed in construing deeds which affect the public interest. *City of Richmond v. Bennett* 279
 2. Written Instruments—Construction of—The writings or deeds herein considered do not evidence a purchase and sale of the property in controversy, but are testamentary in character, therefore, appellant and his sister should contribute from the shares they received from their mother's estate to their brothers and sisters, so that all would be equal. *Siler v. Jones, &c.* 317
 3. Limitation—Must be Pleaded—Limitation, to be available, must be pleaded, and can not be reached by demurrer. (30 Ky. Law Rep., 25.) *Idem* 317
- DIVORCE AND ALIMONY**—See Husband and Wife.
- DURESS**—See Life Insurance, 1, 2.
- EXECUTORS AND ADMINISTRATORS**—
- Personal Representative—Appointment of—The statute does not contemplate that persons who are related by blood, but have no interest in the estate, shall determine who shall be appointed administrator, and, although the sister of deceased and his father and mother, sought to have the administrator removed and the sister appointed, beyond the fact that he proposed to charge the five per cent. commission for settling it, no reason is shown to have him removed. But, as he led the father and mother to believe that he would have nothing in the way of compensation, and procured their written request to the county court to appoint him, he should not be allowed commissions for his services, but should only be allowed his expenses as administrator. *Hilton v. Hilton's Adm'r.* 276
- EXECUTORY CONTRACT**—See Lands, 7.
- EVIDENCE**—See Criminal Law.
- FIRE INSURANCE**—
- Actions for Loss—Surrender of Policy—Direction for Peremptory Instruction—In this action, involving the liability of the appellant on a policy of fire insurance, evidence examined and held that the policy was surrendered by the insured with the intention that it should be cancelled by the company and was accepted by the company with the belief and understanding that it was cancelled, and the peremptory instruction asked by appellant should have been granted. *Aetna Ins. Co. v. Robards Tob. Co.'s Trustee* 257
- GAMING**—See Criminal Law.
- HIRING CONVICTS**—See Contracts, 1, 2, 3.
- HOMICIDE**—See Criminal Law.
- HUSBAND AND WIFE**—
1. Infancy of Husband—Deed for Sale of Land—Disaffirmance by Husband—Where a husband, while an infant, joined his wife in a deed of trust on her land, and after becoming of age joined her in a mortgage on the same land for another purpose, the mortgage operated as a disaffirmance of his deed. *Phillips v. Hoskins, &c.* 378

HUSBAND AND WIFE—Continued—	Page.
2. Same—Under Kentucky Statutes 1903, section 2129, providing that the husband must join in a deed conveying his wife's land, the wife is not bound by a deed made by her husband while he was an infant which deed he disaffirmed after becoming of age. <i>Idem</i>	378
3. Divorce and Allmony—Agreed Order—Title to Real Estate—Divesting Husband of Title—Validity of Order—Parties to Action—Under Kentucky Statutes, section 2123, providing for the making of orders for the care and custody of the children in a divorce proceeding between the parents, it was error in the court to enter an order purporting to be an agreed order, by which the husband was divested of the fee-simple title to a house and lot for the benefit of infant children who were not parties to the action. <i>Bittler, &c. v. Myers' Gd'n</i>	380
IDIOCY—See Criminal Law, 9, 10.	
INDICTMENTS—See Criminal Law.	
JUDGMENTS IN REM—See Life Insurance, 3.	
LANDS—	
1. Division of—Evidence—The evidence here is not sufficient to justify the conclusion that any fraud was practiced upon Mrs. Baker in the division of the land, or that there was a conspiracy to defraud her. C. made an advantageous trade in the division, but this fact alone is not sufficient to authorize the setting aside of the deeds. In brief, it appears that Mrs. Baker simply made a bad trade in the division and is seeking to be released therefrom. Her petition was properly dismissed by the court below. <i>Baker v. Cooper, &c.</i>	263
2. Instructions—Error to Submit Law and Facts—The instruction complained of is erroneous in that it submits both the law and facts to the jury. <i>Idem</i>	263
3. Rule of Caveat Emptor—An officer selling land under execution does not act as agent of the plaintiff. The sale is made by law, and the rule of caveat emptor applies to such sales. <i>Burt & Brabb Lumber Co. v. Hurst, &c.</i>	270
4. Quieting Title—Section 11, of the Kentucky Statutes, authorizes the institution and maintenance of an action to quiet title by one who owns the title and is in the actual possession of the land. As appellant did not have the actual possession of the land at the time he instituted the action, his petition was properly dismissed. <i>Dupoyster v. Turk</i>	320
5. Liens—Levy of Execution—A. recovered judgment against appellee, execution issued, which he levied on its land, which was sold and bought by A. for his debt. The facts bring the case clearly within the provisions of section 1691, Kentucky Statutes, and the lower court properly held that A. was entitled to a lien on the land for his debt by reason of his execution. <i>Attay v. Knox Gem Coal Co., &c.</i>	327
6. Contracts—Instructions—Evidence—Appellant resisted a claim for commissions for the sale of his land, setting up in a paragraph of his answer that the contract relied on was not the one he made, and that his signature to it was obtained by the fraud of appellee. It was error for the court not to allow him to introduce proof to sustain this plea, and the court erred to his prejudice in an instruction which directed the jury to find for appellees if they believed that they procured a purchaser for the land, when the answer set out that while they brought a pur-	

LANDS—Continued —	Page.
chaser they stated that the contract was at an end and that it was done for an accommodation. <i>Stewart v. Roberts, &c.</i>	332
7. Sale of—Encumbrance—Price of Land Covered by Right of Way—Executory Contract—Refusal of Purchaser to Accept Deed—Although the rule in this State, as announced in certain cases is, that when a purchaser accepts a conveyance, with knowledge of the existence of a highway or railroad thereon, he can not obtain an abatement of the purchase price or a cancellation of the contract an account of the incumbrance, this principle will not be applied to railway rights of way against a purchaser under an executory contract, in the absence of evidence showing that it was the intention of the purchaser to pay for the land enclosed in the right of way, where he objects in a reasonable time to accept a conveyance of the property that would require him to pay for the right of way. <i>Jones v. Prewitt</i>	358
LIFE INSURANCE—	
1. Life of Husband—Wife Beneficiary—Assignment—Plea of Duress by Wife—Knowledge of Assignee—In an action on an insurance policy on the life of a husband, payable to his wife, on which a third party claimed a lien by assignment by the husband and his wife before the husband's death, in which the wife claims that she made the assignment under threats and duress of her husband, such duress, if shown, would not affect the validity of the assignment to the third party in the absence of proof that he had knowledge of it. <i>Ely v. Hartford Life Ins. Co., &c.</i>	272
2. Same — Duress — Avoidance of Contract — Knowledge of Third Party—Duress, in order to avoid a contract, must be the act of the other party himself or his agent, or must be imposed with his knowledge or taken advantage of by him for the purpose of obtaining the agreement. Duress by a third person will not avoid a contract made with a party who was not cognizant of it. <i>Idem</i>	272
3. Non-resident Defendants — Judgments in Rem — Constructive Service—Validity—While it is the law that a judgment in personam against a non-resident defendant, not served with process in the jurisdiction of the court, is void, it is equally true that a judgment in rem against a non-resident defendant, though only before the court on constructive service, is not only good against him, but against all other persons claiming interest in, or title to, the property proceeded against, having notice of proceedings. <i>Idem</i>	272
4. Contract for Extended Insurance — Default — Failure to Apply for Extension—Recovery Denied—A policy of life insurance by a husband for his wife for \$2,000 provided that, upon his failure to pay the fourth premium, he was entitled to paid-up insurance of \$300, cash surrender value of \$102 or extended insurance, if applied for, of five years and six months. He made three payments and defaulted on the fourth, and died without applying for extended insurance. Held—That, having failed to exercise the option of applying for the extended insurance, the other provisions, with reference to paid-up insurance, automatically went into effect, and there could be no recovery on the contract for extended insurance. <i>Balthaser v. Ill. Life Ins. Co.</i>	283

LIFE INSURANCE—Continued—

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5. Insurance Companies — Taxation — Liability — Premiums on Face of Policy—Under Kentucky Statutes, section 4226, every life insurance company, other than fraternal assessment companies, not organized under the laws of this State, but doing business therein, are required to pay a tax on premiums receipted for on the face of the policy for original insurance, without regard to whether it was paid in cash or otherwise, or not paid at all, but as to renewal premiums the tax is assessed only upon the amount the company receives in cash or by note or in some manner other than cash. *Mut. Ben. Life Ins. Co. v. Commonwealth, &c* 338
6. Same—Premiums Not Collected—Set Apart for Emergency —Designated as Dividends—Where, however, an insurance company stipulated in its policy for a premium larger than was necessary to carry its risks, but which might be needed in certain conditions, and set aside so much of the first premium as a guarantee against misfortune, and for the succeeding years did not collect the whole amount first stipulated, but designated it as a dividend, the company was not liable to taxation on the premiums stipulated, but only for the amount actually collected. *Idem* 338

LIMITATION—See Deeds, 3.

MASTER AND SERVANT—

1. Death of Servant—Falling of Roof of Mine—Action for damages—Allegation of Petition—Sufficiency—In an Action of an administrator of a deceased miner, against the owners of the mine for damages for negligently causing his death by the falling of the roof of the mine, an allegation in the petition "that it was not the duty of the servant to prop the mine, but that it was the duty of the owners to keep the roof in a reasonably safe condition, and to have a competent mine boss to inspect the mine, but they negligently failed to prop the mine or to have such mine boss," states a good cause of action and a demurrer thereto was improperly sustained. *Jackson's Adm'x v. Richardson Coal Co., &c.* 289
2. Services Rendered—Action for—Part Performance—Compensation Recoverable—One who is employed by another to render two kinds of service, is entitled to a reasonable compensation for the service he rendered, although he may not have accomplished both the things he undertook to perform. *Weikel v. Clarke* 290
3. Same—In an action for service rendered in the absence of any agreement for the price to be paid therefor, it is a question for the jury to fix a reasonable sum for the service shown by the proof to have been performed. *Idem.* 290
4. Duty of Master to Instruct Servant—The duty of instructing an inexperienced servant in the dangers of his employment is one that rests primarily upon the master, and where such a servant is exposed to dangers that are unknown to him, the servant is not required to show gross negligence on the part of his superior. *Owensboro Stave & Barrel Co. v. Daugherty, By, &c* 328
5. Same—A servant who is acting under the direction of his superior may properly obey his orders, unless the danger is so obvious and imminent that a servant of ordinary prudence would not take the risk, and the jury could not have been misled by an instruction having in view this principle. *Idem* 328

MASTER AND SERVANT—Continued—

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6. Mining—Injury to Servant—Negligence of Master—Explosion of Fire Damp—Evidence—Evidence considered and held to show gross negligence in the owner of a coal mine in suffering fire damp to accumulate therein and in not providing proper ventilation, thereby rendering it a dangerous place in which to work, and by the explosion of which the plaintiff was injured. *Black Diamond Coal and Mining Co. v. Price* 334
7. Evidence—Reports of Mine Inspector—Competency—In an action for damages by an employe against a coal mining company for damages for injury received by the explosion of fire damp negligently permitted to accumulate in the mine, evidence of two reports of the mine inspector made shortly before the explosion, was admissible, showing the existence of conditions calculated to produce fire damp. *Idem* 334
8. Duty of Master—Safe Place to Work—Obvious Danger—It is the duty of a mine owner to have his mine in a reasonably safe condition for the performance of the duties of the employes therein, and a failure to do so renders the owner liable for an injury caused thereby "unless a danger incident to the employment is known to the servant, or is an obvious danger, he may rely upon the implied assurance and superior knowledge of his employer that the premises are reasonably safe for the purpose for which they are being used." *Idem* 334
9. Evidence—Similar Explosions—Subsequent to Injury—Admissibility—Reversible Error—On the trial of an action for damages to an employe in a mine by the explosion of fire damp, it was a reversible error in the court to allow evidence to be introduced showing that other like explosions had occurred in the same mine after the one by which the plaintiff was injured. Evidence of previous similar accidents were admissible, but subsequent ones are not competent for any purpose. *Idem* 334

MINING—See Master and Servant, 3. 7, 8, 9.

MISCONDUCT OF COUNSEL—See Criminal Law, 8.

NEW TRIALS—See Criminal Law, 12.

MUNICIPALITIES—

1. City Ordinances—Building Permits—Reasonable Regulations—Avoiding Fires—The courts recognize the right of cities, under the police power, to make rules and regulations necessary to protect the health and morals of the city, and such as may be necessary to prevent the spreading of fires; the only restriction being that in passing such ordinances is that they shall be reasonable. The use of one's property, under the law, means such use and enjoyment as will not unnecessarily endanger or destroy the property of others. *O'Bryan, &c. v. Highland Apartment Co.* 349
2. Same—Property Owner—Injunction—A property owner may sue and enjoin the erection of a building in violation of the reasonable building regulations of the city required by its ordinances. *Idem* 350
3. Same—Reasonable Regulations—An ordinance of a city denying the right to erect a frame building therein, without a written permit from the building inspector, and within the fire limits of the city, held to be a reasonable regulation. *Idem* 350

MUNICIPALITIES—Continued—	Page.
4. Building Permits—Revocation by Inspector—A permit to erect a building, given by the building inspector under a misstatement or misconception of the facts may be withdrawn or revoked by the inspector. <i>Idem</i>	350
5. Building Inspector—Control of Board of Safety—Right to Cancel Permits—Under Kentucky Statutes 1903, section 2861, the building inspector of a city is subject to the order of the Board of Public Safety, and where complaint is made to such board, it may decide that the inspector had no right to issue such certificate because in violation of the building ordinances, and such board may cancel the certificate, though the work on the building may have commenced. <i>Idem</i>	350
PERSONAL INJURIES—	
1. Actions—Injury by Vicious Cow—In this action for an injury by a vicious cow, it was error to peremptorily instruct the jury to find for the defendant where the evidence showed that plaintiff was asked to milk defendant's cow while he was away from home, the latter assuring him that the cow was perfectly gentle. The plaintiff knew nothing about the cow and relied upon the representations as to her gentleness. <i>Thornton v. Layle</i>	382
2. Res Gestae—The rule that excludes the declarations of witnesses after the happening of an event because not a part of the res gestae, has no application to the acts of unreasoning animals. <i>Idem</i>	382
PLEADINGS—See Deeds, 3; Debtor and Creditor, 1, 2, 3—	
Action to Enforce Lien—Infants—The material allegations of the petition were controverted by answer. To entitle the plaintiff to a judgment enforcing his lien, his allegations should have been supported by evidence, but, aside from this, under section 126, Civil Code, although no answer had been filed by the infants, it was necessary to prove the material allegations of the petition. In addition to these errors, no recovery could be had until the required affidavit was filed. (Section 3872, Kentucky Statutes.) <i>Isom, &c. v. Holcomb</i>	307
PRISON COMMISSIONERS—See Contracts, 1, 2, 3.	
RAILROADS—	
1. Action for Damages Against—Trespassers—Evidence—In this action against appellant for the death of decedent, who was a trespasser upon its track at the time he was killed, its liability depends entirely upon whether or not those in charge of the engine, after they discovered the peril of the deceased, could, by the use of ordinary care, have stopped the train in time to prevent its striking him. The evidence examined, and Held—That a peremptory instruction should have been given, directing the jury to find for appellee. <i>N., C. & St. L. Ry. Co. v. Bean's Ex'or</i>	303
2. Spark Arresters—Injury to Eye—Statutes—In this action by the appellee for the recovery of damages for an injury which resulted to his eye by the emission of a cinder from its chimney, there should have been a peremptory instruction to find for appellant, for the reason that the evidence is such as to warrant the belief that the cinder would have escaped through a spark arrester of the most approved pattern, so small was it. Moreover, the language of the statute (section 782), shows that it was enacted to prevent injuries from sparks of fire, and was not	

RAILROADS—Continued—

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- intended to apply to cinders small enough to enter the human eye. C., N. O. & T. P. Ry. Co. v. Baxter 305
3. Injury to Trespasser—Drunk or Unconscious—Lookout—Appellant had no right upon the track of appellee at the place he was injured, and, therefore, the company owed him no lookout duty whatever. The question whether he was drunk or unconscious from sickness was immaterial. Starett v. C. & O. Ry. Co., &c 309
4. Instructions—Expert Testimony—Physical Facts—An instruction that expert testimony must give way to physical facts, was erroneous. It invaded the province of the jury, telling them what weight to give to evidence. It was also error to instruct the jury that, after seeing appellant, the engineer was not required to stop the train, that the presumption was that he would heed the warning and leave the track in time to prevent the injury. Had the man been standing on the track, it might be different, but a man sitting on a cross-tie of a railroad track asleep or unconscious presents an unusual spectacle, and it was the province of the jury to determine whether or not an engineer of ordinary prudence, seeing a man in such situation, ought not to commence to check his train in time to prevent the injury, should it transpire that he was unconscious or asleep. Idem 309
5. Mortgages—Trustee—Authority—Action—Re-imbursement—Persons Liable—Where an unfinished railroad executed to another road a lease upon its road and also a mortgage, in order to obtain funds to complete the road, and the lessee executed a mortgage on its earnings to the trustee for the bondholders, the three writings which were executed simultaneously, must be considered as one contract, though the mortgage of the earnings considered alone, created merely a dry, naked trust, where by the other mortgage, the trustee was authorized to take possession of the road, which, under the law then in force, he could not do, his only remedy was to bring a suit in equity as trustee against the lessee road for the benefit of his trust, and was entitled to be reimbursed by the bondholders for the expenditure he was required, in the prosecution of such suit, for which the lessee road, as one of the bondholders, was liable for its proportional share, although the suit was against its wishes and not for its benefit. L. & N. R. R. Co. v. Schmidt, &c 346

ROAD SUPERVISORS—

- Appointment—Salary—Taxation—Maintenance of Roads and Bridges—Where a sum as large as \$7,000 per annum is actually collected from the taxpayers of a county and expended for road and bridge purposes by the fiscal court, it is a sufficient maintenance by taxation to authorize the employment of the road supervisor at a reasonable salary, under Kentucky Statutes 1903, section 4314, authorizing the appointment of a road supervisor when the roads are worked by taxation. Poole, &c. v. Slayton, For, &c 373

SALARIES—See County Attorney; Road Commissioner.

STREET IMPROVEMENT—

1. Municipalities—Street Improvement—Discretion of City—Review—Absence of Negligence—A city authorized to establish, grade and regrade the streets thereof, assumes a certain public duty with respect thereto, and its judgment or discretion as to the time when and the manner in

STREET IMPROVEMENT—Continued—	Page.
which they shall be improved, is beyond review unless in making and maintaining the improvements it acts with culpable negligence. <i>City of Owensboro v. Hope</i>	375
2. Same—Dedicating Land for Street—Compensation to Owner—Award by Jury—Presumption—When a strip of land is dedicated for a street, it is implied that it may be graded so far as may be necessary to fit it for such purpose, and it will be presumed that the jury, in awarding compensation under the writ of <i>ad quad damnum</i> have estimated the inconvenience of the owner and injury to his remaining property likely to ensue from the necessary grading of the surface. And until the city has once exercised its right to grade the street, the adjacent lot owners have notice that its surface is subject to such change as the city may order in its discretion when it sees proper to improve the highway. <i>Idem</i>	375
3. Original Construction—Consequential Damages—For such consequential damages as result to an adjacent lot because of the original construction of the grade of a street, when not done negligently, the lot owner is not entitled to recover from the city; the street having been previously dedicated, or acquired by the city for that purpose. <i>Idem</i>	375
4. Right to Grade Street—Passage of Ordinance—Subsequent Acts of Lot Owner—Damages Therefor—The right of a city to have a street graded attaches at the time the ordinance authorizing it passed, and a lot owner can not abridge this right by erecting a house or fences or setting out trees along the property line. In so improving his property he took the chances of sustaining a loss by the proper construction of the street when that event happened. <i>Idem</i>	375

TAXATION—

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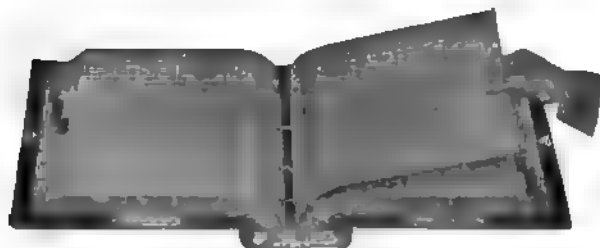
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No. 4

COURT OF APPEALS OF KENTUCKY.

BINDELL, &c. v. KENTON COUNTY ASSESSMENT FIRE INSURANCE CO.

(Filed March 13, 1908—To be reported.)

1. Fire Insurance—Defense—Voluntary Act of Insured—Denial—Plea of Insanity—In an action to recover upon a policy of fire insurance the defense was that the property was destroyed by the voluntary act of the insured. The insured having died before the case came on for trial, his administrator, for reply, denied (1) that the fire was caused by the voluntary act of the deceased; (2) that if the fire was caused by deceased he was at the time temporarily insane and incapable of forming any wrongful or fraudulent design. Held—That the reply, while technically defective, was a good plea and a demurrer thereto was improperly sustained.

2. Insane Person—Wrongful Purpose—Incapacity to Design—An insane person acts without design, has no will of his own, and is influenced by no motive. So an insane person, being unable to form a wrongful or fraudulent design in destroying his own property, so far as the insurer is concerned, the insurers are liable although the insured himself burns the property when insane.

3. Provisions of Policy—Effect—The absence of a clause in an insurance policy providing that the company shall not be liable if the property is destroyed by the insured, would not render the company liable if the property was destroyed by the voluntary, fraudulent, corrupt or wrongful act of the insured.

4. Negligence of Insured—Absence of Fraud or Willful Misconduct—Although the negligence or carelessness of the insured may cause or result in the destruction of his property the company will be liable unless the negligence is of such a character as to amount to fraud or willful misconduct on his part.

Schmidt & Holmes for appellants.

Frank M. Tracy for appellee.

Appeal from Kenton Circuit Court.

Opinion of the court by Judge Carroll, reversing.

In this action to recover upon a policy of fire insurance the defense was that the property insured was destroyed by the voluntary act

of the insured, who died before the case came on for trial. His personal representatives filed the following reply to this answer:

"1. They deny that the fire which destroyed said barn was started by said Charles Bindell, deceased, or the said barn was destroyed as a result of the voluntary act of the said decedent.

"2. They state that if the fire which destroyed said barn was started by said Bindell, or if said barn was destroyed as a result of any act of said decedent, he was at the time temporarily insane and incapable of forming any wrongful or fraudulent design. They state that one of said defenses is true, but that they do not know which of them is true."

The lower court sustained a demurrer to the second paragraph of this reply, and of this ruling appellants complain.

There is no clause in the policy of insurance providing that the company should not be liable if the property was destroyed by the insured. The absence, however, of such a stipulation, would not render the company liable if the destruction of the property was caused by the voluntary, fraudulent, corrupt or wrongful act of the insured. The paragraph of the reply in question is not aptly pleaded. It would have been more in accordance with the rules of good pleading if it had stated that Bindell, if he burned the barn, did not at the time, have mind enough to know the nature or quality of his act, and was laboring under such defect of reason as not to be responsible for his conduct, or that, as a result of mental unsoundness, he did not have sufficient will power to know right from wrong or govern his actions. But, although technically defective, we are not prepared to say that the pleading was not sufficient, and will, therefore, treat the paragraph as if it averred, in apt language, the insanity of the insured at the time he burned the barn.

We have not found any Kentucky case dealing with the question here presented, although it has been often considered in life insurance cases; and in such cases, where the policy exempted the company from liability if the assured should die by his own hand, it has been ruled that self-destruction did not avoid the policy when the insured, who took his own life, was at the time insane. In other words, to avoid the policy the act of self-destruction must have been voluntary. (St. Louis Mutual Life Ins. Co. v. Graves, 6 Bush, 268; Manhattan Life Ins. Co. v. Beard, 23 Ky. Law Rep., 1747.) A different rule has obtained where the policy contained a stipulation that if the insured should take his own life while insane, or, if his act be voluntary or involuntary while sane or insane. The cases construing these last-mentioned provisions may be found in Manhattan Life Ins. Co. v. Beard, supra, and it is not necessary to further mention them here.

If Bindell, while insane, destroyed the insured property, the company can not, under the conditions of this policy, escape liability for the loss upon this ground. Unless Bindell's act in destroying the property was fraudulent, voluntary or intentional, the company is bound. It is well settled that although the negligence or carelessness of the insured may cause or result in the destruction of his property, the company will be liable, unless the carelessness or negligence is of such a character as to amount to fraud, or willful misconduct on his part. (Ostrander on Insurance, page 192; Wood on Insurance, volume 1, page 274.) In Cyc., volume 19, page 831, the rule is thus stated: "In the absence of fraud or design on the part of the insured, or some stipulation in the policy, the insured is not relieved from liability by mere negligence or carelessness of the insured or his servants, although directly contributing to or causing the loss; but, on the other hand, even in the absence of stipulations in the policy, the failure of the insured to take reasonable care to avoid loss, or the doing of wrongful acts directly calculated to bring about the loss, may be such as to defeat a recovery under the policy."

The text is supported by numerous authorities, including *Scottish Union Ins. Co. v. Strain*, 24 Ky. Law Rep., 958, where this court said: "The law is well settled that insurance companies are responsible for losses caused by a risk insured against, notwithstanding such loss may be directly contributed to by the negligence or carelessness of the assured or its agent."

There is no conflict in the authorities upon this proposition. It will thus be seen that to relieve the insurer from liability the destruction of the property must have been caused or brought about by the fraudulent design, voluntary act or intentional misconduct of the insured. Accepting this doctrine as sound, it necessarily follows that if the insured did not, at the time, have mind enough to know the nature or quality of his act, and was laboring under such a defect of reason as not to be responsible for his conduct, or as a result of mental unsoundness he did not have sufficient will power to know right from wrong or govern his actions, that the destruction of the property by him would not relieve the company. Under the conditions stated, the act of the insured could not have been fraudulent because there can be no actual fraud in the absence of an intent to commit it. It could not be voluntary or intentional because he did not have sufficient mind and memory to do a voluntary or intentional act. The acts of an insane person are not voluntary or intentional in the sense that they impose responsibilities that ordinarily flow from the consequences of a voluntary or intentional act committed by a sane person. Or, to put it in another way, assuming that Bindell destroyed the property, and at the time he was insane within the definition heretofore given, he was not capable of forming any judgment as to the consequences of his act, and hence the wrongful intent necessary to constitute a fraudulent purpose, a voluntary or willful, or an intentional act, was lacking. An insane person acts without design, has no will of his own, and is influenced by no motive. So, an insane person can form no wrongful or fraudulent design in destroying his own property so far as the insurers are concerned, and the insurers are liable although the insured himself burns the property when insane. In *Autremont v. Fire Ass'n*, 65 Hun. (N. Y. Sup. Ct. Rep.), 475, in an action to recover on a fire insurance policy, the insured, while insane, set fire to the building, and upon this ground the company resisted a recovery; but the court said: "We are unable to see that an insane person can form a fraudulent or wrongful design in the destruction of his own property so as to defeat a policy or insurance thereon any more than he can form a criminal intent in the commission of crime. Mere negligence, however great the degree, is not sufficient to defeat a recovery, provided it does not reach the point of a wrongful or fraudulent purpose, or a wanton disregard of others. To the same effect is *Karow v. Continental Ins. Co.*, 57 Wis., 56, 46 Am. St. Rep., 17.

It has been suggested that although an insane person is not criminally liable for his acts, and although a policy of fire insurance will not be avoided if the property is destroyed by the insured while insane, yet, that insane persons are responsible to the extent of compensatory damages for any injury done by them, and hence if Bindell damaged the insurance company by his own insane act, his estate should be required to compensate it for any loss sustained thereby. Generally speaking, a lunatic or insane person, is liable for the actual damage resulting from his wrongful acts. (Cooley on Torts, page 99; *Williams v. Hays*, 143 N. Y., 442, 26 L. R. A., 153.) In *Shearman & Redfield on Negligence*, volume 1, section 121, it is said the liability of lunatics to a civil action for the damages caused by their torts rests "not upon the usual principle of personal fault, for there may be none, but upon the broad ground that when one of two innocent persons must bear a loss, he must bear it whose act caused it."

This question was fully considered by the Wisconsin court in the Karow case, *supra*, and the conclusion reached that although if the insured while insane had burned the house of another person, he would be liable for the value thereof; yet, the fact that he burned his own house did not relieve the company from liability; and in support of this doctrine a number of cases are cited in the opinion. The reason for the distinction, which is not entirely satisfactory, is rested upon the ground that, as the company can not escape liability upon the policy of insurance for the insane act of the insured, it would be in effect enabling it to do so if it could, in an independent action, require his estate to compensate it for the loss, or could set it up as defense to defeat an action brought to recover the amount of the policy. In short, the doctrine seems to be that the company ought not to be allowed by this indirect means to defeat a recovery on the policy when it could not have succeeded solely upon the ground that the insured burned it, if in fact he was at the time insane. To permit the company to recover from the insured would be going through the idle ceremony or form of paying him the amount of the policy with one hand, and at the same time taking it away from him with the other. If insurance companies do not desire to be responsible in cases of this character, they should so stipulate in their policies.

For the error in sustaining the demurrer to the reply, the judgment must be reversed, with directions for a new trial not inconsistent with this opinion.

MILLER SUPPLY CO. v. LOUISA WATER CO.'S ASS'ES, &c.

(Filed March 13, 1908—To be reported.)

1. Mortgage Lien—Description of Property—Identification—Validity—A mortgage on property which was sold and used in building a water plant is void for uncertainty which does not locate the property as to State, county or town, and which contains no reference which would supply the omission. A mortgage covering so many feet of "spiral pipe" is void for uncertainty in description where there is nothing in the mortgage by which it could be identified and distinguished from other pipe of like kind.

2. Water Plant—Enforced Sale—Liens on Connected Parts—Distribution of Proceeds—Where parties sold property to a water company by a contract which was recorded in which they retained the title to the property sold until the purchase price was paid on the sale of the waterworks to pay its debts, under order of a court, where the property sold could not be attached without injuring the sale of the waterworks plant, the court should have ascertained the cost of each item that constituted the plant, and distributed the proceeds of the sale according to the cost of each of them on their respective claims, and if their whole claims are not then satisfied they should be permitted to present the balance as a general claim, to share with the other creditors pro rata, under section 74, Kentucky Statutes.

Thomas R. Brown for appellant.

O'Neal & Carter and E. E. Shannon for appellees.

Sullivan & Stewart for appellee, Fairbanks, Morse & Co.

Hager & Stewart for appellee, American Spiral Works.

Appeal from Lawrence Circuit Court.

Opinion of the court by Judge Nunn, reversing.

In the spring or summer of 1904, one W. B. Cox procured a franchise from the town of Louisa for the building and operating a waterworks and sewer system in that town. It appears that prior to September 2, of that year, Cox purchased considerable material in the way of water pipes, machinery, &c., and had laid the pipe, installed the machinery and done considerable work toward completing the system. He purchased pipe from appellant, Miller Supply Co., to the amount of about \$2,500, and from appellee, American Spiral Pipe Works, to the amount of about \$3,000, and it also appears that fourteen citizens of the town agreed to, and did furnish, Cox one hundred dollars each, to enable him to construct the waterworks, upon condition that each of them would be permitted to receive a supply of water from the works at the same rates that water was furnished to others in the town, until the one hundred dollars was repaid to each. And it was also stipulated that if the waterworks were not completed, or if for any cause the plant was sold or assigned, they should have a lien upon the whole plant to secure them in the amount so advanced. This contract was recorded in the early part of 1905. On September 2, 1904, the Louisa Water Co. was incorporated, directors and officers elected. The corporation, by an order entered in its books, assumed and agreed to pay the above named claims, and others not necessary to mention here. On the 10th day of March, 1906, the Louisa Waterworks became insolvent and made a general deed of assignment of all its property to G. W. Castle, who qualified as such assignee and at once entered upon the duties of his office. Soon thereafter the assignee instituted this action for the purpose of settling the estate, and having the priority of creditors adjudged, and for a settlement of all matters pertaining to the trust.

Appellee, Fairbanks, Morse & Co., filed its answer and cross-petition of the assignee and set up a contract entered into between it and the Louisa Water Co., of date August 31, 1905, for the price of a gasoline engine and a pump which was agreed to be \$2,100, payable in installments. The contract provided, among other things, that the property sold should belong to it and that the title should remain in it until fully paid for, which contract was recorded in the office of the Lawrence County Court, and prayed that its lien be enforced.

A similar pleading was filed by A. J. Garred, assignee of Rumsey & Co., with reference to the pump which was purchased from Rumsey & Co. at the price of \$600, and a lien asserted on it for \$600.

Appellees, the fourteen citizens referred to, filed their pleading alleging the facts before stated, and asserted a lien for the balance due them on the contract. (Most of them had received something like one-half of their claims in water furnished by the company.)

Appellant, Miller Supply Co., and appellee, American Spiral Pipe Works, filed answers, both resisting the liens asserted by Fairbanks, Morse & Co., Garred, assignee of Rumsey & Co., and the claims of the fourteen citizens; and each set forth their respective claims and asserted liens on the pipe sold by each to the Louisa Water Co. The Miller Supply Co. by reason of a mortgage which it filed with its answer, and the American Spiral Pipe Works by reason of an execution levied on the property of the waterworks company. This execution lien was abandoned for the reason that it was not levied until after the date of assignment made by the company to G. W. Castle. The cause was referred to the master commissioner to take proof and to report all claims against the waterworks company, and to determine which claims were liens against its property. The master commissioner made his report and reported liens in favor of the fourteen citizens for the balance due them, and in favor of Garred, assignee of Rumsey & Co., a lien on the pump sold by it and in favor of Fairbanks, Morse & Co., allowing it a lien on the engine

and pump sold by it to the waterworks company; but reported, from the proof, that this engine and pump and the pump furnished by Rumsey & Co. were attached to and were being used as a part of the waterworks system and could not be detached and sold separately without materially injuring the property as a whole, and it was in the interest of all the creditors that the property be sold together. Exceptions were filed to this report by the Miller Supply Co. because the commissioner failed to report its claim as secured by mortgage lien, and because it allowed the claims of the fourteen citizens and gave them a lien upon the property, and also because he reported that Fairbanks, Morse & Co. had a lien on the pump and engine. The court tried and overruled the exceptions, to which appellant, Miller Supply Co., objected and excepted. The court adjudged that the Miller Supply Co. had no lien upon the property, to secure its debt; that Fairbanks, Morse & Co., and Garred, as assignee of Rumsey & Co., had liens on the engine and pumps, and as they were being used as a part of the water system and could not be sold separately without greatly injuring the whole system, gave them a preferred lien on the whole property of the water plant; and also directed that the whole property be sold with the directions that the purchaser carry out the contract made by Cox and the water company with the fourteen citizens referred to, viz: Furnish them water at the same rate charged other citizens of the town until the balance of their claims were paid. To this judgment appellant excepted, and superseded so much of it as gave Fairbanks, Morse & Co. a prior lien upon the property and directed that its claim be paid first out of the proceeds of sale.

Appellant, Miller Supply Co., assigns, in its brief, the following reasons for reversal of the judgment:

1st. The court erred in refusing to adjudge it a lien upon the pipe which it sold and delivered to the water company.

2d. Because the court allowed the claims of the fourteen citizens and directed the property to be sold, with directions for the purchaser to carry out the contract made with them by the assignor, Louisa Water Co.

3d. The court erred in adjudging that Fairbanks, Morse & Co. had a lien on the engine and pump for the sum due it, and in allowing it and Garred, assignee of Rumsey & Co., a lien upon the whole property of the water company for the payment of their claims.

We will consider the reasons assigned in the order stated.

Appellant claims that it has a lien on the pipe sold by it to the waterworks company by reason of a mortgage, which was recorded in Lawrence county, Kentucky. That part of the mortgage necessary to elucidate the question to be determined is as follows: "This indenture made and entered into by and between W. B. Cox, of Pikeville, Ky., party to the first part and the Miller Supply Co., of Huntington, West Virginia, party of the second part."

After reciting the indebtedness, says: "Do hereby mortgage and give a lien on the following described personal property, to-wit: Fourteen hundred and thirty-eight feet of eight-inch spiral pipe; and forty-one hundred and twenty-three feet of four-inch pipe (spiral) and three thousand two hundred and twenty-five feet of six-inch spiral pipe, together with the couplings and the fittings and known as the material pipes, couplings and fittings purchased of the second party and shipped from Abendroth and Root Mfg. Co. And further, that the party of the second part has and holds a lien on ten shares of one hundred dollars each in the Crystal Waterworks Co. Certificate, No. 7, which shall be held as security on said debt."

It will be observed that the mortgage recites that W. B. Cox, the mortgagor, resided in Pikeville, Pike county, Kentucky, and, as stated, the mortgage was recorded in Louisa, Lawrence county, Kentucky:

and it is asserted by appellee's counsel that for this reason, among others, the mortgage did not create a lien upon the property of the waterworks company; that to have obtained a lien by it the mortgage should have been recorded in Pike county, the residence of the mortgagor. The rule is that ordinary personal property is held to have a situs at the residence of the owner, and that a mortgage thereon should be recorded in that county. The cases of *Vaughn v. Bell* 9 B. Mon., 447; *Coppage v. Johnson*, 21 Ky. Law Rep., 1357, and *Day, &c. v. Mack, Strader & Co.*, 24 Ky. Law Rep., 640, were cases where in mortgages were executed upon property not permanently located in the counties where the mortgages were executed. In the first two cases the mortgages were executed upon horses, and in the last the mortgage was given upon a portable engine.

The property in this case was purchased for the construction of the water plant, and whether the mortgage should have been recorded in the place of the actual situs of the property, or in the county of the residence of the owner, we do not decide for the reason we have arrived at the conclusion that the mortgage did not create a lien upon the property for another reason. The mortgage is void for uncertainty, in that it does not locate the property as to State, county or town, and contains no reference which would supply this important omission; but the mortgage would indicate that the property was possibly in Pikeville. Again, the mortgage covered so many feet of "spiral pipe," and there is no other description given of it; there is nothing in the mortgage by which it could be identified and distinguished from the pipe of the American Spiral Pipe Works, or the pipe of any other company. (*Amer. & Eng. Ency.*, 2 Ed., 957, and *Pearce, &c. v. Hall*, 12 Bush, 209.)

With reference to the second question, the claims of the fourteen citizens, we are unable to see how this question affects appellant, Miller Supply Co. It did not object to the sale of the property, and it did not supersede the judgment in that respect; and if this court should reverse the judgment upon this question it would only result to the benefit of the purchaser of the property. The purchaser took the property for a certain price with the obligations resting upon him to furnish these fourteen citizens with water at the rates it furnished water to other citizens, until their claims were paid; and if this court should adjudge that the lower court erred in this it would result alone in relieving the purchaser from that obligation, and would not benefit appellant, or the other creditors of the water company, they will get the benefit of the purchase price and no more. For these reasons we will not consider the action of the lower court with reference to this matter.

Fairbanks, Morse & Co. sold to the Water company the pump engine described, in September, 1905, and it took a contract from the water company, and had it recorded, by which it retained the title to the property until the purchase price was paid. It certainly had a lien upon the property for the payment of its debts, and the court did not err in refusing to allow it and the assignee of Rumsey & Co. to detach the engine and pumps and sell them separately and enforce their liens, but, in the interest of all the creditors, the court properly directed the sale of the whole plant; but erred in adjudging Fairbanks, Morse & Co. and the assignee of Rumsey & Co. a first lien on the proceeds of all the property. This was inequitable to the other creditors who had no liens. It may have been, and probably was true, that the pumps and engine would not have brought the full amount of their debts, and, again, the proceeds of the engine and pumps were all that they had a lien upon.

The court should have ascertained the cost of each item that constituted the water plant, and then ascertained what per cent. the cost of the pump sold by Rumsey & Co. and the cost of the engine

and pump sold by Fairbanks, Morse & Co. is to the sum total of all the items that went into the water plant, and gave each of them, on their respective claims, that per cent. of the proceeds of the whole water plant, and if their whole claims are not then satisfied, they should be permitted to present the balance as a general claim and to share with the other creditors pro rata. (Section 74, Kentucky Statutes.)

For this reason the judgment of the lower court is reversed and remanded, for further proceedings consistent herewith.

VALLANDINGHAM, &c. v. RAY, &c.

(Filed March 19, 1908—To be reported.)

Replevin—Action Against Sureties on Replevin Bond—Failure to Show Breach—Recovery Denied—In an action against the sureties on a replevin bond, where it appears that no restitution of the property in controversy was directed in the replevin suit, and no damages were sought or awarded, the plaintiff's right of recovery against the sureties being dependent upon the breach of the bond they must fail in the absence of showing that there has been a breach of some of its provisions.

Jas. H. Settle for appellants.

Chas. Strother for appellees.

Appeal from Owen Circuit Court.

Opinion of the court by Judge Lassing, reversing.

In April, 1904, J. B. Gibson, filed suit against W. A. Ray and J. C. Frazier, in which he alleged that he was the owner of, and entitled to the immediate possession of, a certain lot of tobacco, amounting to about 5,500 pounds, which he claimed to have purchased from them. That the defendants were unlawfully detaining the tobacco from him to his damage in the sum of \$385. He prayed for an order of delivery for the tobacco and for damages for withholding it from him. He executed the required bond; the order of delivery was issued, placed in the hands of the sheriff, and, under this order of delivery, the tobacco in question was taken and delivered to the plaintiff. When the case came on for trial the defendants, Ray and Frazier, filed a general demurrer to the petition. Upon hearing, the demurrer was sustained, with leave to plaintiff to amend. Plaintiff elected to stand on his petition, and, declining to amend, his suit was dismissed. From this judgment he prayed and prosecuted an appeal to this court, where, in due course of time, the judgment of the lower court was affirmed. Thereupon Ray and Frazier, the defendants in the replevin suit, brought suit upon the bond which had been executed in the replevin suit, wherein they sought to recover of J. B. Gibson and his sureties, the damages which they alleged that they had sustained by reason of the unlawful and wrongful seizure and conversion of their tobacco, together with the costs incurred by them in their defense of the replevin suit.

The defendant, J. B. Gibson, filed his separate answer, and, as the judgment herein rendered as to him is not before us on this appeal, it is unnecessary to consider the defense set up by him.

The sureties, T. T. Vallandingham, &c., filed a general demurrer to the petition, which was overruled. They, thereupon, answered, alleging that the covenants of the bond, which they signed as surety

for J. B. Gibson, had been fully complied with and satisfied, in that J. B. Gibson had duly prosecuted the replevin suit to a final judgment, not only in the Owen Circuit Court, but in the Court of Appeals. That in the replevin suit no return of the property had been adjudged, nor had any sum of money been directed to be paid by J. B. Gibson to the defendants, Ray and Frazier, or either of them, and, that inasmuch as there had been no breach of any of the covenants of the bond, and they had fully performed and satisfied the judgment in the replevin suit by the payment of all of the costs therein, they were absolved from all liability on account of their suretyship on said bond. The material allegations of this answer of the sureties were traversed, and the case proceeded to a trial before a jury with the result that a judgment was rendered in favor of appellees, against J. B. Gibson and the sureties on his replevin bond. This judgment being for the amount which J. B. Gibson alleged he had agreed to pay for the tobacco, and a small sum, \$35, as attorney's fees, he is satisfied therewith and is not complaining. The sureties, feeling that their liability should be strictly limited to the terms and conditions of the bond which they signed, filed a motion and grounds for a new trial, which was overruled, and they appeal.

The bond executed in the replevin suit is as follows:

"J. B. Gibson, Plaintiff,

v. } Bond.

"W. A. Ray, &c., Defendants.

"We undertake to the defendants, W. A. Ray, &c., that the plaintiff, J. B. Gibson, shall duly prosecute this action, and shall perform the judgment of the court therein returning the tobacco ordered to be delivered to the plaintiff, J. B. Gibson, if a return thereof be adjudged, and by paying to the defendants, W. A. Ray, &c., such sums of money as are adjudged in this action against plaintiff, not exceeding nineteen hundred dollars and the costs of this action. This 20th day of April, 1904.

"J. B. GIBSON,
 "S. G. GIBSON,
 "E. S. GIBSON,
 "T. T. VALLANDINGHAM,
 "S. F. GIBSON."

From the record before us it appears that the defendants in the replevin suit did not seek a return of the tobacco taken thereunder, nor did they seek to recover of plaintiff therein any sum of money for the seizure or detention of this tobacco, but, they chose rather to defeat plaintiff's right of recovery by non-suit, and, in this they were successful, for their demurrer to plaintiff's petition was sustained and his petition was dismissed with judgment for their costs.

The petition alleges that J. B. Gibson did not duly prosecute the replevin suit, but the record refutes this allegation and, on the contrary, shows that he not only prosecuted it duly, but did so with diligence, both in the circuit court and in this court. He did everything that was in his power to succeed in that suit and only surrendered his right to maintain it when a judgment had been entered in this court denying him that right. No return of the property was adjudged to the defendants in the replevin suit, nor any sum of money ordered to be paid to them, other than the costs of the suit. These costs, the sureties allege, have been paid, and this is not denied.

The only question left for determination is, may the defendants in the replevin suit, having failed to procure an order for the return

of the property in that suit or a judgment for any sum of money as damages in that suit, now in an independent action proceed against the sureties on the bond?

In the case of the Kentucky Land and Immigration Co. v. Crabtree, 26 Ky. Law Rep., 283, a somewhat similar question was presented. In that case the appellant had filed its suit in replevin; executed a bond and caused an order of delivery to be issued for certain personal property. Under this order of delivery the property described therein was taken and delivered to appellant. Thereafter, at the next succeeding terms of the circuit court, wherein the action was pending appellant dismissed its suit without prejudice. The defendant thereupon brought suit against the plaintiff in the replevin suit; and the surety on his bond, to recover the value of the property taken and damages for withholding it. This court, in passing upon the question, held that the bondsmen were liable, inasmuch as the record showed that appellant had not duly prosecuted the replevin suit. Of course, when appellant dismissed its suit appellee had no opportunity to litigate the question of ownership or damage with it in that suit, and was compelled to seek a recovery in an independent action, and, this court permitted a recovery in that case upon the sole ground that there had been a breach of one of the covenants of the bond, to-wit: That appellant had not duly prosecuted the replevin suit. In that case it was inferentially held that, but for the breach in the covenant of the bond, no recovery could have been had.

In the more recent case of Mounts v. Murphy, decided by this court (October 24, 1907, and found in volume 31, page 1193, Ky. Law Rep., almost identically the question here involved was before this court. In that case a resident of Virginia instituted a suit in replevin in the Pike Circuit Court; executed the bond required by section 184, of the Code, procured an order of delivery for certain cattle and articles of personal property, and, under said order, was placed in possession of the property described therein. At the following term of court the defendant in the replevin suit moved that the plaintiff, being a non-resident, be required to execute a bond for costs. This motion was sustained, and the plaintiff, failing or refusing to give the bond for costs, his suit was dismissed, and it was adjudged in the order dismissing his suit that "The defendant is entitled to an order of restitution of said property, if to be had, and if not to be had, an execution to issue for the sum of \$409, the value fixed by plaintiff of said property, and the clerk of this court will forthwith issue said order of restitution, and upon the return of same, if the said property has not been restored, then the said clerk will issue an execution against the plaintiff, * * *, for the sum of \$409, the value of the cattle taken under said writ, and the costs of this action."

Thereafter the defendant in the replevin suit instituted suit against the surety on the non-resident's bond, seeking to recover of him twenty-five dollars costs expended in the replevin suit, eighteen dollars, the value of certain articles described in the order of delivery, which had not been returned under the order of the court directing a restitution; \$400 damages for the detention of the cattle and other property; and, \$300 damages for the difference between the value of the cattle when taken and the value of same when returned. The bondsman answered, alleging that all of the costs of the replevin suit had been paid; denied that any of the property directed to be returned had not been returned; denied damages either for the detention of the property described in the order of delivery, or damages to said property while in the possession of the plaintiff in the replevin suit, and pleaded affirmatively that, if there had been any damages due the defendant in the replevin suit, they should have been assessed in the final judgment in that suit. Upon a trial the jury found in favor of the bondsman as to the property which it was claimed had not been

returned, and, found against him in the sum of \$300 damages for the detention of the cattle, and, \$90 damages for injury to them while so detained.

Upon review here this court held that the trial court erred in submitting to the jury the question of damages for the detention of the property, holding that this matter should have been presented and determined in the replevin suit, that, as appellee failed to present it and have the matter determined in that action, he is barred from recovering it from the surety on the bond. The surety on the bond was held liable for the damages which had resulted to the property itself while in the possession of the plaintiff in the replevin suit. This recovery was permitted upon the idea that it was the duty of the bondsman to see to it that the property, when restitution was directed, was restored to the defendant in as good condition as it was when it was taken from him. The jury found that the property had been damaged and depreciated in value while in the possession of plaintiff in the replevin suit. There had, therefore, been, to this extent, a failure on the part of the bondsman to comply with that provision of the bond which called for a restitution of the property, if directed by the judgment in the replevin suit, because there had not been a restitution of the property in the condition in which it was when taken, but in a damaged condition, and the property not having been in the custody of the court when the judgment was entered in the replevin suit, this matter could not have been determined in that litigation. Not so, however, with the case at bar. As above stated, no restitution was directed in the replevin suit in this case, and no damages sought or awarded, and appellee's entire right of recovery against the sureties being dependent upon a breach of the replevin bond, they must fail, in the absence of a showing, that there has been a breach of some one of the three provisions of the bond.

One of the provisions of the bond is that the plaintiff in the replevin suit will duly prosecute that action. As above stated, the record in this case shows that he did so. The other covenants in the bond are to the effect that the plaintiff shall return the property if a restitution is adjudged and that they will be answerable to the defendants in the replevin suit for such sums as may be adjudged them therein. In order to determine the liability of the bondsmen upon these two covenants of the bond, we must look alone to the judgment in the replevin suit, for the covenants expressly provide that their liability in these particulars is to be measured by that judgment. When so tested we find that there has been no breach of the bond whatever for which these bondsmen can be held liable.

For the reasons indicated, the judgment is reversed and remanded, with instructions to the lower court to set aside the judgment, so far as the sureties, Vallandingham, &c., are concerned, and enter a judgment dismissing the proceedings as to them, with judgment for their costs.

MAYPOTTER v. GAST, &c.

(Filed April 29, 1908—Not to be reported.)

1. Street Improvement—Apportionment Warrants—Sale—Right of Redemption—Prior Judgment—Effect Thereon—Under section 2834. Ky. Statutes, referring to apportionment warrants, a failure to provide in a judgment of sale thereunder, that the defendant in the warrant may redeem the land within two years from the report of the sale, does not affect a previous judgment in favor of parties to the action, where the defendant did not offer to redeem the land within the two years.

2. Same—Sale and Conveyance—Failure of Owner to Object—Legality of Sale—Under section 989, Ky. Statutes, providing that the court may summarily determine the amount due on the assessment and provide for its payment in the judgment, where property was sold under an apportionment warrant and was conveyed to the purchaser without objection by the owner, who failed to ask that he should have two years time in which to redeem it, he can not thereafter raise the question as to the legality of the sale and conveyance.

J. W. S. Clements for appellant.

William Furlong and Bennett H. Young for appellees.

Appeal from Jefferson Circuit Court, Chancery Branch, Second Division.

Opinion of the court by Judge Hobson, affirming.

D. E. Maypothor and Ira S. Barnett owned a tract of land in Louisville, at the southwest corner of Floyd and G streets, fronting on Floyd street 694 7-12 feet and running back 265 feet. They held the land jointly, Barnett owning two-thirds interest in it and Maypothor one-third. On January 28, 1902, they mortgaged the land to the Columbia Finance & Trust Company to secure a debt of \$5,000 due the Trust Company for borrowed money. On July 29, 1903, Barnett mortgaged his two-thirds of the property to the Southern National Bank to secure a debt of \$7,500 due by him to the bank. On June 2, 1903, the General Council of the city of Louisville passed an ordinance for the improvement of this part of Floyd street. The contract was let to G. W. Gosnell, who did the work and after it was accepted, he received an apportionment warrant dated May 24, 1904, for the sum of \$3,793.19 against 525 feet of the property along Floyd street, beginning at the corner of G street and running back 265 feet, and \$878.82 against 265 feet of the property along G street and running back 250 feet. Gosnell assigned his claim to Jacob Gast, and the debt not having been paid, this suit was brought on November 30, 1904, by Gast and Gosnell against Barnett, Maypothor, the Trust Co. and the bank, setting up their lien and praying that it be enforced. They asked that the Trust Co. and the bank be required to assert their claims, alleging that the lien for the apportionment warrant was prior to the mortgages. Maypothor and Barnett filed an answer in which they assailed the validity of the apportionment warrant. The Trust Co. set up its mortgage and prayed that it be enforced; the bank set up its mortgage and asked its enforcement. No answer was filed by Maypothor and Barnett to the cross-petition of the Trust Co. Maypothor entered his appearance to the cross-petition of the bank and filed an answer stating that its allegations were true. Barnett filed a similar answer to the cross-petition of the bank. In this condition of the pleadings the case was submitted for judgment on June 28, 1905, without objection and it was adjudged by the court that Gosnell and Gast had the first lien on that part of the property referred to in the apportionment warrant; that the Trust Co., subject to the contractor's lien, had a first lien on all the property for its debt of \$5,000, and this debt it was agreed was to be paid three-fifths by Barnett and two-fifths by Maypothor. It was also adjudged that the bank had a lien on Barnett's two-thirds interest in the whole property for its debt of \$7,500, but that this was subject to the prior liens. The court also determined that the land was divisible into thirteen (13) lots, which were described in the judgment, and that each lot should be offered first for sale and then the whole property, and that bid should be accepted which brought the most. The land was ordered sold on the judgment in favor of the Trust Co. and the bank;

and it was provided that out of the proceeds the apportionment warrant was first to be paid; then the debt to the Trust Co.; that one-third of the surplus should be paid to Maypothor and two-thirds of the surplus should be paid to the Southern National Bank, on its mortgage from Barnett. It was also ordered that \$2,000 of the debt of the Trust Co. should be charged to Maypothor and \$3,000 to Barnett. On July 31, Maypothor and Barnett were granted an appeal from the judgment on their motion and on the same day they executed a supersedeas bond which, as far as material, is in these words.

"Ira S. Barnett and D. E. Maypothor, appellants,
vs.

Jacob Gast and Geo. W. Gosnell, appellees.

"Whereas, said appellants have taken an appeal from the judgment of this court, rendered on the 28th day of June, 1905, as amended on July 15, 1905, against Ira S. Barnett and D. E. Maypothor, in favor of appellees, Jacob Gast and George W. Gosnell, for so much of said judgment as adjudges a lien on a certain lot of land at Floyd and G streets, and a sale of said land, which judgment is in words and figures as follows, to-wit:

(Here follows judgment.)

"Now we, Ira S. Barnett and D. E. Maypothor, principal, and J. W. Gaulbert, surety, do hereby covenant to and with the appellees, Jacob Gast and George W. Gosnell, that the appellants will pay to the appellees all costs and damages that shall be adjudged against the appellants on the appeal; and also that they will satisfy and perform the said judgment in case it shall be affirmed, and any judgment or order which the Court of Appeals may render, or order to be rendered, by the inferior court, not exceeding in amount or value the judgment aforesaid, and also pay all rents, hire or damage which, during the pendency of the appeal, may accrue on any part of the property of which the appellees are kept out of possession by reason of the appeal."

On the same day the clerk issued a supersedeas which was executed on Gast and Gosnell. The supersedeas is in these words:

"Ira S. Barnett and D. E. Maypothor, appellants,
vs.

Jacob Gast and Geo. W. Gosnell, appellees.

"I, W. L. Weller, Jr., Clerk of the Jefferson Circuit Court, do hereby certify that an appeal has been granted from a judgment rendered in favor of Jacob Gast and Geo. W. Gosnell, appellees, against Ira S. Barnett and D. E. Maypothor, appellants, from so much of said judgment as adjudges a lien on a certain lot of land at Floyd and G streets, and a sale of said land in the Jefferson Circuit Court, Chancery Branch, Second Division, on the 28th day of June, 1905, and as amended July 15, 1905, and that a supersedeas bond has been executed after the appeal was granted. Therefore, the appellee and all others are commanded to stay proceedings on the judgment aforesaid."

Notwithstanding the supersedeas the Bank and Trust Co. proceeded with the sale. The property was appraised at \$11,300, and brought \$10,800. It was purchased by the Southern National Bank. The sale was reported to the court and, without objection, was confirmed. Maypothor and Barnett failed to prosecute their appeal and it was dismissed by this court, the supersedeas being discharged. The purchaser paid the price and, without objection, a deed was made to it. Out of the money arising from the sale, there was a balance of \$159.28, coming to Maypothor from his one-third of the land; and this was paid to him and accepted by him on March 24, 1906. There was also a balance of \$318.57 coming to the bank on its mortgage from Barnett, and it was paid to it. After all this, on June 1, 1907,

the appeal before us was sued out by D. E. Maypotter before the clerk of this court.

It is insisted on the appeal that the sale was improperly made after the execution of the supersedeas bond and the issual of the supersedeas. But it will be observed that Gosnell and Gast were the only parties named in the supersedeas bond or in the supersedeas. The surety in the bond was not liable to any one but Gosnell and Gast, and only Gosnell and Gast were required to suspend proceedings on the judgment. It is insisted that the judgment of sale was an entirety and that if it was suspended as to one of the parties, it was suspended as to all. We cannot concur in this conclusion, for if that were the rule then in any case where a debtor's property is ordered sold to satisfy several liens, all he has to do is to supersede the judgment as to the smallest lien and this will prevent a sale of the property, without imposing upon him or his surety any liability to the larger lien holders for the loss they may sustain by reason of the supersedeas. This is not the meaning of the statute. Under such a construction, if Gast's debt had been only \$10, a supersedeas as to him would have suspended the judgment. The sale was not ordered on the petition of Gast; it was ordered on the cross-petition of the Trust Co. and the bank. The defendants, by executing the bond and obtaining the supersedeas as to Gosnell and Gast, superseded the judgment as to them and the effect of this was that no money could have been paid to them under the judgment as long as the supersedeas was in force; but it had no other effect.

By section 2834, Ky. Statutes, which is a part of the act under which the apportionment warrant was issued, it is provided that the defendant in the apportionment warrant, or any one claiming under him, may redeem the land within two years from the date of the order confirming the report of the sale; and that this shall be so expressed in the order confirming the report of the sale. The order confirming the report of sale in this case did not so provide, but the failure to so provide in that order would have no effect on the previous judgment. The defendant did not offer to redeem the property within two years, and the time for redemption is now passed. By section 989, Ky. Statutes, which is a part of the act governing the Jefferson Circuit Court, it is provided that in actions for the sale of real property, the court may determine summarily the amount of the state, district or municipal taxes or any assessment upon the property to be sold, and shall provide in the judgment for the payment of the same out of the purchase money; and if the plaintiff fail to ask therefor, the purchaser shall be entitled, at any time before the payment of the purchase price, to a credit for the amount thereof. The purpose of the statute is to protect the purchaser of the property. The bank and Trust Co., when brought into court, had a right to foreclose their mortgages and to have the property sold under the law governing such foreclosures. The court did not abuse a sound discretion in ordering the property sold upon the cross-petition of the bank and Trust Co. The defendant was not prejudiced by the form of the judgment, for under section 989, the court might summarily determine the amount due on the assessment and provide for the payment of it in the judgment. Appellant did not object to the order directing the property to be conveyed to the purchaser, or ask the court then to provide that he should have two years to redeem the property. He cannot, after thus allowing the case to proceed as it did in the circuit court, raise the question here for the first time, after the deed has been made and after the time of redemption has expired.

It is also insisted for appellant that the court erred in selling all the property and that it should have ordered a sale of only so much of his one-third of the property as was necessary. It is a sufficient answer to this to say that the defendant, after the sale had been made

and confirmed, without objection, accepted the money coming to him from the sale. After accepting the proceeds of the sale of the surplus property, he cannot complain that the court ordered more property sold than should have been sold. (Brown v. VanCleave, 86 Ky., 381.) The money represented the property. He has the money, and, while retaining it, he can not complain that he ought also to have the property.

Lastly, it is insisted that the apportionment warrant is invalid for the reason that Shipp street extended will run across the lot and that the apportionment should not have crossed Shipp street. We have examined with care the proof taken to show this, but conclude that the proof is not sufficient to establish the fact. The map shows that Shipp street runs out to the railroad right of way, but there is nothing in the record to show that it crosses the right of way or that the land on the opposite side of the right of way, where the lot in controversy lies, was ever dedicated in any way as a street. There is nothing in the record to show that Shipp street should be extended across this lot or that it probably ever will be. It not appearing that the land has been dedicated as a street or that there is any necessity for the extension of Shipp street across this land, the circuit court properly sustained the apportionment, which was made in accordance with the rule repeatedly sanctioned by this court.

Judgment affirmed.

BLAND v. CUMBERLAND TELEPHONE AND TELEGRAPH CO.

(Filed April 29, 1908—Not to be reported.)

1. Telephones—Contract Between Two Companies—Pleading—The parties to this action entered into a five year contract providing for an interchange of business, and a controversy arising as to appellant's right under the contract, appellee cut off all connection before the termination of the contract. In this action against appellee for damages for the breach of the contract, appellee, in an amended answer, alleged that appellant had not obtained a franchise from Sonora, the place of its central station, as required by sections 163-164, of the Constitution. In its reply appellant admitted such failure, but averred that many of his subscribers were reached by lines that did not go over or upon any street in Sonora, and that most of his rural subscribers were of this class. It was error to sustain a demurrer to the reply. The contract was severable. There was an agreement to use such lines as the parties might from time to time set up.

2. Rule as to Construction of Contracts—The rule is elementary that contracts, though partly in violation of a statute, severable into parts, may be enforced as to the part that is good.

L. A. Faurest and S. M. Payton for appellant.

H. L. James and Wm. L. Granberry for appellee.

Appeal from Hardin Circuit Court.

Opinion of the court by Chief Justice O'Rear, reversing.

Appellant owned and was operating a rural telephone plant, the central station of which was at Sonora, a town of the sixth class, in Hardin county. Appellee operated a more extensive plant, with "exchanges" in a great number of towns and cities, including some other towns in Hardin county. The two entered into a five-year contract by which the former was to rent and install in its service certain

instruments from the latter, and to provide for connecting with the latter's lines, so as to afford an interchange of business between the two. All messages originating and ending in Hardin county were to be transmitted free on whatever lines it passed over, so far as charges between the contracting parties were concerned. But all messages originating on appellant's lines destined beyond Hardin county were designated long distance service, for which appellant was to receive 15 per cent. of the tolls charged by appellee for those messages. Appellant had a number of subscribers in Sonora, and a considerable number in the country, known as farmer lines; he also had, or thereafter installed, certain pay stations in the country, that is, in Harlan county, but not in any city or town. A controversy arose between the parties as to appellant's right, under the contract, to have messages of his patrons, originating at these pay-stations, transmitted under the contract, over appellee's lines. Appellee construed that appellant had not such right, and cut off all connection between the two systems, some eighteen months before the termination of the contract period. This suit was brought by appellant against appellee to recover the damages resulting from its breach of the contract. The pleadings finally came down to the point where appellee, in an amended answer, alleged that appellant had not obtained a franchise from Sonora to operate telephone lines on its streets and alleys, as required by sections 163-164, Constitution, and was doing so in violation of the Constitution; that its action for damages was based upon the failure of appellee to continue the arrangement by which it was thus violating the law. In the reply appellant admitted his failure to obtain the franchise in the manner required by the Constitution, but averred that many of his subscribers, using his instruments, were reached by lines that did not go upon or over any public street or alley of Sonora, and that most or all of his rural subscribers were of this class. A demurrer was sustained to the reply, and the amended answer held to present a complete bar to plaintiff's cause of action.

It was held by this court in *East Tennessee Tel. Co. v. Russellville*, 21 Ky. Law Rep., 307, that a telephone company, taking possession of the streets of a city for the purpose of erecting its poles, without the consent of its legislative bodies, is a trespasser, and the presence of its poles and wires upon the streets a public nuisance. In *East Tenn. Tel. Co. v. Anderson Co. Tel. Co.*, 22 Ky. Law Rep., 418, an ordinance granting a franchise to a telephone company that was not passed in accordance with the statutes, was held void and as conferring no rights. In *Nicholasville Water Co. v. Board of Councilmen*, 18 Ky. Law Rep., 592, it was held that the attempted grant of a water franchise by a city council, without its being exposed to sale as required by the Constitution, was void. In *Merchants Police & Dis. Tel. Co. v. Citizens Tel. Co.*, 93 S. W., 642, the same principle was again announced and applied to telephone franchises. In *Rough River Tel. Co. v. Cumberland Tel. & Telg. Co.*, 84 S. W., 517, one telephone company sued another to prevent its interference with the plaintiff's wires in a city wherein the plaintiff had not acquired a franchise as required by the Constitution. The court said:

"A mere trespasser can not complain that he is prevented from continuing his wrongful act. No injury is claimed to the corporeal property of the appellee. The sole injury is the prevention of the full exercise of its invalid claim of a franchise in the streets of a city. It follows, therefore, under the authorities cited, that, as it has no such franchise, it can have received no injury of which equity will take cognizance."

To the same effect in the more recent case of Rural Home Telephone Company v. Ky. & Ind. Tel. Co., decided February 20th, 1908.

The court expressly adheres to the principles announced in those cases. It is believed the provision of the Constitution involved is one of great importance to the people of the municipalities, and in any event, ought to be enforced by denying all benefit to those who ignore or attempt to get around it, by denying to such the relief that would indirectly serve their ends.

But it should be born well in mind, just what the franchise is that is the subject of sale, as required by the Constitution. It is not, as sometimes seems to be thought, the right to operate a telephone exchange in a city. That right is not one to be granted or denied by the municipality any more than it could grant or refuse a franchise to conduct a dry-goods store within the city. The franchise under discussion, is the permission to do something which the city has the right of control over—that is, the occupancy of some part of the public streets. This is made plain by section 163, of the Constitution, which reads:

“No street railway, gas, water, steam heating, telephone, or electric light company, within a city or town, shall be permitted or authorized to construct its tracks, lay its pipes or mains, or erect its poles, posts or other apparatus, along, over, under or across streets, alleys or public grounds of a city or town, without the consent of the proper legislative bodies or boards of such city or town being first obtained; but when charters have been heretofore granted conferring such rights, and work has in good faith been begun thereunder, the provisions of this section shall not apply.”

Section 164, of the same instrument, provides for the sale of the franchise or privilege treated or in the preceding section, and reads:

“No county, city, town, taxing district or other municipality shall be authorized or permitted to grant any franchise or privilege, or make any contract in reference thereto, for a term exceeding twenty years. Before granting such franchise or privilege for a term of years, such municipality shall first, after due advertisement, receive bids therefor publicly, and award the same to the highest and best bidder; but it shall have the right to reject any or all bids. This section shall not apply to a trunk railway.”

If it be true then that appellant's telephone business, though its central station was in the corporate limits of Sonora, was conducted in large or considerable part, without its going upon or across the public streets of the town, its presence there was not illegal, and its business was, for that matter, legitimate. It will not lie in appellee's mouth to say that its contract could be violated with impunity because a part of it, if executed, would involve appellant's continuing a public nuisance, if nevertheless, the remainder ought to have been executed. It did have the right to refuse messages that came over lines being operated by appellant, if any, in the forbidden zone of the streets of the town, and so far as the alleged damages sued for arose out of such violation, there can be no recovery in this action. But if there was damage resulting from the breach as to the other business of appellant, we perceive no reason, legal or moral, that denies its recovery.

Appellee contends that the contract is an entirety; that it was entered into upon the faith of appellee's belief that appellant was authorized to occupy the streets of Sonora with his poles and wires; and that it was the aggregate business of appellant that was in contemplation of the parties. The contract and the nature of the business alike refute this contention. We think this contract is severable. There was not an agreement to use certain lines, but such lines as the parties might, from time to time, during the term set up.

The very nature of the business contemplated the abandonment of any of the lines as conditions might make expedient to be done. Neither party had the right, under the contract, to say to the other, you must continue your line now, being used by A., so long as this contract endures. Just the opposite was contemplated. Each message was separate, and if a toll message, was accounted for separately. If appellee's subscriber A., in Elizabethtown, had called for connection with appellant's subscriber B., in Sonora, appellant could have refused to make the connection either because B. was in arrears, or because the law forbade the use of the line for the time; or appellant could have cut out the line entirely without any reason, so far as appellee was concerned. And these rights between them were reciprocal. The nature of the business shows, as does the written contract itself, that the parties might change or abandon some of its lines at will, and substitute others, without liability to the other contracting party on that account. The rule is elementary that contracts, though partly in violation of a statute or Constitution, if severable into parts, may be enforced as to the part that is good. (15 Am. & Eng. Ency. of Law, 990.)

The demurrer to the reply should have been overruled.

Judgment reversed and remanded, for proceedings consistent herewith.

KENTUCKY JOURNAL PUBLISHING CO. v. GAINES.

(Filed May 6th, 1908—Not to be reported.)

1. Affidavit for Special Judge—Bias of Regular Judge—Facts Showing Bias—In an action against a party for a libel in accusing the plaintiff of forging a letter purporting to have been written by defendant, where the defendant filed an affidavit asking for a special judge to try the case, alleging that "the regular judge will not afford him a fair trial, because he had a political bias and enmity towards him, and that he had openly asserted his belief in the genuineness of the signature of the defendant to the letter in question and that said judge had been in frequent communication with the plaintiff concerning the publication of said letter in a newspaper under the control of plaintiff," the affidavit thoroughly disqualified the regular judge from presiding at the trial.

2. Same—Explanation of Judge—Admissions—Canvassing Question to be Tried—No judge should preside over a trial where the evidence requires so elaborate an explanation of his relations to the subject-matter of the litigation as that given by the trial judge in this case which shows conferences with the plaintiff concerning the letter, the genuineness of which was involved in the litigation before him, and where he had to some extent at least, canvassed its value as a political asset in a heated campaign in which he was deeply interested.

3. Political Bias—Effect—Political bias, amounting to personal hostility, is an arch enemy to an impartial trial, and its presence undermines and weakens the foundations of the temple of justice, and it is no answer to say that the record, as a matter of fact, does not show, on the trial, any subsequently occurring error on the trial prejudicial to the party complaining.

Lewis McQuown and Jas. Andrew Scott for appellant.

John W. Ray and Geo. A. Williams for appellee.

Appeal from Anderson Circuit Court.

Opinion of the court by Judge Barker, reversing.

The appellee, Noel Gaines, instituted this action in the Anderson Circuit Court against appellant, Kentucky Journal Publishing Company, to recover damages for an alleged libelous publication concerning him, which, in part, is as follows:

"Gaines confesses he is a thief. Endeavor to bolster up defense of his forged letter sinks him deeper in mire. Produces another forgery while you wait.

"Under the headlines: 'Makes Manly Statement and Shows Honorable Possession of the Letter,' a local afternoon paper yesterday printed Noel Gaines' version of how he secured the letter which General Percy Haly has pronounced a base forgery, and taking his own statement it shows acts which are anything but honorable, and which are convincing that the man who would stoop so low as to secure a letter or paper in the way in which he acknowledged in his statement could be guilty of what the former Adjutant General charges.

"In the same publication in this afternoon paper, Gaines prints another letter which he says General Haly gave him, and which General Haly declares to be a second forgery. This second letter, which is printed for the purpose of bolstering up the Crusader in his false charges, is one of recommendation with a date line at its head giving a time at which the alleged writer can prove, if necessary, by a good many local men of standing, that he was hardly on speaking terms with Gaines because of what he considered attempts at blackmail to secure the appointment as Adjutant General of the State."

The defendant, before answering, made a motion that the regular judge vacate the bench and allow a special judge to preside, and, in support of this motion, filed the following affidavit:

"The affiant, the Kentucky Journal Publishing Company, by W. P. Walton, president of said company, says that the judge of this court can not properly preside in this action, because he will not afford said company a fair and impartial trial, as he verily believes, for the following reasons, to-wit:

"1st. The said judge of this court is politically antagonistic to this defendant, and has political bias and enmity towards said company, and because—

"2nd. The judge of this court has openly stated his belief in the genuineness of the signature of Percy Haly to the letter purporting to have been written by Haly to Judge Lassing, and referred to in the alleged libel herein.

"3rd. Because the judge of this court was in frequent communication and conference with the plaintiff, Noel Gaines, concerning the publication of said letter in the Crusader, a paper published by said plaintiff, out of which the alleged libelous publication herein grew.

"4th. This defendant says that the alleged libelous publication, and this suit, grew out of and were the direct result of the political campaign which has just ended between Gov. J. C. W. Beckham, upon the one side, and Senator J. B. McCreary, upon the other, for the United States Senatorship, and that said campaign was waged with great bitterness upon both sides, and to such an extent that the judge of this court felt called upon to go, and did go, on the stump and make speeches for said McCreary and against said Beckham, in which he attacked said Beckham personally, together with his administration of the State's affairs, and that in said campaign this defendant was the friend and partisan of said Beckham and his administration,

and it therefore says that the judge of this court, by his action as aforesaid, has become so embittered against this defendant that in fairness to himself, he ought not to preside in this case, and can not do so in such an impartial manner as to afford this defendant a fair and impartial trial of this cause."

The court overruled the motion that he should vacate the bench, and presided at the trial, which resulted in a verdict in favor of the plaintiff for the sum of two thousand dollars.

The only ground relied upon for reversal of the judgment based upon the verdict of the jury is the refusal of the regular judge to vacate the bench.

So much of section 968, of the Kentucky Statutes, as is applicable to the subject in hand, is as follows:

"When, from any cause, the judge of the circuit court fails to attend, or being in attendance can not properly preside in an action, proceeding or prosecution pending in said court, or if either party shall file with the clerk of the court his affidavit that the judge will not afford him a fair and impartial trial, or will not impartially decide an application for a change of venue, the parties, by agreement, may elect one of the attorneys of the court to preside on the trial or hear the application, or hold the court for the occasion."

* * *

The affidavit filed by the defendant in the court below, seems to us to fully measure up to the requirements of *German Insurance Company v. Landram*, 88 Ky., 433, which is the leading case upon the principle that, under the statute, it is necessary to state in the affidavit the facts from which the deduction is drawn, that the trial judge will not afford the litigant a fair and impartial trial. The affidavit not only states that the judge had a political bias and enmity toward the defendant, but that he had openly asserted his belief in the genuineness of the signature of Percy Haly to the letter, which was the crucial question in the libel suit; that the judge had been in frequent communication with the plaintiff concerning the publication of the letter in the *Crusader*, a newspaper under the control and management of the plaintiff. It further shows that the alleged libelous publication, and the suit concerning it, grew out of and was the direct result of a bitter political campaign which had just been waged between Governor Beckhan, on the one side, and Senator McCreary, on the other, for the office of United States Senator for Kentucky. We are of opinion that the statements in this affidavit thoroughly disqualified the regular judge from presiding in the trial of the case. We do not mean to say that, in our opinion, these statements are true; for their truth can not be inquired into in this action. All that the statute, as construed by this court in *German Insurance Company v. Landram*, supra, requires, is that the affidavit should allege such facts, which, if true, show that the trial judge will not, or may not, afford the litigant a fair and impartial trial of his case. Manifestly, if the trial judge had openly expressed an opinion of the genuineness of the letter, which was the real question in the litigation, and if he had been, as charged, in communication with the plaintiff concerning its publication in a newspaper, there can be no doubt that the judicial mind was not in that state of impartial equipoise between the litigants which is required to afford a fair and impartial trial.

It is no answer to say that the record, as a matter of fact, does not show any subsequently occurring error prejudicial to the interest of the party complaining. This may be because the litigant has chosen to rest his right to a reversal alone upon the error of the court in refusing to vacate the bench; or because counsel for the litigant may not have been as watchful over the interest of his client

as he should have been, or that the prejudicial acts upon the part of the court were not detected by the vigilance of counsel. In answer to the same proposition—that the record showed no ground for complaint of the judge's rulings—this court, in the case of *Masle v. Commonwealth*, 93 Ky., 588, said:

"But that is not the question; for the accused has the right to be tried by a judge that is fair and impartial, and when he has good reason to believe, supported by facts, that he will not afford him such trial, he should not be compelled to take chances of a trial before that judge in order that the truth of the matter may be developed, which may never be developed, because there are many ways that a partial or prejudiced judge may knife a party that he is trying without it appearing from the record or without his being able to ascertain the fact. So, when the fact is made to appear, by proper affidavits, the judge should then vacate, and it is a reversible error if he does not."

In the case of *Givens v. Crawshaw*, 21 Ky. Law Rep., 1618, the affidavit was to the effect that the regular judge, M. J. Moss, was personally hostile to the litigant, because he had voted against the judge in his election, and had said that "all those parties who opposed him and kicked out of the harness in the election, that he would make them have a hard road to travel." This affidavit was held to be sufficient, under the statute, to require the regular judge to vacate the bench, and the judgment was reversed alone for this error.

In the opinion, it was said:

"It is part of the current history of the day that severe antagonisms often occur between bolters and regulars, and that, too, without any desire or intention upon the part of either to wrong the other. It seems to us, that under all circumstances, that the trial judge should have vacated the bench and permitted the selection of another judge. The final judgment rendered in this case is erroneous."

In the case of *Powers v. Commonwealth*, 24 Ky. Law Rep., 1007, it was held that an affidavit which showed political antagonism and bias on the part of the judge toward the litigant, was sufficient to require the judge to vacate the bench. The opinion reviews all of the adjudications of this court upon the subject in hand, and it was there said:

"With the wisdom of the enactment of such a statute, we have nothing to do; that is a question solely within the province of the law-making body of government. Nor can the fact that some litigants abuse this privilege of the statute and do so to the great injustice of the trial judges, and the adverse party, influence a fair interpretation of the law as it is. Many statutes are abused, but we never feel justified in declaring that they are inoperative because of that fact. The Legislature doubtless saw, and in the experience of the many years that this law had been upon the statute books of this Commonwealth may have been confirmed in the belief, that it was necessary to the just protection of the rights of litigants, and to an absolutely fair and impartial administration of justice through the courts, that such statute should be in existence, that such a right should be available to the litigant, where the facts justified its employment.

"From this statute, and the decisions quoted from, the law may be gathered to be, if a litigant files his affidavit, stating that the judge will not give him a fair and impartial trial, and states therein the basis of such belief, and if the facts so stated are such as would prevent an official of personal integrity from presiding in the case, or as would prevent him affording a fair and impartial trial, then the truth of the statement of the facts as set out in the affidavit must be assumed, for it can not be traversed or tried."

There is nothing in the opinion in Hargis, &c. v. Marcum, &c., 31 Ky. Law Rep., 795, which militates against the principle contained in the above cited cases. After analyzing the affidavit, and showing that it did not state facts which entitled the litigant to require the judge to vacate the bench, it is said:

"If the affidavit had disclosed facts showing hostility on the part of the judge to Hargis as to the matter on trial, or expressions by the judge of opinion as to the merits of the case, or conduct negating impartiality on his part, or tending to do so, a different question would be presented."

During the progress of the trial, the evidence was such that the judge thought it due him to make an explanation of his connection with Noel Gaines and the subject-matter of the alleged libelous articles involved in the litigation, and by consent of counsel he made a statement, which, in justice to him, we incorporate in full. It is as follows:

"Gentlemen of the jury, since my name has been connected with this affair, I think it is due myself, and due the position that I occupy, and by the consent of counsel, to state to the jury my connection with that matter.

"I wouldn't attempt to give the dates at all. It was sometime between the first of July and the first of September, I am only able to fix that from the fact that it was during the summer vacation of the courts in this district, which occurred between these dates, I was over in Eminence, on Saturday afternoon, at a gathering of the farmers where they were organizing the American Society of Equity, I went there for the purpose of addressing them, and while at the Fair Ground, the Old Eminence Fair Ground, where the meeting was held, I was called to the long distance telephone, and Colonel Gaines was at Frankfort and talked to me over the phone, and wanted to make an engagement with me to meet me concerning a matter as he thought of considerable political importance, saying that he had had some interview with Senator McCreary in respect thereto, and that probably he had been referred to me. We made no definite engagement at all. I said to him that I might be at home the following Monday and might not. On the following Monday, however, I was in the office of Mr. Holland, the official stenographer of this district, in whose office I stay a great deal, and really call it my office, but it is his office, and Mr. Gaines came in when there was no one there but myself. We shook hands and he opened up the conversation concerning the letter and telegrams which has been referred to. I said nothing to him at all except probably a short answer or a question or two, and probably he talked for some ten or fifteen minutes, when Mr. Holland came in, Mr. Holland, the official stenographer. I introduced them and told Mr. Gaines to go on, and further told him Mr. Holland's position, and after some further talk on the part of Mr. Gaines, probably some questions on my part, he produced what I now recognize to have been a copy of the letter that was introduced as the Haly-Lassing letter, and also produced what I now recognize to be a copy of the telegram sent by Colonel Gaines to Governor Beckham, as introduced in evidence here. I said to him then, 'I really don't care to talk to you Colonel Gaines, about this matter. I have very grave doubts about my propriety of discussing the matter with you. I have no authority from Senator McCreary, or General Hays, to represent them in their campaign, and while I am a very strong supporter of each, I am not representing them, but if you are here this evening, I have two or three friends of mine I would like for you to talk to, talk to them in my presence.' It was arranged for three of half after three that afternoon at the office. I went out to my dinner, and telephoned to Charlie Lewis

to come around, and concluded to telephone to Mr. Holland to bring Colonel Gaines out to my house. There, in the presence of Mr. Holland, Mr. C. M. Lewis, and Mr. Will Scott, I don't now recall whether any one else was present or not, Colonel Gaines talked about the matter at some length, and questions were asked by each one present concerning it, and we each advised, each one of us, that it was a matter of very serious importance, that if the letter was not genuine it was calculated to cause a great deal of trouble to him, and if it was genuine it might cause some trouble in the State, and we were not representatives of either of the candidates for leading offices in the primary, and that we couldn't handle the matter, and then again that we did not have the original of what purported to be the letter. I asked Colonel Gaines, myself, probably I used the slang phrase, what's your game, or something of that kind, and he said his purpose was to write an article and publish these matters in his paper, called the Crusader, and that if he did he thought it would be very valuable campaign matter, and he wanted an order for, I think, 25,000 copies of the September issue, and 25,000 of the October issue, and I don't now recall the price, but think it was \$2,000 maybe more, I don't remember, and we again informed him that we had no authority in the matter from either of them, and that we couldn't take it up, and we told him we had not seen the original, and we were not fully advised, and he said he could show the original any time at Frankfort, and I think I made the remark, that I would be in Louisville the following day, or Wednesday, that being Monday, and if he was there and had the original, I would look at it. I went to Louisville on the day in question, and met Colonel Gaines at the Old Inn, at Sixth and Main, and shook hands with him, and there was no one there just at that time that I recognized, and I made an arrangement to meet him at Senator Carroll's office some hour later in the day, and I met him there and asked him concerning the original, and he said he didn't have it with him, and I said 'Very well, I don't care to handle it,' and I said 'That ends the matter,' and that is, in substance, the entire transaction."

No judge should preside over a trial where the evidence requires so elaborate an explanation of his relations to the subject matter of the litigation as that given by the trial judge in this case. This explanation shows conferences with the plaintiff concerning the letter, the genuineness of which was involved in the litigation before him, and the fact that he had, to some extent at least, canvassed its value as a political asset in a heated campaign in which he was deeply interested. It is but the utterance of a legal platitude to say that it is of the utmost importance that every man should have a fair and impartial trial of his case, and that to secure this great boon, two things are absolutely essential—an impartial jury and an unbiased judge. But we go further, and say that it is also important that every man should know that he has had a fair and impartial trial; or, at least, that he should have no just ground for the suspicion that he has not had such a trial. Political bias (amounting to personal hostility) is an arch enemy to an impartial trial, and its presence undermines and weakens the foundations of the temple of justice. When this insidious evil holds absolute dominion, a judicial investigation instead of being a fountain in which justice sees only its own fair reflection, sinks into a mere mockery of justice, "a cistern for foul toads to knot and gender in." Amid the bitter spume of an excited political campaign, the cause of the litigation about to be tried was engendered, and the judge was too closely identified with the opposing side of that conflict to be competent, under the statute, to sit in judgment on the legal rights of the defendant. We are not to be understood as reflecting on the integrity

or character of the learned judge whose ruling we are reviewing. We think he was led into an error of judgment none the less hurtful because it was unconsciously committed.

The judgment is reversed for a new trial.

Whole court sitting, except Judge Lassing.

FAIRBANKS, MORSE & CO. v. GUILFOYLE, &c.

(Filed April 30, 1908—Not to be reported.)

Contracts—Construction of—Evidence—This action grows out of the sale of an interest in a patent to appellant, appellees insisting that the contract guarantees a minimum of royalties, but an examination of the contract shows that while it was contemplated that the business should yield a royalty of \$200 a year, that amount was not agreed upon at all hazards. Therefore, it was error to instruct the jury peremptorily to find for appellees the balance necessary to make up that amount. Neither was the contract so ambiguous as to admit of extraneous evidence to explain it.

Thatcher, Clifford & Steinfeld for appellants.

Sidney Smith and Helm Bruce for appellees.

Appeal from Jefferson Circuit Court, Common Pleas Branch, Third Division.

Opinion of the court by Chief Justice O'Rear, reversing.

Appellee Finn was the patentee of a track-leveler, a device for leveling railroad tracks. He assigned a half interest in the patent to appellee Guilfoyle. They contracted with appellant to manufacture and sell the patented article upon a royalty. This suit involves the construction of the contract. It arises upon an alleged breach of the contract by appellant. Appellees' contention is, that the contract guarantees a minimum of royalties of \$200 a year, whilst appellant insists that it agreed to pay as royalties only \$1 a set for the instruments actually sold (except that it was to pay 50 cents per set for those sold the Illinois Central R. R. Co.), but that appellees had the right, under the contract, to terminate it at any time upon notice if the annual royalties were not as much as \$200, unless appellant thereupon paid enough in addition to the actual royalties due to make \$200 a year for each year the contract had run. The contract is in these words:

"This memorandum of agreement made this sixteenth day of August, in the year of our Lord one thousand nine hundred and four, between John Finn and Edward A. Guilfoyle, parties of the first part, and Fairbanks, Morse & Co., a corporation, party of the second part,

"Witnesseth: In consideration of the payment of the royalties herein provided for, the parties of the first part assign, transfer, and give to the party of the second part, the exclusive right to manufacture and sell track levelers in the United States, covered by Letters Patent No. 750,353, dated January 26, 1904, including any improvements or new devices which said second party shall make or suggest pertaining to said track levelers, during the life of the patent aforesaid, and during any renewal, extension or continuation thereof, so long as this agreement shall remain in force, not, however, to extend beyond the life of said original patent. Parties of the first part guarantee that they are the sole and exclusive owners of said patent and have the right to make this license. That said patent is a

valid one, and that they will defend the party of the second part, its agents, attorneys and employes and purchasers, from all infringements thereon, when notified so to do, and that they will, at their own expense, defend and protect party of the second part from all suit or suits, damages, attorneys' fees, court costs, and other expenses which it may incur or become liable for in the defense of any suit or suits brought against it, or its agents or vendees, on account of any alleged infringement of any other patent, by the use of the patent aforesaid, or any improvement or addition thereto, made or authorized by parties of the first part.

"Party of the second part agrees, in consideration of the above license and guarantee, to pay to parties of the first part or their assigns, a royalty of one dollar (\$1) a set on each set of track levelers, manufactured under the said patent aforesaid, sold and paid for, one-half of such amount to be paid to John Finn and the remaining one-half to Edward A. Guilfoyle, the payment to be made quarterly, on the first day of June, October, January and April of each year, for track levelers sold during the previous quarter: Provided, however, That it is agreed between the parties that fifty per cent. (50) per cent.) only of the above royalties shall be charged on track levelers sold to the Illinois Central Railroad Co., and that party of the second part will, in addition to the reduction on account of royalty, make a corresponding reduction in price on track levelers sold to the Illinois Central Railroad Co., of at least ten per cent. (10 per cent.) better than the price made to any other railroad company.

"It is agreed between the parties hereto that the annual royalties to be paid to the parties of the first part under this license should average two hundred (\$200), and if the royalties for any year, together with the royalties paid on previous years, shall not equal two hundred dollars (\$200) a year from the time this contract has run, that then, and in that case, the parties of the first part shall have the right within sixty (60) days from the expiration of any year when the total royalties paid per annum shall not average two hundred dollars (\$200) a year to terminate this contract unless the party of the second part shall, within said sixty (60) days, pay the said parties of the first part a sufficient sum to make the amount of royalties paid average two hundred dollars (\$200) per year for the time the contract has been in existence, meaning and intending that if, for illustration, during the first two years of existence of this contract parties of the second part should pay as royalties four hundred dollars (\$400) a year, that the contract would continue, for two additional years without any additional payment, or if, at the end of the first year, parties of the second part had only paid one hundred dollars (\$100) royalty, then they must either pay enough additional to make the annual royalty two hundred dollars (\$200) or submit to a cancellation of this contract at the option of parties of the first part; but nothing herein shall limit the amount of royalty of one dollar (\$1) per set on the amount actually sold as hereinbefore provided; and, in the event of cancellation of this contract for any cause, the party of the second part shall always be liable for royalties on track levelers actually sold and paid for preceding the annulment of this contract. And party of the second part agrees that it will push the sale of said track levelers in the usual manner.

"It is also agreed between the parties that if the party of the second part shall undertake to manufacture and sell any other track levelers, to the detriment of the track leveler covered by said letters patent, that parties of the first part shall have the right to cancel this contract by giving sixty (60) days' notice of its intention so to do.

"It is agreed that this contract shall be a substitute and shall stand in the place of all contracts heretofore made or claimed to have been made by the parties hereto.

"Witness," &c.

There is no serious controversy arising upon the contract except as to the construction of that paragraph relating to the \$200 of royalties to be paid annually. Nowhere in the instrument does appellant agree to pay \$200 or other specific sum as the minimum of annual royalties. They contemplated that the business "should" realize \$200 a year to appellee; but appellant did not agree to pay that amount at all hazards. It was stipulated though, that, in event the minimum of annual royalties should not realize \$200, that appellees had the option to recede from the agreement, unless appellant should thereupon make up the sum of \$200 as royalties for the year. And this is the sum of the agreement as we construe it. There was evidence introduced as to negotiations preceding the contract; but the court is of opinion that its terms were not so ambiguous as to admit of extraneous evidence to explain it. Nor was it attacked by either party as failing to be a true memorial of their agreement. In that aspect of the case, as the pleadings stand, we think the evidence mentioned was not relevant.

Appellant did assert a counterclaim based upon alleged fraud of appellee in the procurement of the contract—but not in its execution. The evidence wholly failed to sustain this claim. The representations complained of were mere puffing talk of the seller, mainly expressions of opinion in the nature of predictions as to what could be done in the market with the appliance. The court properly instructed the jury to find for appellees in that behalf. But it was error to instruct the jury peremptorily to find for appellees the balance necessary to make up the annual royalty for the year in suit to \$200.

Judgment reversed and cause remanded, for a new trial.

SKAGGS v. SIMPSON.

(Filed May 6, 1908—Not to be reported.)

1. Contracts—Not to Engage in Business—Construction of Such Contracts—Contracts in partial restraint of trade have been frequently upheld by this court; and a contract not to engage in business, for three years is a valid and enforceable contract.

2. Same—The delivery of the check and the execution of the writing were a part of the same transaction, and while, by the terms of the writing, S. only obligated himself not to engage in business in the city of Murray, yet from the circumstances it is manifest that it was the intention of both parties that S. should not engage in business in Murray or its vicinity, and his attempt to establish an opposition business just outside of the city limits was a violation of the spirit of the contract, and an injunction will properly lie to restrain him from so doing.

Jos. R. Grogan and A. D. Thompson for appellant.

J. H. Coleman and Rainey T. Wells for appellee.

Appeal from Calloway Circuit Court.

Opinion of the court by Judge Carroll, reversing.

Skaggs and Simpson were each engaged in the marble and tombstone business in Murray, a city with a population of about three thousand. Skaggs desired to buy out the business of Simpson and negotiations looking to this end were conducted with Simpson by Boyce, acting on behalf of Skaggs. In the event the trade was consummated, Skaggs desired to obligate Simpson not to engage in

business in opposition to him. After the negotiations had been pending some days, it was finally agreed that Simpson would sell for \$1,425, and on February 14, 1906, he was paid this amount in cash by Skaggs. The weight of the evidence is that the stock of goods purchased by and delivered to Skaggs was not worth exceeding \$800, and that the consideration for the remainder of the purchase price was the good will of Simpson, and the understanding and agreement that he would not again enter into business in competition with, or opposition to Skaggs. At the time the trade was closed, no person was present except Boyce and Simpson. Concerning what took place, Boyce testified that, while the negotiations were pending, it was understood between them that if Skaggs paid the price demanded, Simpson was not to engage in business in opposition to him; and that when he handed Simpson the check, he said to him, "here's the check; now let me have that writing that you won't go into business against us, according to our agreement;" Simpson replied: "I won't sign anything; I won't sign my rights away;" that he then reached for and got the check, telling Simpson that if he did not enter into the contract the trade would not be closed. That Simpson then said to him "I will sign it, as I don't intend to open up again; if I did, I wouldn't sell out; write what you want me to sign." That he told him he could not write it, and asked him, Simpson, to do it; that Simpson then asked for what length of time he wanted to bind him not to engage in business, and he said "five years," but Simpson would not agree to make it over three years, and then wrote, signed and delivered to Boyce the following contract: "This is to certify that I will not open up a marble shop in the city of Murray in three years."

Boyce further testified that "there was nothing said in particular about the place, but it was understood that he was not to open up again in opposition to us here at Murray; nothing was ever said about Murray, except what Simpson wrote in the statement I have mentioned; we never talked about the city of Murray, or city limits; nor was anything said about Simpson's right to open a shop about the city of Murray or outside the city limits;" and that he thought the writing contained the agreement. Simpson does not deny that he signed the writing, but testified, in substance, that nothing was said during the negotiations about his not re-entering the marble business in opposition to Skaggs, but that after the trade was made, and the check delivered, Boyce asked him to give him a contract that he would not again enter the marble business, and he gave him the writing; but it was not a part of the trade, or mentioned until the trade was closed, and that the property he delivered to Skaggs was worth the purchase price. Forrest, a witness for Simpson, said that he heard Simpson say that "he did agree, as a part of the trade, not to open a marble shop in opposition to Skaggs, but could do it, and was going to do so, as there had been so much said and done about it; that he (Simpson) had the \$1,425, and Skaggs had his old stuff, and he (Simpson) was going to put in a new stock and continue in the business."

Other witnesses testified in substance that Boyce said he made a mistake in not having the contract specify that Simpson was not to open up in opposition to Skaggs, and that he did not ask Simpson to give him the written contract until after the trade was closed and the check delivered.

The delivery of the check, and the execution of the writing were a part of the same transaction, both acts being done at the same time and place, and although a few moments may have intervened between them, it is clear that the writing, as well as the check, was a part of the contract, and they must be so treated. It is admitted that in May, 1906, Simpson established a marble yard and

tombstone business about 150 feet outside of the city limits, and was conducting it in opposition to Skaggs when this action was brought by Skaggs to enjoin Simpson from engaging in business in opposition to him, and to recover damages for his breach of the contract. The lower court refused to grant an injunction, and submitted the question of damages to a jury, who returned a verdict in favor of Simpson, thereupon the petition of Skaggs was dismissed, and he appeals.

Contracts in partial restraint of trade have been frequently upheld by this court; and a contract not to engage in a business, such as the one under consideration, for three years, is a valid and enforceable contract. (*Pike v. Thomas*, 4 Bibb., 486; *Sutton v. Head*, 86 Ky., 156; *Grundy v. Edwards*, 7 J. J. Mar., 368; *Turner v. Johnson*, 7 Dana, 435; *Western District Warehouse Co. v. Hobson*, 16 Ky. Law Rep., 869; *Davis v. Brown*, 17 Ky. Law Rep., 1428; *Clemons v. Meadows*, 29 Ky. Law Rep., 610.) The only serious question in this case is, whether or not the rights of the parties are to be determined and fixed by the strict letter of the writing. By its terms Simpson only obligated himself not to engage in business in the city of Murray; that he violated the spirit and intention of the writing when he went outside the city limits 150 feet and set up in business, is not open to doubt. He insists, however, that his rights must be adjudged by the very words of the contract, and that Skaggs must be left without redress because he had not violated the letter of the writing. In this view of the transaction we can not concur. In the construction of contracts, although the evidence may not be sufficient to show fraud or mistake, it is well settled that they must be read and construed in the light of the intention of the parties at the time the contract is entered into, if this can be done without doing violence to the writing. And to arrive at the intention of the parties it is competent to look to the conduct, conversation, situation and circumstances surrounding the parties. (Page on Contracts, section 1123; *Crane v. Williamson*, 23 Ky. Law Rep., 689; *Thompson v. Thompson*, 2 B. Mon., 161; *Montgomery v. Firemen's Ins. Co.*, 16 T. B. Mon., 427; *Marshall v. Piles*, 3 Bush, 249; *Railroad Co. v. Ormsby*, 7 Dana, 276; *Hildrith v. Forrest*, 4 J. J. Mar., 217.) Considering this contract from this standpoint, it is manifest that it was the intention of both the parties to it, and an essential part of the consideration for the purchase, that Simpson should not engage in business in Murray or its vicinity, or in territory where he would come directly into competition with Skaggs for the term of three years. This does not mean that Simpson may not, at other places, establish himself in business, but only that he must not do so in the territory in which it may be presumed he would come into direct opposition with Skaggs, or in the territory in which he had been doing the business that he sold.

We, therefore, conclude that Skaggs was entitled to an injunction restraining Simpson from conducting his establishment.

The question of damages the court may submit to the jury; and as the execution of the writing is admitted, and we have determined, as a matter of law, that it was a part of the contract, the only question to be considered by the jury is the amount of damages to which Skaggs is entitled.

Wherefore, the judgment of the lower court is reversed, with directions for a new trial in conformity with this opinion.

SUPREME LODGE KNIGHTS OF PYTHIAS v. BRADLEY.

Filed May 7, 1908—Not to be reported.)

Thornton & Kerr for appellant.

Pendleton, Bush & Bush and C. F. Spencer for appellee.

Appeal from Powell Circuit Court.

Response by Judge Settle modifying and extending opinion.

Appellee has filed a petition for a re-hearing in this case in which he asks that the opinion herein, reversing the judgment of the circuit court, be withdrawn and another written affirming the judgment in question. The appellant has also filed a petition asking a modification of the opinion.

In the petition for re-hearing appellee complains that the opinion rests the reversal of the judgment of the circuit court upon error in the instructions given by that court, when in fact appellant did not object to the instructions or enter of record exceptions thereto. A re-examination of the record convinces us that this complaint is well founded; for it fails to show that appellant interposed any objection to the instructions, or that it excepted to the action of the court in giving them. We do not recall that our attention was directed by the briefs of counsel to the silence of the record in this particular, and in the first reading of the record it was inadvertently overlooked. The custom of counsel to object and except on the record to the giving of instructions, though often a matter of mere form, being well known to the court, doubtless occasioned the assumption that the usual course had been followed in this case. Be this as it may, in view of the failure of the record to show the necessary exceptions, it is manifest that the judgment appealed from should not have been reversed on account of error in the instructions, although they were defective and prejudicial to appellant, as stated in the opinion.

But while the reversal can not be made to rest upon error in the instructions, a second reading of the record has led us to the conclusion that it should stand upon the ground urged by appellant in its petition for a modification of the opinion, viz: Error of the trial court in excluding from the consideration of the jury the written application of the insured for the insurance granted upon his life by appellant, and the proofs of his death furnished the latter by appellee; both of which were offered in evidence by appellant on the trial. The application, which bears date April 12, 1905, contains the following provisions: "It is agreed by myself, and binding upon all parties who may hereafter become interested, that if any statement in this application, or to the medical examiner, or in any certificate of health that may be hereafter given, or in the proofs of loss or death, by which any certificate of membership issued hereon matures, is untrue, or if there shall be any failure or neglect to pay any assessments, monthly payments or dues as prescribed by the rank or order, or severing in any manner my membership or connection with the order or the endowment rank, said certificate shall be null and void, and all right, title and interest in and to the same, as well as the rights of my heirs and beneficiaries and privileges accruing to members in good standing of this risk, shall be forfeited; and I hereby, for myself, my heirs, assigns, representatives and beneficiaries, expressly waive any and all provisions of law, now or hereafter in force, prohibiting or excusing any physician heretofore or hereafter attending me, professionally or otherwise, from disclosing or testifying to any information acquired thereby, or making such physician incompetent as a witness; and hereby consent that any such physician may testify

to and disclose any information so derived or received in any suit or proceeding wherein the same may be material."

As in part said in the opinion, the insured, Kinney Bradley, stated and represented in this application when it was made that he was then in good health, and had not consulted a physician within five years next before the date of the application; that none of his sisters had ever had consumption; that he himself had never been afflicted with that disease, or with any disease of the heart, throat or lungs, or with any disease of the genital or urinary organs.

It must be assumed that appellant, in granting the insurance to Bradley, relied upon the statements and representations contained in the application. It is also evident that appellant received and accepted the application, for a copy of it was attached to and remained a part of the certificate of insurance issued and delivered to the insured, and appellee, the beneficiary named in the certificate, filed that instrument and attached application with the petition, and made them parts thereof.

After the death of the insured, which occurred December 24, 1905, appellee, as required by the application and certificate in question, furnished appellant with the proofs of his death. These proofs were made up of the certificate of Dr. J. W. Williams, the attending physician, as to the fact and cause of the insured's death, and of that of the officiating undertaker; both being signed and sworn to.

The certificate of Dr. Williams contradicted many of the material representations contained in the insured's application for insurance, as it showed that Williams had been the medical adviser of the insured for eighteen months prior to his death; that he had treated him for cystitis in May, 1904, nearly a year before the representations contained in the application for insurance were made, which treatment continued until September, 1904; that tuberculosis caused his death, of which disease he had suffered for at least a year before his death; that insured, before his last illness, had been treated by Dr. Brown, of Winchester, and during his last illness was attended by Drs. Littlepage and Smith, of Clay City; that a sister of insured had died with tuberculosis. Under a proper ruling of the court below the appellant assumed the burden of proof and when, during the trial, it offered to introduce in evidence the proofs of death and original application, a copy of which attached to the certificate of insurance appellee had already filed as an exhibit with his petition, the court refused to allow either the proofs of loss or application to be read to the jury. The purpose of their introduction was to establish the alleged false and fraudulent character of the representations made in the application for insurance. It is true, other evidence of like import was furnished on the trial by the testimony of Dr. Brown and others, and that there was only slight testimony to support appellee's right to recover, but the additional evidence that appellant would have secured from the application and proofs of death, would perhaps have had such preponderating effect upon the minds of the jury as to remove all doubts, and influence them to return a verdict for appellant.

The application and proofs of loss were clearly competent as evidence. In *Hunziker v. Supreme Lodge, Knights of Pythias*, 117 Ky., 418; *Golden Cross v. Hughes*, 114 Ky., 175, and *Mooney v. A. O. U. W.*, 114 Ky., 950, it was held that section 679, Kentucky Statutes, requiring application for insurance to be attached to the certificate or policy to make it competent as evidence applies to a certificate like the one under consideration, and though by an act of March 24, 1906, so much of section 679 as applies to companies like appellant was repealed, still at the time the application in this case was made by the insured the section in question did apply to appellant; however, in this case the provision of the statute was complied with,

for a copy of the application was attached to the certificate of insurance and delivered to the insured.

The competency of the proofs of loss was also free from doubt. In Bacon's Benefit Societies and Life Insurance, 2 volume, section 47, it is said: "The modern rule probably is that the proofs of loss furnished by the assured are not only evidence that the condition of the policy requiring them had been complied with, but are also to be regarded as admissions and prima facie evidence of the facts therein stated." (3 Elliott on Evidence, sections 2387, 2389; 2 Wigmore on Evidence, section 1073; Conn. Mut. Life Ins. Co. v. Siegel, 9 Bush, 451.)

In Prudential Insurance Co. of America v. Breustle's Adm'r, 19 Ky. Law Rep., 305, the administrator of the insured furnished the insurer proofs of death, as required by the policy, and these showed that the deceased had come to his death by his own hand and act. By the express terms of the policy such act precluded a recovery. On the trial the insurance company read in evidence to the jury the proofs of death and rested. The court said in its opinion: "On the trial the court put the burden on the defendant, and the only proof offered by it was the written proof of death, furnished the company by the administrator, which consisted of the certificate of the brother, accompanied by the coroner's verdict, and which showed that the death of the insured had been caused by his own hand and act. The court then instructed the jury to find for the plaintiff the amount sued for. This was error. The company had the right to refuse payment of the policy on the proof of death furnished it without inquiry as to whether the deceased in fact came to his death by his own hand or not, if the proof so furnished showed such cause of death; and no recovery could be had in the face of such proof without some satisfactory explanation of it, or until such proof and accompanying exhibits were withdrawn."

In Buffalo Loan Co. v. Aid Ass'n, 126 N. Y., 450, we find this statement of the law: "Where a physician's certificate of death of the insured, in which a cause of death is stated, which would, if true, vitiate the policy, is furnished to the insurer as part of the proof of death, although no cause of death was required to be stated, such certificate, though not admissible as original evidence of the cause of death, is admissible as an admission of the plaintiff of an action against the insurer to recover on the policy, and its reception in evidence does not violate a statutory provision prohibiting a physician from disclosing any necessary information acquired by him in a professional capacity."

So much of the opinion as reversed the judgment of the lower court for error in the instructions is withdrawn, and this extension of opinion is given in lieu thereof. Upon retrial of the case, if appellant objects to the instructions as given on the first trial, the trial judge should so frame them as to make them conform to the view of the law as expressed in the opinion.

Wherefore, the opinion is modified and extended as herein indicated.

TRUMBO'S ADM'X v. GAINES & CO.

(Filed May 8, 1908—Not to be reported.)

Master and Servant—Action for Negligent Death of Servant—Verdict for Defendant—Affirmed on the Evidence—This is an action for damages for causing the death of an employe in the operation of an elevator in a distillery building in which the jury found for the defendant and is affirmed on the evidence, the court holding that the

appellant's whole contention was fairly submitted to the jury whose province was to determine the disputed facts.

J. H. Hazelrigg, Jas. Andrew Scott and W. C. Marshall for appellant.

B. G. Williams and D. W. Lindsey for appellee.

Appeal from Franklin Circuit Court.

Opinion of the court by Judge Barker, affirming.

Andrew Trumbo was in the employ of the appellee, W. A. Gaines & Company, in the capacity of general utility machinist in the elevator building of the Old Crow Distillery, near Frankfort, Kentucky. On the 5th day of May, 1905, while working about an upright shaft, which came up through a raised platform in one of the warerooms of the building, his foot was caught in the rapidly revolving machinery, inflicting such injuries as caused his death on the 1st day of July, 1905. Afterwards, his mother, Margaret Trumbo, qualified as administratrix of his estate, and instituted this action to recover damages for his death. Her petition, as amended, alleges, that her son's death was caused by the negligence of appellee in failing to furnish him a reasonably safe place in which to work, and (2) that it had negligently failed to employ sufficient men to operate the machinery, thereby causing the injury to her son. There was no evidence to support this latter allegation of negligence, and we mention it only to explain its appearing in the instructions given by the court, which we shall hereafter set forth. The real cause of action, which appellant undertook to establish in the evidence, was the alleged failure of the appellee to furnish the decedent with a reasonably safe place in which to do the work for which he was employed. The answer placed in issue all of the affirmative allegations of the petition, and pleaded the contributory negligence of the decedent. A trial resulted in a judgment in favor of the defendant; and appellant's motion for a new trial having been overruled, she has prosecuted an appeal to this court.

The testimony shows that Andrew Trumbo was experienced in the management of the machinery which was operated in the Old Crow Distillery warehouse, and that he was thoroughly familiar with the management of the particular machinery by which he was hurt. For some time before the day of the accident involved here, the appellee had in its employ one James Edwards, a colored man, who operated the same machinery by which the decedent was injured. Edwards was discharged, or quit the employment of appellee, on the day before the accident. Trumbo was assigned, by the superintendent, to take his place, and to operate the machinery, temporarily. The upright shaft which inflicted the injury, came up, as said before, through the floor of the wareroom and through an elevator platform. Just underneath the platform and fastened to the shaft, was a fly-wheel, thirty-five inches in diameter, which turned a belt and furnished power to operate other machinery in the building. About two feet above the platform there was fastened to the shaft, another fly-wheel of the same diameter, which turned another belt operating other parts of the machinery. In the floor of the platform and just underneath the top fly-wheel there was a hole ten inches wide and eighteen inches long, which was used as a means of oiling the machinery below the platform. When not in use, this hole could be entirely covered up by a cap made for the purpose, which fitted the aperture, and when in place, excluded all possibility of any one stepping into it while working about the shaft. This cap had a ring in the top, which was used for the purpose of taking it off when necessary to oil the machinery underneath.

About noon of the day of the accident, the decedent was heard to scream, and, when other employes rushed to his assistance, he was found sitting upon the floor, holding his leg in his hands, and suffering excruciating pain. He explained his injury by saying that he had stepped into the open hole underneath the top fly-wheel, and his foot had been caught by the fly-wheel below the floor of the platform, and ground in pieces. Amputation was found necessary, and from the effects of his injury, he afterwards died.

The cap, which was provided to be used in covering the hole, was afterwards found leaning against the wall of the wareroom, about four or five feet from the shaft. There was also another piece of plank found either across or near the hole; but it was not made clear whether this plank was a temporary make-shift used by Trumbo to stop the hole in the platform, or whether it had been used by him in throwing off or putting on the belt. There is evidence that such a plank had been used by Edwards, the day before, for the purpose of putting on and taking off the belt.

Several witnesses deposed for the defendant, that, while Trumbo was being hauled from the distillery to his home in Frankfort, for treatment, he made statements that his injury was the result of an accident, and that no one was to blame for it but himself. For the plaintiff, it was shown that, after his injury, Trumbo was given large quantities of whisky to drink in order to enable him to endure the pain he was suffering, until medical assistance was obtained; and it is argued that whatever statements he made on the subject of his injury he was not responsible for, on account of his intoxication.

It is insisted for the appellee that it was entitled to a peremptory instruction, because the evidence showed that Trumbo was familiar with the hole and had in his possession the cap, which, if he had placed upon it, would have made it entirely safe for him to be about the shaft; but its motion for a peremptory instruction was overruled by the court, and we do not find it necessary to discuss this phase of the case further.

In appellant's behalf, it was shown that there had been piled a large number of sacks of grain in the near vicinity of the revolving shaft, and these sacks tended to exclude the light from the windows of the wareroom, and to make the place, where Trumbo worked, so dark that the danger of stepping into the hole was thereby increased. This was sought to be rebutted by appellee by showing that there were ten large windows in the wareroom, and that as the weather was warm the door near the platform was open, and there was sufficient light around the shaft to enable any one to see the open hole into which the decedent stepped.

This, substantially, states the effect of all the evidence in the case.

The court instructed the jury as follows:

"No. 1. The court instructs the jury that it was the primary duty of the defendant, W. A. Gaines & Company, to furnish the plaintiff's intestate, where he was engaged at work, a reasonably safe place and premises fit and suitable for the purposes for which they were being used, viewed from the nature of his employment, and to keep the same reasonably safe, and it was its further duty to furnish him reasonably safe machinery and appliances with which and about which he was required to work, and to keep the same in reasonable repair, and it was its further duty to employ and provide a sufficient number of competent hands to carry on the work in hand and at which said decedent was engaged and for which he was employed, with reasonable safety; and said intestate had the right to rely upon the performance of these duties by said defendant while engaged in the line of his employment, and if the jury shall believe from the evidence that said defendant failed to furnish said intestate a reason-

ably safe place to work, and premises fit and suitable as named above, or to keep same reasonably safe, or failed to furnish him reasonably safe machinery and appliances with which and about which he was required to work, or failed to employ and provide a sufficient number of competent hands to carry on the work in hand, and at which he was engaged and for which he was employed, with reasonable safety, and that, by reason of its failure, if any, to perform either of its said duties as above described, said intestate, Trumbo, was caused to be thrown against or caught in a rapidly revolving wheel or pulley, whereby he was injured, and from which he died, the law is for the plaintiff, and the jury will so find.

"No. 2. The court instructs the jury that if they believe from the evidence that the defendant furnished plaintiff's intestate a reasonably safe place and premises fit and suitable for the purpose for which they were being used, viewed from the nature of his employment, and kept the same reasonably safe, and that the defendant furnished him reasonably safe machinery and appliances with which and about which Trumbo was required to work, and that they kept same in reasonable repair, and that defendant employed a sufficient number of competent hands to carry on the work in hand, at which deceased, Trumbo, was engaged and for which he was employed, the law is for the defendant, and the jury should so find.

"No. 3. Although the jury may believe from the evidence that the place, machinery and appliances were unreasonably unsafe and dangerous, on the occasion when Trumbo was hurt, and that defendant knew it, or could have known it by the exercise of ordinary care, in time to have avoided Trumbo's injury; still, if Trumbo, by his own negligence or carelessness, caused or contributed to the accident in a manner, but that for his own negligence or carelessness the accident would not have occurred, the jury must find for the defendant."

There were four other instructions, defining ordinary care and negligence, and establishing the measure of damages, which are not complained of, and are not, therefore, reproduced here. The foregoing instructions, given by the court, fully set forth the principles of law controlling the case, and left appellant with no room for complaint on that score. No substantial error is pointed out in the matter or manner of introducing the testimony, and it fully sustains the verdict of the jury. Appellant's whole contention was fairly submitted to the jury, whose province it was to determine the disputed facts, and they found that the evidence did not support her contention. This being true, we have no alternative but to affirm the judgment; and it is so ordered.

THIRD NAT. BANK OF LOUISVILLE v. TIERNEY.

(Filed May 6, 1908—To be reported.)

Husband and Wife—Liability of Wife for Husband's Debts—Under Kentucky Statutes, section 2127, known as the husband and wife property statute, providing that "no part of a married woman's estate shall be subjected to the payment of any liability upon a contract made after marriage to answer for the debt, default or misdoing of another, including her husband" when the wife executes her note to take up the debt of her husband, or borrows money from the husband's creditor on her own obligation, and hands it to him to pay her husband's debt, she is, in the meaning of the statute, assuming the debt of another, the same as if her name was signed as to a writing promising to pay the debt. The form of the transaction will not be allowed to defeat the statute when the substance is an evident attempt to evade it.

McDermott & Ray for appellant.

Lieber & Lincoln for appellee.

Appeal from Jefferson Circuit Court, Chancery Branch, Second Division.

Opinion of the court by Judge Carroll, affirming.

The only question involved in this record is whether or not the appellee is liable upon a promissory note executed and delivered by her to the appellant bank, on January 22, 1903, whereby she promised to pay to it the sum of \$3,400. It appears that Thomas J. Tierney, the husband of appellee, borrowed from the appellant bank in 1900, \$4,000 for the purpose of paying part of the purchase price of eighty shares of stock subscribed for by him in the Tierney-Silbery Company. For this sum he gave his two individual notes, signed by him alone, for \$2,000 each, secured by the stock which he pledged as collateral. These two notes were renewed by him from time to time until February, 1902, when \$500 was paid—thus reducing the debt to \$3,500. Under the terms of the last renewal, one of these notes was made to fall due on March 4, 1902, and the other on June 10, 1902. Sometime after the execution of the last mentioned notes, the bank notified Tierney that when they fell due in March and June, respectively, they must be paid or additional security given. After this, and before the notes became due, Tierney notified the bank that it was not convenient for him to get security, and he suggested that his wife, the appellee, was solvent and proposed that the bank lend her \$3,500, on her individual note, and that he would pledge the eighty shares of stock to secure her note, and with this money Mrs. Tierney would pay off his indebtedness of \$3,500. This proposition was accepted by the bank, and on February 14, 1902, Tierney brought to the bank a note signed by his wife for \$3,500 and also checks drawn by her upon the bank for the proceeds of the note, when it should be placed to her credit. The note and checks were delivered to the bank, the note discounted and the proceeds, less the discount, placed to the credit of Mrs. Tierney on the books of the bank. Thereupon, the checks she had drawn on her account, payable to the bank, were applied to the payment of the notes of Tierney, and they were delivered to him. At this time the two notes executed by Tierney had not matured and the evidence shows that Tierney was then solvent and remained so until after the maturity of the notes. It also appears that the eighty shares of stock pledged to secure the note were worth more than the amount of it, although soon after this the stock decreased in value and was sold for \$1,475, and Tierney became insolvent, and further that the note executed by Mrs. Tierney was several times renewed by her and that she paid \$100 on it.

In the consideration of this case it must be kept in mind: first, that the note sued on was executed by Mrs. Tierney to the bank to take up and discharge the notes executed by her husband and held by the bank; second, that she received no part of the proceeds of the notes executed by her husband, or the note executed by herself; third, that no part of her estate was set apart as provided in section 2127, of the Kentucky Statutes, to secure the payment of the indebtedness of her husband to the bank; fourth, that the bank knew that appellee was the wife of T. J. Tierney, and that her note was to be used to take up and discharge his indebtedness to the bank; fifth, that the eighty shares of stock pledged to secure his notes were also pledged as collateral to the note of Mrs. Tierney.

There is little, if any, conflict in the evidence, so that the question narrows down to the single proposition whether or not Mrs. Tierney, under the facts stated, is personally liable upon this note.

It is argued for appellant that, under the statute, a married woman has the right to borrow money from a bank by discounting her own note and may do as she pleases with the money thus borrowed, and may borrow money to pay her husband's debts, and the fact that she borrows money for that purpose, does not invalidate the contract or note upon which she obtains the money, and further, that the lender is not chargeable with notice of the purpose to which the wife may put the money or required to look to an investment of it for her use and benefit. In the correctness of these propositions, as general statements of the law, we agree, but, they are subject to important exceptions that will be later noticed. The statute was not designed to prevent a married woman from borrowing money or to deny her the right to discharge her husband's debts or to do with her money as she pleases. Nor are the rights of the lender affected or prejudiced by the disposition made by the wife of the money borrowed upon her note, provided the transaction is not a subterfuge or device to evade the statute or a scheme to procure the obligation of the wife as surety for her husband or another. A married woman, under the statute, may make contracts, sell and dispose of her personal property, sue and be sued as a single woman, and is liable for her debts, except, that under section 2127, "No part of a married woman's estate shall be subjected to the payment or satisfaction of any liability upon a contract made after marriage to answer for the debt, default or misdoing of another, including her husband, unless such estate shall have been set apart for that purpose by deed of mortgage or other conveyance."

In all respects, with the exceptions pointed out in the statute, a married woman, in so far as her property rights are concerned, stands in the same position as if she were a single woman. The limitations imposed upon her by the statute are intended to protect her interest and to prevent her from becoming involved as the surety of her husband, or any other person, unless the obligation is assumed in the manner pointed out in the statute by which married women may pledge their property, and bind it as security for the payment of debts assumed as surety. In no other way than the one provided by statute, can a married woman's estate be subjected to the payment of debts contracted as surety.

This statute has been before this court in a number of cases, and in all of them we have endeavored to give it such a construction as would effectuate the legislative intent which was to preserve the estates of married women from being wasted or impaired by the assumption of debts created for the use and benefit of other persons, and from which they might derive no benefit. On more than one occasion, ingenious efforts have been made to evade the statute, but they have failed of their purpose. And whenever it has appeared that an effort was being made to subject the estate of a married woman to the payment of another's debt, unless her estate was set apart for that purpose in the manner provided in the statute, we have uniformly held that it could not be done. The question of the honesty of the transaction, or the object for which the debt was made, or the hardship the creditor must suffer, has never been permitted to alter our decision nor to impair the efficiency of the statute, or permitted inroads to be made upon its useful purpose. The fact that the husband is released by the note of the wife taken in satisfaction of his debt, or the fact that the husband was solvent when the novation took place and the lender might have collected from him his debt although afterwards, and when the wife interposes the statutory plea to relieve her, he may be insolvent, will not be allowed to defeat the intention of the law. Nor will the court be misled by the superficial appearance of the transaction. It will

look beneath the surface to ascertain the real purpose of the parties.

The controlling feature in this case, and the one by which it must be adjudged, is that Mrs. Tierney, by executing her note to the bank, took up and discharged a note it held against her husband alone, and when the bank knew that the liability she assumed was her husband's debt. No question of estoppel or release or fraud or agency or insolvency or other thing, can destroy the efficiency of this dominating fact, to relieve her from liability in this case. Indeed, no fraud is shown nor is there evidence of agency or estoppel that will bind her.

Cases sufficiently like the one under consideration to control its adjudication, have been before us more than once. Thus:

In *Russell v. Rice*, 19 Ky. Law Rep., 1613, a married woman, who was co-surety with another for her husband, executed to the co-surety her note for half the amount he had paid in consideration of his releasing her husband, but it was held that the note was not binding upon her, although by reason of it her husband had been discharged from liability.

In *Crumbaugh v. Postell*, 20 Ky. Law Rep., 1366, Postell held the notes of the husband with one Williams as surety—the latter desiring to be released, the husband proposed to Postell to give him his wife's note in lieu of the ones upon which Williams was surety, and upon Postell consenting to this arrangement, the husband obtained his wife's notes and delivered them to him—whereupon he surrendered the old notes to the husband. It appeared that Postell had no conference or communication with the wife, and she made no representations to him. Under these facts, the court held that the wife was not liable, as the notes were executed to discharge her husband's debts.

In *Deposit Bank of Carlisle v. Stitt*, 21 Ky. Law Rep., 671, Mrs. Stitt desired to borrow from the bank, for the use of her husband, \$150. The bank held an unpaid note of her husband for \$125, and in consideration of her assumption of this debt, by the execution of her note in lieu thereof, the bank advanced to her the \$150. In opposition to her defense, in a suit to recover the \$125, the bank insisted that the release of the husband was a sufficient consideration to uphold her promise to the bank, as it had delivered to her, the note against her husband; and that her engagement to pay the debt was an original undertaking of her own and not a contract to answer for the debt, default or misdoing of another. But the court held she was not liable.

In *Milburn v. Jackson*, 21 Ky. Law Rep., 700, under a state of facts similar to those in the Stitt case, the court reached the same conclusion.

As further illustrating the views of this court upon the construction of this statute, we may call attention to the cases of the *Planters Bank & Trust Co. v. Major*, 25 Ky. Law Rep., 702; *Hines v. Hays*, 26 Ky. Law Rep., 967; *Hall v. Hall*, 26 Ky. Law Rep., 553; *Black v. McCarley*, 31 Ky. Law Rep., 1198, and *Hart v. Bank of Russellville*, 32 Ky. Law Rep., 338.

An attempt is made to bring this case within the rule announced in *Thompkins v. Triplett*, 23 Ky. Law Rep., 305, and *Dearing v. Veal*, 25 Ky. Law Rep., 1809; but it is easily distinguishable from both of those cases. In the *Triplett* case, the husband of Mrs. Triplett applied to Thompkins to loan him money, which he refused to do, but told him he would lend it to his wife—thereupon Triplett procured his wife's signature to the note and delivered it to Thompkins, and the court held that Mrs. Triplett had constituted her husband as agent to deliver the note and receive the money, and that she was bound by the representations he made as her agent. The wife did not in any sense become the surety of her husband, nor was her

note or the proceeds thereof used to take up any note that Thompkins held against her husband. The lending of the money to Mrs. Triplett was an original transaction. It was treated by the court as if she had herself applied to Thompkins for the loan and executed to him her note and obtained the money thereon. In the Dearing case, under facts very similar to the Triplett case, the court followed it.

There is no conflict whatever between the principles herein announced and those laid down in the Triplett and Dearing cases. There could not well be any, because the essential facts that are decisive points in the cases are radically different. If the appellant bank, as an original transaction, had loaned to Mrs. Tierney \$3,500, upon her application therefor, in person or by agent duly authorized, she could not, as against the bank, interpose the defense that the money had been applied to the payment of her husband's debts due to other persons, or the defense that her husband had taken the money from her and appropriated it to his own use, or the defense that she did not receive the use or benefit of the money. But, this is not the state of facts we are dealing with. Here, the money obtained by the wife, on her note from the creditor of the husband was applied by the creditor to discharge the husband's debt. So far as the legal effect of the transaction upon the wife is concerned, it was precisely the same as if she had signed her name as surety for her husband upon a note executed by him to the bank. If the bank could hold her liable upon her note, accepted by it for the purpose of discharging a debt due it by her husband, we are unable to perceive why it could not hold her liable if she had signed her husband's note as surety for the same debt. If the statute can, in this way be evaded; it might as well not have been enacted, as it is plain that it would not accomplish the purpose for which it was intended. If the argument made by counsel for appellant were sound, then the creditor of the insolvent husband could secure his debt by taking in its place the obligation of the wife, and thereby bind her estate, although if the husband executed, with his wife as surety, his obligation to pay the debt or demand, she would not be liable thereon. When the creditor of the husband takes, in satisfaction of his debt, the obligation of the wife, the wife is in effect becoming the surety of the husband, and the creditor accepts her note with the intention of looking to her for its payment. The fact that it is the creditor of the husband that advances the money to the wife to pay to him her husband's debt, or that he accepts the obligation of the wife in discharge of the debt of her husband, or takes her as surety for her husband to better secure a loan made to him, is the essential thing that places his relation to the transaction in a different attitude from that of the person who as an original business proposition, lends the wife money to do with as she pleases, and who derives no benefit or advantage except such as grows out of the interest or profit he may secure from the loan of the money. When the wife executes her note to take up the debt of her husband or borrows from the creditor of the husband on her own obligation the money, and hands it to him to pay her husband's debt, she is, in the meaning of the statute, assuming the debt of another, the same as if her name was signed as surety to a writing promising to pay the debt. The form of the transaction will not be allowed to defeat the statute, when the substance is an evident attempt to evade it. This rule will not impair or interfere with the power of a married woman to borrow money or contract indebtedness in the ordinary course of business, or charge the person from whom she obtains it with notice of the use to which it is put, unless he be the husband's creditor and the money is borrowed from him to pay the husband's debt.

Wherefore, the judgment of the lower court is affirmed.

BALLARD'S ADM'X v. L. & N. R. R. CO.

(Filed May 7, 1908—To be reported.)

1. Master and Servant—Injury to Servant—Prank of Fellow-Servant—Liability of Master—While two fellow-servants were at work at a machine shop, one of them, as a prank, turned compressed air on the other from a hose used therein, which entered his bowels through his rectum, causing his death, for which suit was brought against the master by the administratrix of the deceased servant. Held—That the master is responsible only for the acts of the servant in the scope of his employment.

2. Same—The master in selecting his servants is not required to take into consideration the pranks they may play on their fellow-servants outside the scope of their duties, unless they use an instrument that is dangerous, and the master, with the knowledge of its deadly character, has failed to exercise such care as a man of ordinary prudence would do in keeping it so that it would not do any injury.

3. Same—The master must exercise ordinary care in the selection of his servants, and if he fails to exercise such care and one of the servants is injured by the incapacity of another servant, the master is liable, but such incapacity must relate to the duties required by the master of the servant.

4. Same—If a fellow-servant is entirely competent to discharge the duties assigned him by his master, and he should, without authority from the master, undertake to do things beyond the scope of his employment, the master would not be responsible for his negligence in these matters, on the ground that he was not a suitable person for that service.

L. B. Herrington and Smith & Smith for appellant.

Benjamin D. Warfield and John T. Shelby for appellee.

Appeal from Madison Circuit Court.

Opinion of the court by Judge Hobson, affirming.

Appellant, as administratrix of John Ballard, instituted this action to recover against the L. & N. Railroad Company for the death of her intestate. The circuit court sustained a demurrer to the petition and she appeals.

The facts set up in the petition are these: John Ballard was an apprentice in the defendant's machine shop at Corbin, Kentucky. He was an infant and had been in the shop only three days. There was another apprentice in the shop whose name was Hodge. While Ballard was engaged in his duties, Hodge slipped up behind him with a compressed air hose and turned the high pressure of air from the hose into Ballard's rectum, the air entering his bowels and rupturing them in such a way that he died shortly afterwards. Hodge had been serving his apprenticeship in the shop for about two years. He turned the air hose on Ballard as a prank. The superintendent of the shop, under whom both Hodge and Ballard worked, had knowingly permitted Hodge and the other apprentice boys in the shop to use this hose in a dangerous manner. The defendant knew that the hose was a dangerous appliance. Hodge had been using the compressed air hose in a playful manner while on duty with the defendant for sometime prior to Ballard's death. The defendant knew this and permitted it without warning, restraining or discharging Hodge. Hodge was a careless, reckless and stupid boy, and utterly unfit to be working around or handling this dangerous

air hose, or dangerous compressed air. The defendant knew this or could have known it by the exercise of ordinary care. The defendant, knowing of the careless, reckless and dangerous disposition of Hodge, and knowing of his conduct in connection with the use of the dangerous compressed air, negligently retained him in its employ, and negligently failed to exercise proper and reasonable supervision over his acts and conduct while in defendant's service, and negligently exposed John Ballard to the dangers and hazards of working with this reckless, unsafe and unfit servant, dangers which were unknown to Ballard and from which he lost his life.

In *Sullivan v. L. & N. R. R. Company*, 115 Ky., 447, the foreman of a switching crew, as a prank, put a torpedo on the track in front of the engine, to alarm one of the hands working with him. The torpedo went off and a piece of it struck the hand in the leg; he sued the railroad to recover damages. It was held that, as the foreman was discharging no duty to the master in placing the torpedo on the track, but was merely playing a prank on one of the men working with him, the master was not responsible for the acts of the servant not done in his service.

In *L. & N. R. R. Company v. Routt*, 25 Rep., 887, the fireman in a locomotive intentionally threw a lump of coal at the plaintiff, who was standing on the side of the track, intending to hit him with the coal; in thus throwing the coal he was discharging no duty which he owed to the master, and it was held that the railroad company was not answerable.

In *Railroad Company v. Cooper*, 88 Tex., 607, the engineer and fireman intended to play a practical joke on Cooper by injecting water into his pockets through a hose, and, by mistake turned on hot water and steam, he was badly burned and brought suit against the railroad to recover for his injuries. It was held that he could not recover.

In *Galveston, &c., Railroad v. Currie*, 96 S. W., 1073, the Supreme Court of Texas had before it a case very similar to this. In that case the foreman of the shop, who had a crew of men under him, as a prank, turned the air hose on one of the men, and when he jumped, turned it on another. No bad effect was seen at the time, but subsequently the man died from the air having entered the rectum and ruptured the bowels. In that case the only physician who was examined as a witness, testified that he had not believed such a thing could be possible, and that it was the most remarkable accident of which he had ever heard. It was there held that the master was not responsible for the servant's prank.

It is earnestly insisted, however, that this case differs from all of those cited in this, that it is alleged here that Hodge was a careless, reckless and stupid boy, utterly unfit to handle the air hose, and that the defendant knew of his incapacity and knew that he was in the habit of using the hose in a playful, improper and reckless manner. Ballard and Hodge were fellow-servants. The master is responsible only for the acts of the servant within the scope of his employment. The master must exercise ordinary care in the selection of his servants and if he fails to exercise such care, and one of the servants is injured by the incapacity of another servant, the master is liable, but the incapacity of the fellow-servant must relate to the duties required of him by the master. If the fellow-servant is entirely competent to discharge the duties assigned him by the master and he should, without authority from the master, undertake to do things beyond the scope of his employment, the master would not be liable for his negligence in these matters on the ground that he was not a suitable person for that service. Boys are employed as apprentices in all shops and yet there are in all shops many duties that may not safely be entrusted to these

boys, and, if a boy should voluntarily leave the scope of the duty assigned him by the master without authority, the master would not be liable to a fellow-servant who was injured by reason of his incapacity to do the work which he had thus wrongfully assumed.

It is not shown in the petition that the use of the air hose was part of Hodge's duty. The fair inference from the petition is that Hodge only used the air hose to play pranks. If he had used the water hose, supposing that he was turning on cold water, and had, in fact, turned on hot water, thus burning Ballard, manifestly the railroad would not be answerable, simply because the hot water was a dangerous agency, and it had retained Hodge in its employment, knowing that he was in the habit of turning the hose on the other boys, as a prank. Compressed air is used in all shops to blow away the filings or cuttings, so that the progress made by the tools may be seen. It is ordinarily entirely harmless; if turned on a person at any other point than near the rectum, it simply stings a little: and that the air, when striking near the rectum, would go through the clothes and into the rectum to such an extent as to rupture the bowels, would, perhaps, never occur to any one who had not heard of the possibility of such an accident. Compressed air is no more dangerous than the tools ordinarily furnished to the men to work with in shops; one apprentice might hurt another with his hammer, or with a piece of iron, in playing a prank on him. No shop can be conducted without agencies that are more or less dangerous when improperly used, and the master is not responsible if an apprentice gets hold of some tool not committed to him and uses it in a way to hurt another in playing a prank on him; unless the danger was so imminent that a person of ordinary prudence would have guarded against it. Dangerous instrumentalities like nitroglycerine or dynamite must be carefully kept and should not be put where ignorant or reckless persons may injure others with them, but a compressed air hose is not a deadly thing, and the same rule that would apply to a dynamite cartridge or package of nitroglycerine can not be applied to it. An air hose is as common a tool in a shop as a lathe or furnace, and there are, in nearly all shops, apprentices; nor is it uncommon that apprentices play pranks on one another.

The sum of all the facts alleged is about this; that Hodge, in using an air hose, as a prank, on Ballard, caused his death, when there was nothing in the appearance of the thing to suggest danger to him, or to Ballard, and when, in so doing, he was discharging no duty to the defendant. When the master has selected fellow servants competent to discharge the duties assigned to them, he is not responsible for an injury which they may do in a prank, outside of their duties; unless they use an instrument that was dangerous, and the master, with knowledge of the deadly character of the thing, has failed to exercise such care as a man of ordinary prudence would exercise in keeping it so that it would not do injury. The master, in selecting his servants, is not required to take into consideration the pranks one servant may play on his fellows, outside of the scope of his duties. The master has no right to control his servant outside of his service, as to the pranks he may play on his fellows. As to these, the master is under no greater responsibility to the fellow-servants than to a stranger. If Ballard had not been in the service of the railroad company, it would hardly be maintained that the company would be responsible to him on the facts alleged. Dangerous agencies must not be entrusted to unfit hands, and proper care must be exercised to protect others from them. But the duty to guard a dangerous agency, in the sense in which the terms are used in the rule referred to, does not extend to such a thing as an air hose, on the facts shown.

An air hose is an instrument so familiar and usually so harmless that we do not see how this principle can be applied to it.

Judgment affirmed.

Whole court sitting.

Judge Nunn dissenting.

CITY OF OWENSBORO v. HOPE.

CITY OF OWENSBORO v. LOSSIE.

(Filed May 8, 1908—To be reported.)

1. Municipalities—Public Common Nuisance—Omitting Legal Duty Required for Common Good—A common or public nuisance is one that affects the people at large, and is a violation of a public right, either by a direct encroachment upon public property, or by doing some act which tends to the common injury, or by omitting to do, in the discharge of a legal duty, that which the common good requires.

2. Street Improvement—Property Owners—Common Law Liability—Statutory Requirements—There is no common law liability on the part of abutting property owners to pay for street improvements. The only liability is that imposed by statute. The general rule is, that when a power is conferred upon a municipal corporation, and the manner in which it is to be exercised is prescribed, such mode must be pursued.

3. Same—Abatement—Jurisdiction of Courts—In addition to the ordinary remedies by indictment and abatement, a court of equity will often take jurisdiction of a public nuisance, such as the unlawful obstructing of a public highway, and restrain or enjoin acts prejudicial to the interests of the community. The jurisdiction of the court, in such cases, is founded upon the greater promptitude and efficiency of the remedy, as well as the desirability of preventing irreparable mischief and vexatious litigation.

4. Same—Abating Nuisance—Mandatory Injunction—Under section 3290, sub-section 7, Kentucky Statutes, relating to cities of the third class, authorizing the common council "to open, alter, abolish, widen, extend, establish, grade, pave, or otherwise improve and keep in repair, streets and sidewalks, or have the same done," the only liability created by these sections and by sections 3449 to 3452, inclusive, is the liability on the part of the abutting property owner to pay for the improvements, after they have been made, and a mandatory injunction will not lie to compel a property owner, in such city, to construct a sidewalk and abate a nuisance suffered by his failure to do so.

George W. Jolly for appellant.

Wilfred Carico for appellees.

Appeals No. 2 and No. 3 from Davless Circuit Court.

Opinion of the court by Wm. Rogers Clay, Commissioner, affirming.

These two appeals involve the same questions, and will be considered together. The suits were brought by the city of Owensboro against appellees, to compel them, by mandatory injunction, to remedy nuisances suffered by them to exist in front of their respective lots, by failing and refusing to excavate the dirt projecting above the level of the walks, and put down cement walks in front of their property, as required by ordinances of the city, in conformity with a new grade established by the common council.

Appellee Lossie's property lies on the east side of Mulberry street, between Second and Third streets, about midway of the square. Mulberry street was macadamized by the city in the year 1901. The ordinance required the property-holders on both sides of Mulberry street, from Second street southward to Fifth street, to build cement sidewalks. All the abutters on the east side of Mulberry street, between Second and Third streets, north and south of Lossie's lot, complied with the ordinances requiring the construction of such walks on the new grade. This left the old sidewalk, in front of her property, about two feet, at the north line of her lot, and eighteen inches, at the south line, above the cement walk; the lot having a frontage of eighty-three and a half feet. It is charged that this left the street in a condition not only inconvenient to public travel, but actually dangerous to pedestrians.

Hope's lot lies on the east side of Clay street, between Fifth and Seventh streets, and has a frontage of forty-three feet. A macadam street, with curbs and gutters, was constructed in front of his property in 1901. The ordinance required the construction of a six-foot cement walk in front of all property, on both sides of Clay street, from second to Seventh street. All property-holders lying north and south of Hope's lot, on the east side of Clay street, complied, and built their walks. This left the old sidewalk, in front of Hope's lot, two feet higher than the walk north and south of said lot; thus making an abrupt offset of two feet at the north and south sides of his lot, which is alleged to be dangerous to public travel on the street.

The ordinances of the city, after prescribing the streets and the specifications for the sidewalks, contain the following provision:

"That the pavements required to be constructed under the provisions of said ordinance finally passed May 20th, 1901, and the amendments thereto, and under the provisions of this ordinance shall all be constructed as soon as practicable, and before the first day of October, A. D., 1902. But the failure or neglect of any person to comply with the provisions of this ordinance as to the construction of said pavement before said dates, shall not have the effect to exonerate such person from a full compliance herewith."

The ordinances further have a provision to the effect that the concrete or cement walks required to be constructed "shall be immediately constructed at the cost and expense of the owners of the lots and parcels of ground abutting on said improvements; and the cost and expense of such construction of said concrete or cement pavements * * * shall be apportioned against each lot or parcel of ground so abutting thereon, according to the number of feet each person may own, abutting or in front of said improvement. And a lien shall exist on said ground so fronting on said improvement for the cost and expense thereof in front of such lot or parcel of ground."

The ordinances further provide that it shall be the duty of the mayor to enter into contracts, upon the best and most advantageous terms, for the construction of said work; that the work contracted to be done shall be performed under the supervision of the mayor and the city engineer, and subject to the acceptance of the common council; that it shall be the duty of the city engineer to make out and report to the common council complete and accurate estimates and apportionments of the cost of said work and improvement against the owners of the property liable to pay the same, designating therein each one's respective liability.

The foregoing facts appear from the petitions, each of which concludes with a prayer asking that the defendants therein be required to construct a sidewalk in front of his property, as provided by the ordinances. The trial court sustained a demurrer in each instance, and dismissed the petitions of the city; from which judgments it appeals.

For appellant it is insisted that the common council is given plenary power over the streets of the city; that it may require the streets and sidewalks to be constructed, re-constructed, &c., by the property owners abutting on the streets, and may also assess the cost of the improvement by the frontage, &c.; that it is the duty of the city, aside from these charter provisions, to see to it that the streets are kept in a reasonably safe condition for public use; that if it fails, it is liable to indictment and civil suits for any injury sustained by any individual caused by its negligent failure to maintain the streets in a reasonably safe condition; that this control of the streets, together with its duty to keep them in a reasonably safe condition, and its liability for a failure so to do, invest the city with such an interest in the streets as will enable it to maintain a suit in equity to compel one who, in violation of a local law, obstructs, or suffers the street to be obstructed, or refuses to remove the obstruction, by performing a duty which the law enjoins.

It may be conceded that, in addition to the ordinary remedies by indictment and abatement, a court of equity will often take jurisdiction of a public nuisance, such as the unlawful obstruction of a highway, and restrain or enjoin acts prejudicial to the interests of the community. The jurisdiction of a court of equity in such cases is founded upon the greater promptitude and efficacy of the remedy, as well as the desirability of preventing irreparable mischief and vexatious litigation. And the liability of a town or city to pay damages for injuries caused by the obstruction is a sufficient interest to entitle the town or city to maintain a suit in equity to enjoin an obstruction which constitutes a nuisance, although it does not own the fee. (Elliott on Roads and Streets, section 664; Watertown v. Cowen, 4 Paige Ch., 510; Burlington v. Schwartzman, 52 Conn., 181; Railway Co. v. Chicago, 96 Ill., 620; San Francisco v. Buckman, 111 Cal., 25; Dillon on Mun. Corps., sections 659, 660; Smith on Mod. Mun. Corps., section 1094.)

A common or public nuisance is one that affects the people at large, and is a violation of a public right, either by a direct encroachment upon public property or by doing some act which tends to the common injury, or by omitting to do, in the discharge of a legal duty, that which the common good requires. (Am. & Eng. Ency. of Law, 2d edition, volume 21, page 683.)

Thus it will be seen that a nuisance may be created by a positive act on the part of the offender, or by neglecting to perform a duty imposed by law. In these cases it is not contended that appellees created a nuisance by any positive act on their part. They did not place a dangerous obstruction in the streets. The only theory, then, upon which the chancellor could act, would be that they created a nuisance by failing to comply with a legal duty. It is even doubtful if the common council, by the ordinances involved herein, has itself imposed upon the property owners the duty of constructing the sidewalks in question. It seems to us that the ordinances should be construed in the light of the power and authority given to the common council; and if that be done, it is certain that the purpose of the ordinances was to follow the manner and form provided by the statute.

But even conceding that the ordinances themselves imposed upon the property owners the duty of constructing the sidewalks, did the common council have the power to impose this duty? By section 3449, Kentucky Statutes, it is provided that the common council "shall have power to pass ordinances to require the improvement of streets and alleys, subject to the mode and manner herein designated." This section further provides that the work shall be done at the cost of the owner or owners of the ground fronting such improvement;

and a lien is created on said ground for the cost thereof. Section 3450 makes it the duty of the mayor to enter into a contract with any person or persons offering or agreeing to do the work required to be done by the ordinance, upon the best and most advantageous terms. Section 3451 requires that the work shall be done under the supervision of the mayor and engineer, and subject to the acceptance of the common council. This section also makes it the duty of the engineer to make out and report to the common council complete and accurate estimates and apportionments of the cost of said work and improvements against the owners of property liable to pay the same, designating each one's respective liability. Section 3452 provides that when the common council shall have passed an ordinance requiring the improvement to be made, and when a contract, in pursuance to such ordinance, shall be executed and ratified as aforesaid, and the common council shall have received the report of the engineer estimating and apportioning the cost of the work, and, by order or resolution, shall have received said work as done, then the liability of the owners of the property chargeable with the cost of said work shall be fixed, and there shall be a lien on the property for same.

The sections above referred to provide for the construction of sidewalks, the manner in which the work shall be done, how completed, received and approved by the common council, and for the creation of a lien upon abutting property. In these sections is embraced the whole statutory law imposing liability upon property owners. While section 3449 does provide that the common council shall have power to pass ordinances requiring the improvement of streets and alleys, it further provides that the power so to require is subject to the mode and manner therein designated. That section and those which follow show conclusively that the only manner and mode therein contemplated was that the mayor should enter into a contract for the work, and that the cost thereof should be assessed against, and be a lien on, the property abutting the improvement.

The doctrine is well settled that there is no common law liability on the part of abutting property owners to pay for street improvement. The only liability is that imposed by statute. The general rule is, that when a power is conferred upon a municipal corporation, and the manner in which it is to be exercised is prescribed, such mode must be pursued. (Am. & Eng. Ency. of Law, 2d edition, volume 20, page 1142.)

It is true, the common council of the city of Owensboro is given power and control over the streets of the city, and may require the streets and sidewalks to be constructed, re-constructed, &c. This authority is contained in section 3290, Kentucky Statutes, which is as follows:

"The common council of each of said cities shall, within the limitations of the Constitution of the State and this act, have power by ordinance:

"Sub-section 7. To open, alter, abolish, widen, extend, establish, grade, pave or otherwise improve, clean, sprinkle and keep in repair, streets, alleys, lanes, avenues and sidewalks, or to have the same done." * * *

From the above, it will be seen that the common council is given the power, within the limitations of the Constitution and acts relating to cities of the third class, to improve streets. The limitations referred to are found in sections 3449 to 3452, inclusive, of the Kentucky Statutes. As before stated, the only liability created by those sections is the liability on the part of the abutting property owners to pay for the improvements after they have been made. This liability is not even a personal liability; it is imposed only on the property of

the abutting owners, and is secured by lien thereon. Assuming, then, that the ordinances in question imposed upon appellees the duty of constructing sidewalks in front of their premises (a proposition which is doubtful in the extreme), the common council did not have the authority so to provide, for such power is not given by the charter of cities of the third class. That being the case, the nuisance complained of did not result from the negligence of the appellees in failing to perform a duty imposed by law. The law did not impose upon them the duty of constructing the sidewalks in question; it went no further than to provide a lien against their property for the cost thereof, after the work had been done under contract made by the mayor. The nuisance, therefore, did not result from any positive acts or neglect of duty on the part of appellees. It follows that a mandatory injunction will not lie to compel appellees to construct the sidewalks and abate the nuisance complained of.

For the reasons given, the judgment is affirmed.

SOUTHERN RY. CO. IN KY. v. COMMONWEALTH.

(Filed May 12, 1908—To be reported.)

Railroads—Freight Trains—Carrying Passengers on Caboose—Separate Caboose for White and Colored Passengers—Under Kentucky Statutes, sections 772a and 801, the carrying of passengers by a railroad in a caboose attached to a freight train, does not change the freight train into a passenger train, and though a railroad company may allow both white and colored passengers to ride in such caboose, it is not subject to indictment under Kentucky Statutes, section 795, for failing to provide separate coaches on said trains for white and colored passengers.

Humphrey & Humphrey and E. H. Gaither for appellant.

James Breathitt and Tom B. McGregor for appellee.

Appeal from Mercer Circuit Court.

Opinion of the court by Wm. Rogers Clay, Commissioner, reversing.

Appellant, Southern Railway in Kentucky, was indicted by the grand jury of Mercer county for a violation of section 795, of the Kentucky Statutes, requiring railway companies operating in this State to furnish separate coaches or cars for the travel or transportation of white and colored passengers. An agreed statement of facts was filed, and upon this agreed statement the trial was had, without the intervention of a jury. Appellant was adjudged guilty, and its fine fixed at \$500.00. From a judgment overruling its motion and grounds for a new trial, the railway company prosecutes this appeal.

The following is the agreed statement of facts:

"1st. That the defendant is a corporation organized under the laws of the State of Kentucky, and operating a railroad in Mercer county, Kentucky, one branch of which runs from Harrodsburg to Burgin, Kentucky.

"2d. That at the date charged in the indictment, the defendant was operating a freight train between Harrodsburg and Burgin, to which was attached a caboose.

"3d. The defendant's agents at Burgin and Harrodsburg sold first-class passenger tickets to such passengers as applied for tickets, colored and white, for said freight train to which said caboose was attached.

"4th. That the only train run upon said day, and on other days, and the only car upon which passengers could ride, was said caboose car; said car was used regularly for all passengers buying first-class passenger tickets at the depot in Burgin for Harrodsburg, and from Harrodsburg to Burgin, and there was no other car attached to said train, or any other train for passengers, between said points, at said times and days.

"5th. That said caboose was not divided into separate compartments, and there was no sign upon said caboose car to indicate which car or compartment was intended for white or colored passengers.

"6th. That the said colored and white people mentioned in the indictment herein were passengers upon said caboose car; that they held first-class passenger tickets, sold by the agent at the passenger depot, and that there was no other car upon which they could ride upon the said tickets on the said days."

Section 801, of the Kentucky Statutes, is as follows:

"The provisions of this act shall not apply to employees of railroads, or persons employed as nurses, or officers in charge of prisoners [nor shall the same apply to the transportation of passengers in any caboose car attached to a freight train]." (Words in brackets added by amendment of March 15, 1894.)

It will be observed, from the foregoing section, that the provisions of the act in question do not apply to the transportation of passengers in any caboose car attached to a freight train.

Section 772a, of the Kentucky Statutes, is as follows:

"That all corporations, companies, persons or associations owning and operating a railroad line in this Commonwealth, or any branch of any railroad in this Commonwealth, the length of which exceeds five miles, shall be required, and they are hereby directed, to run at least one passenger train each way on every day of the year, Sundays excepted, over said line: Provided, however, That the operation of a train known as a mixed train, on lines carrying passengers and freight for hire, on which both passengers and freight are carried, if operated in accordance with the provisions of this act, shall be deemed a compliance therewith: Provided, further, That the provisions of this act shall not apply to mere coal switches, or any switch or branch, which is chartered and used by any corporation, company or person, merely for the purpose of carrying freight or coals to their main line or track."

It appears, from the agreed facts, that the only train run on the day upon which it is alleged the offense was committed, and other days, and the only car upon which passengers could ride, was said caboose car; that said car was used regularly for all passengers buying first-class tickets at the depot in Burgin for Harrodsburg, and from Harrodsburg to Burgin, and that there was no other car attached to said train for passengers, "between said points, at said times and days." It is the contention of the Commonwealth that it was the duty of appellant to comply with the provisions of section 772a, by providing trains for carrying passengers as therein required; that, as appellant provided no other train for the carrying of passengers, except a freight train with the caboose attached, and regularly sold tickets to passengers to be carried on this train, it was, as a matter of fact, carrying on a passenger traffic with the train in question, and that this, in effect, made it a passenger train; that the evident purpose of the enactment of the law was to compel railroad corporations doing a passenger traffic, or regularly engaged in hauling passengers, to separate the races by providing separate coaches or compartments; it matters not whether the passengers were regularly hauled upon a regular passenger train or a regular freight train; that railroads can not evade the Separate Coach Law by equipping

their trains with caboose cars and hauling passengers in them. We do not think, however, that appellant's failure to comply with section 772a, of the Kentucky Statutes, or the fact that it actually carries passengers in a caboose attached to a freight train, and provides no other train for the carrying of passengers, can alter the character of the train in question. In other words, the carrying of passengers in a caboose attached to a freight train does not change the freight train into a passenger train. The expressions "passenger train" and "freight train" have a well-defined meaning. Section 801 recognizes the right of a railroad company, under certain conditions, to transport passengers in a caboose car attached to a freight train. The exemption from liability where passengers are carried in a caboose attached to a freight train was placed in the statute by an amendment of March 15th, 1894. The language is plain and certain. The record does not show that any other car in which passengers were carried was attached to the train. The train was simply a freight train, with a caboose attached. This, then, brings appellant within the exemption.

Whether or not appellant has been guilty of a violation of section 772a, is a question not now before us. It is true, the agreed facts show that no passenger train was operated on the branch road between Harrodsburg and Burgin upon the date mentioned in the indictment; but this is not an indictment for a failure to run a passenger train each way upon appellant's road, under section 772a. Even if it were, the agreed facts fail to show that the branch road in question exceeded five miles in length, or that it was not one of the branches or switches which are exempted from the provisions of that act. Furthermore, if the agreed facts showed that appellant was guilty of violating section 772a, the proper way to proceed would be by indictment under that section. The failure to run a passenger train each way on appellant's road is not included in, or in any way a part of, the offense mentioned in section 795, known as the Separate Coach Law. Appellant could not be convicted under section 795 for an offense prohibited by section 772a.

Whether wisely or not, the Legislature provided the exemption contained in section 801. The agreed facts show that the train in question was a freight train, and passengers were carried in a caboose attached thereto. Clearly, then, appellant comes within the exemption, and we are, therefore, of opinion that it was not guilty of the offense charged in the indictment.

For the reasons given, the judgment is reversed and cause remanded, with directions to dismiss the indictment.

CROSS v. ILLINOIS CENTRAL R. R. CO.

(Filed May 12, 1908—Not to be reported.)

1. Railroad Crossings—Gates—Flagman—Signal—Invitation to Cross—Assumption of Traveler—A traveler, in approaching a railroad crossing that is protected by a flagman or safety gates, has the right to depend upon the invitation extended to cross the track by the open gates, or the signals of the flagman. When the safety gates are open, or the flagman signals the traveler that he may cross, it is an invitation to do so, and the traveler has the right to assume that he can pass in safety.

2. Same—Implied Invitation—Care Required of Traveler—But the fact that the gates are open, or the flagman gives the signal to cross, does not relieve the traveler from exercising ordinary care for his own safety, as if, notwithstanding the invitation implied by the

open gates, or the flagman's signal, the traveler, by the exercise of ordinary care, could know that a train was approaching, the invitation would not be an absolute protection against his negligence.

3. Same—Duty of Trainman—Giving Statutory Signals—The fact that the crossings are protected by gates, or a flagman, does not relieve those in charge of a train of the duty to exercise ordinary care, in approaching the crossings, to prevent accident to the persons at the crossings, or of the duty of giving statutory signals, or other warning, where the statutory signals are not required.

4. Same—Instructions of Court—While the travelers may not rely, to the exclusion of exercising ordinary care for his own safety, on the open gate, or the flagman's signal, it is not proper in the trial court to instruct the jury that the traveler has no right to rely entirely on the flagman, or the open gates, as the case may be, thus diminishing the weight and importance that the traveler has the right to attach to the invitation to cross, by the open gates or the flagman's signal.

W. J. Webb for appellant.

Robbins & Thomas, J. M. Dickinson and Trabue, Doolan & Cox for appellee.

Appeal from Graves Circuit Court.

Opinion of the court by Judge Carroll, reversing.

The appellant, while riding in a vehicle, collided with one of the trains of appellee railroad company at a street crossing, within the corporate limits of the city of Mayfield. To recover damages for the injury sustained to his horse, wagon and himself, he brought this action. The jury who heard the case returned a verdict in favor of appellee, and to reverse the judgment thereon this appeal is prosecuted.

The appellee company employs a flagman at the crossing where appellant was injured, to warn travelers of the approach of trains. The evidence introduced on behalf of appellant tends to show that when he had approached within a short distance of the crossing, he stopped, in obedience to a signal of the flagman, who, in a short time, motioned that he might cross. He testifies that when he stopped, he took out his account book to make a note of a sale of milk he had made, and when he looked again towards the track, the flagman was making motions to indicate that the way was clear, and, in obedience to this invitation of the flagman, he made the attempt, with the result stated. On the other hand, the flagman and a number of witnesses introduced in behalf of the railroad company, said that appellant attempted to drive across the track in the face of warnings from the flagman that he must stop, and that the flagman did not give him any signal that the way was clear, or that he might cross in safety.

With the evidence in this condition, no instruction on the subject of gross negligence was requested, but the court in connection with other instructions, gave instruction number three, reading as follows:

"The court instructs the jury that the plaintiff was bound in law to exercise ordinary care in approaching Broadway crossing, for his own safety, and had no right to rely entirely on the flagman, and should the jury believe that he failed to exercise ordinary care in approaching said crossing, and that he relied entirely on the flagman, and further believe that if he had exercised ordinary care in making said approach, the collision would not have occurred, notwithstanding

that he might have thought the flagman signalled him to cross, then the law is for the defendant, and the jury should so find."

The objection pointed out by counsel for appellant, to this instruction, is that it tells the jury in so many words that appellant had no right to rely entirely on the flagman. This criticism is well founded. A traveler, in approaching a crossing that is protected by a flagman or safety gates, has the right to depend upon the invitation extended to cross the tracks, by the open gates or the signals of the flagman. When the safety gates are open, or the flagman signals the traveler that he may cross, it is an invitation to do so, and the traveler has the right to assume that he can pass in safety. We do not mean to hold that the fact that the gates are open or the flagman gives a signal to cross, relieves the traveler from exercising ordinary care for his own safety, as if, notwithstanding the invitation implied by the open gates, or the flagman's signal, the traveler, by the exercise of ordinary care, could know that a train was approaching, the invitation would not be an absolute protection against his negligence. It may also, with propriety, be said that persons in charge of trains reasonably assume the flagman or gates will protect the track from travelers, and their establishment at crossings has a tendency to lessen the vigilance which, under other circumstances, might be expected from those in charge of a train. The fact, however, that crossings are protected by gates or a flagman, does not relieve those in charge of the train of the duty to exercise ordinary care in approaching crossings to prevent accident to persons at the crossings, or the duty of giving statutory signals, where they are required to be given under the statute, or other warning where the statutory signals are not required. But, where a crossing is protected by gates or a flagman, the primary duty rests upon the company to afford protection by giving timely and reasonably sufficient warning as the effect of gates or a flagman is to make the traveler less cautious and careful than he would be if the crossing was not so protected. And, while he may not rely, to the exclusion of exercising ordinary care for his own safety, on the open gates or the signal of the flagman, it is not proper to instruct the jury that the traveler has no right to rely entirely on the flagman or the open gates, as the case may be, thus diminishing the weight and importance that the traveler has the right to attach to the invitation extended to cross by the open gates or the signal of the flagman.

In *Louisville Bridge Co. v. Moroney*, 32 Ky. Law Rep., 705, it was said: "The fact that the railroad corporation maintained the watchman and gates at the intersection of the streets where the accident occurred, was an invitation to the public to cross, and an assurance to them that they would be safe in so doing, when the gates were open or raised." To the same effect is *Sights v. L. & N. R. Co.*, 25 Ky. Law Rep., 1548; *Dick v. L. & N. R. Co.*, 23 Ky. Law Rep., 1068; *L. & N. R. Co. v. Wilson*, 30 Ky. Law Rep., 1048.

In lieu of the instructions given, the court should, on a re-trial of the case, instruct the jury as follows:

"1. The court instructs the jury that it was the duty of defendant's agents and servants in charge of its train to use ordinary care to prevent collisions with, and injury to, persons traveling the street where it crosses the railroad track, at the place appellant was struck, by keeping a lookout in approaching said crossing, and in giving reasonably sufficient signals, by ringing the engine bell, to warn travelers of the approach of the train, and by running at such rate of speed as was reasonably consistent with the safety of persons traveling the street. And if the jury believe, from the evidence, that, on the occasion in controversy, the defendant's agents and servants in

charge of its train failed in the performance of all or any of these duties, and by reason of such failure the collision occurred, then the jury will find for the plaintiff; unless they believe, from the evidence, that plaintiff failed to exercise ordinary care for his own safety.

"2. The court instructs the jury that it was the duty of the flagman at the intersection of the railroad track with Broadway street to give persons approaching said crossing warning of the approach of trains, so as to give them a reasonable opportunity to avoid being injured in crossing the track; and if the jury believe, from the evidence, that, at the time and place complained of by plaintiff, the defendant company, through its flagman, failed to discharge this duty, and by reason thereof the plaintiff, while exercising ordinary care for his own safety, was injured in his person or property in attempting to cross the track, the jury should find for the plaintiff.

"3. They are further instructed that if they believe, from the evidence, that the flagman signalled the plaintiff to cross the track, then this circumstance was an invitation on the part of the defendant to plaintiff and the public to cross, and an assurance that the track could be crossed in safety; and the plaintiff was not guilty of negligence in attempting to cross, unless the jury believe, from the evidence, that he failed to use ordinary care for his own safety and protection. And if the jury believe that the defendant's flagman did signal plaintiff to cross, yet if they further believe that plaintiff failed to exercise ordinary care for his own safety, then the law is for the defendant, and the jury should so find.

"4. If the jury find for the plaintiff, they will award him such damages as they may believe, from the evidence, he has sustained, including the reasonable value of the horse, wagon and contents, and clothing injured or destroyed, not exceeding \$225.00 for the horse, \$95.00 for the wagon and contents, and \$15.00 for clothing; for the amount expended, if any, for doctor's bills and medicine, in effecting, or attempting to effect a cure, and for loss of time directly caused by his injuries, not exceeding \$150.00; and for the mental and physical pain, if any, that he has suffered, or may suffer, as the direct cause of the injuries sustained, and for any permanent impairment of his power to earn money, if any, not exceeding in all the sum of \$10,000.00.

"5. The court instructs the jury that if they believe, from the evidence, that, at the time and place plaintiff claims to have been injured, he failed to exercise ordinary care in crossing the railroad track, and but for such failure upon his part, the injury would not have occurred, then the law is for the defendant, and you should so find, although you may believe, from the evidence, that the persons in charge of the train, as well as the flagman, were, each or both, guilty of negligence.

"6. Ordinary care, as used in these instructions, is that degree of care that ordinarily prudent persons would usually exercise if surrounded by the same or similar circumstances to those proven in this case.

"7. Negligence is the failure to exercise ordinary care."

The judgment is reversed, with directions for a new trial, in conformity with this opinion.

O'BANNION'S ADM'R v. SOUTHERN RY. CO. IN KY.

(Filed May 12, 1908—Not to be reported.)

1. Railroads—Trespassers on Track of—Infants—The deceased was a trespasser on appellee's track, and the fact that it was an infant, two years old, added no duty or responsibility on the railroad's employes to anticipate its presence on the track, or to keep a lookout in advance of actually seeing its peril.

2. Same—Instructions—There was no evidence to show that the child was killed by the negligent acts of those in charge of the train, and the peremptory instruction to find for appellee was properly given.

Edwards & Godson for appellant.

Wallace & Harris and Edward Colston for appellee.

Appeal from Woodford Circuit Court.

Opinion of the court by Judge Barker, affirming.

On the 31st day of March, 1905, the Cincinnati, New Orleans & Texas Pacific Railway Company was prevented from running trains over its track between Lexington and Georgetown, on account of a derailment or wreck between those cities, which, for a while, effectually blocked transportation. In order to transport passengers and freight with as much dispatch, and with as little inconvenience to its patrons as was possible under the then existing circumstances, that company detoured its trains over the track of appellee, from Lexington, through Versailles and Midway, to Georgetown, and then ran them from the last named city to their destination, over its own track. One of these detouring trains was a very heavy, through passenger train from the south, consisting of a locomotive, tender and eight or nine coaches. This train passed through Midway on the morning of the 31st of March, 1905, going in the direction of Georgetown. While going down a heavy grade, at a point about two miles from Midway, and about one hundred feet from a private farm crossing, it ran over and killed appellant's intestate, a little girl slightly over two years of age. The appellant, the father of the child, qualified as administrator of her estate in the Woodford County Court, and then instituted this action against appellee, charging negligence and carelessness. The issues were made and a trial had. At the conclusion of the testimony introduced by appellant, the trial court, on motion of appellee, peremptorily instructed the jury to find a verdict for it, and, on the return of that verdict by the jury, it entered a judgment thereon, in accord therewith, and this cause is now before this court, on an appeal from that judgment.

The appellee railroad corporation, having licensed the Cincinnati, New Orleans & Texas Pacific Railway Company to run its cars over its line, it is as responsible for whatever accident took place in the operation of the train as if it had been one of its own; and, therefore, so far as the responsibility of the appellee for the injury involved here is concerned, we will treat the case as if the accident was occasioned by one of its own trains. (McCabe's Adm'x v. Maysville & B. S. R. Co., &c., 112 Ky., 861; Louisville & Nashville R. R. Co. v. Breeden's Adm'x, 111 Ky., 729.)

The little child killed by the accident above detailed was a trespasser upon the track of appellee, and, therefore, its employes in charge of the train which caused the injury owed her no duty except to use reasonable diligence, after her peril was discovered, to prevent the accident. (Chesapeake & Ohio Railway Co. v. Nipp's Adm'x, 100

S. W., 246; Chesapeake & Ohio Railway Co. v. Barbour's Adm'r, 93 S. W., 24; Louisville & Nashville Railroad Company v. Redmon's Adm'r, 91 S. W., 722; Hulsey's Adm'r v. L., H. & St. L. Ry. Co., 87 S. W., 302; Davis, Adm'r v. Chesapeake & Ohio Railway Co., &c., 75 S. W., 275; Louisville & Nashville Railroad Co. v. Vltitoe's Adm'r, 41 S. W., 260; Louisville & Nashville Railroad Co. v. Logsdon's Adm'r, 81 S. W., 655; Freel's Adm'r v. L., H. & St. L. Ry. Co., 89 S. W., 143; Nashville, Chattanooga & St. Louis Railroad Co. v. Bean's Ex'or, decided May 8th, 1908.) And the fact that the decedent was an infant only two years old added no duty or responsibility on the railroad's employees to anticipate her presence on the track, or to keep a lookout for her in advance of actually seeing her peril. (Freel's Adm'r v. L., H. & St. L. Ry. Co., supra; Dorsey's Adm'r v. Louisville & Nashville Railroad Co., 80 S. W., 1131; Louisville & Nashville Railroad Co. v. Logsdon's Adm'r, 81 S. W., 655.)

It only remains, then, to ascertain whether or not the employees in charge of the train saw the child's peril in time, by the exercise of ordinary care, to prevent her injury.

It was proved, for the plaintiff, that the track, from where the train rounded a curve to the point where the child was struck by the engine, a distance of five hundred and forty-nine feet, was perfectly straight, and that those in the cab of the engine could have seen her for the whole time the train was traversing this distance, if she was actually on the track; that from a point five hundred and forty-nine feet from where the child was killed, the engineer and fireman were both observed looking out of the window of the cab, straight down the track, in the direction where the little girl was killed. It was further shown that when the engine reached a point within one hundred and four feet of the child, the engineer sounded the alarm whistle and applied the brakes, showing that, at that point at least, he had observed her peril. The O'Bannion home was about one hundred feet from the railroad track, and there was a little path leading from a corner of the yard to it. Just where this path reached the track, the child's bonnet was found lying between the rails. She was killed seventy-five feet from this point.

The record fails to disclose at what time the child went on the track, or at what point. No one saw her, so far as the evidence shows, except at the place where she was killed. So far as the evidence shows to the contrary, she may have gone on the track at the point where she was killed, and after the train was in so short a distance of her as to preclude the possibility of her being saved after her peril was discovered.

It is not contended that the train could have been stopped and the injury prevented between the point where the alarm whistle was sounded and where the tragedy occurred, a distance of one hundred and four feet. Of course, if the child had been on the track when the train came around the curve, five hundred and forty-nine feet away, there was nothing to prevent the engineer and fireman from seeing her from that point on; and as the evidence showed they were looking down the track from that point on, it could well be assumed that they saw her; and to see her at all upon the track, considering her age, was to realize her peril. But we have no right to assume, in the absence of evidence, that the child was on the track all the time while the train was running the distance of five hundred and forty-nine feet, to where she was struck. She might have gone on the track and off of it again several times while the train was traversing that distance; certainly, if she had been on the side of the railroad track, she could have walked on it and imperiled her life long after the train reached a point of proximity to her, which would have precluded the possibility of saving her life after her peril was discovered.

But it is said that, because her bonnet was found on the railroad track seventy-five feet from where she was killed, it must be presumed that she had dropped it at point where it was found, and walked the distance of seventy-five feet to the point of the accident; and that this would show she had been on the railroad track during the whole time the train was coming the five hundred and forty-nine feet from the curve in the road. We do not think this is a legitimate deduction. There is no evidence as to how long the child had been playing on the track, or in the neighborhood of it. We do not know whether her bonnet was dropped by her at the point where it was found, or whether it was blown there by the winds, or what cause, or force or circumstance brought it there. If we assume that the child dropped it there when she got upon the track, it does not follow that she remained on the track and walked down to the point seventy-five feet away, where she was finally killed. For aught that appears to the contrary, she may have been on and off the track several times after she dropped her bonnet at the point where it was found, before she finally reached the place where she was killed. We can not assume the existence of any unproved fact necessary to establish the plaintiff's cause of action. The burden was upon him to prove every such material fact; and if he failed so to do, then he can not recover.

The facts in the case of *Freel's Adm'r v. L., H. & St. L. Ry. Co.*, before cited, were very similar to those in the case at bar. There an infant seventeen months old wandered upon the railroad track, and it was shown that she could have been seen by those in charge of the train for at least three hundred yards from where the accident occurred; and it was insisted that this was evidence sufficient to take the case to the jury. On that subject, it was said:

"There was no evidence introduced to show that the child was on the track when the train reached the point where it is claimed it could have been seen by those in charge of the train. There is nothing in the record to show that the child may not have gotten on the track just at the time those in charge of the train discovered its peril, and endeavored to prevent the accident. It is true, one witness testified that, some time before the accident, she had seen the child on the track; but the train was not then in sight, nor did the witness know that it was then approaching. Therefore, the evidence failed to show that the child remained on the track from the time it was seen by this witness until it was killed. It may have walked on and off the track two or three times after the witness saw it upon the track before it was killed. We do not think that there was any evidence from which the jury could have inferred that the child was killed by the negligent act of those in charge of the train."

Applying the reasoning of the foregoing opinion to the case in hand, there was no evidence to show that the little girl was upon the track when the engine rounded the curve and reached a point from where those in charge of it would have seen her had she then been upon the track; or that she did not get on the track just before the train reached her, and when no effort would have saved her life. It necessarily follows that the plaintiff failed to make out his case, in the absence of evidence establishing these very material facts; and this being so, the peremptory instruction was properly given. Sympathy for the little sufferer can not be substituted for the lacking evidence necessary to establish the plaintiff's cause of action.

Judgment affirmed.

Whole court sitting.

Judge Nunn dissenting.

BARBEE v. STOKES, &c.

(Filed May 12, 1908—Not to be reported.)

Deeds—Action to set aside on the Ground of Fraud—Evidence— This action to set aside a deed on the ground of fraud and undue influence can not be sustained for want of proof. The deed was made four years before the grantor's death, and was at once put to record. Appellees knew about it from the time it was made, and waited until the death of the grantor to institute the action. The facts and circumstances show that the grantor was the grandmother of appellant. She raised him from infancy and he remained with her during her old age and helpless condition, and her action in conveying him the property is what any grandmother would have done under the circumstances.

J. J. Osborne for appellant.

McMillan & Talbott, Robert Buckler and John P. McCartney for appellees.

Appeal from Robertson Circuit Court.

Opinion of the court by Judge Barker, reversing.

This is an appeal from the judgment of the Robertson Circuit Court, in the action of Annie E. Stokes and others against Luther Barbee and his mother, Sarah Barbee. The action was instituted by the appellees for the purpose of having a deed, made by Elizabeth Prather, deceased, to Luther Barbee, set aside and held for naught and declared a fraud upon the rights of the plaintiffs; and that the appellees and Sarah Barbee should be adjudged the owners of the land in the proportion set out in the petition. The deed attacked was made on the 21st day of June, 1902, by Elizabeth Prather, the decedent, to Luther Barbee, appellant, for the recited consideration of the love and affection of a grandmother to a grandchild, and the further consideration that Luther Barbee was to maintain and care for the grantor during her natural life, and to furnish to her that care and attention that a son should furnish to a parent until her death. That in consideration thereof, Elizabeth Prather sold and conveyed to the appellant, Luther Barbee, the property in controversy herein, consisting of sixty-nine acres, three roods and eighteen poles of land lying in Robertson county, Kentucky.

The appellees state in their petition that, at the time the deed was made, to-wit: on the 21st day of June, 1902, Elizabeth Prather, the grantor, was over eighty years of age, feeble in mind and body and incompetent to enter into a contract or to make a deed. Further, that the appellant, Luther Barbee, lived with Elizabeth Prather, on the land conveyed to him, and exercised undue influence over her; that he took advantage of her feebleness of body and mind and overreached her by persuasion, threats and importunities, and by influence unduly and improperly exerted obtained the conveyance of the land to himself. They further say that, while Elizabeth Prather was under the influence of Luther Barbee, and at a time when, by reason of her feeble condition of mind and body, she was unable to resist his importunities, she made the conveyance, and that it was a fraud on the rights of plaintiff, and that there was no valuable consideration for it; and that, in fact, Luther Barbee received more from the farm than his services to her were worth.

The appellees in this case, in conjunction with Sarah Barbee, who was joined as defendant in the action in the circuit court, are the sole

heirs' at law of Elizabeth Prather, deceased. Issue was joined on the facts set out in the petition, and proof taken, and on final submission of the cause the court adjudged the deed invalid because obtained by improper influence, and as being a fraud on the rights of appellees, and set it aside; and in addition adjudged that appellees recover of Luther Barbee rent for the use of the land from the death of Elizabeth Prather, the grantor in the deed. From this ruling he prosecutes this appeal.

The question before us is one wholly of fact, and, as we have often said, this court is loath to differ from the trial judge upon his conclusion as to the facts submitted to him for adjudication; but in the case before us we feel constrained, by our conception of the value of the evidence adduced, to reach a conclusion different from his.

In support of the allegations of the petition, the appellees introduced evidence of declarations on the part of the grantor, Elizabeth Prather, to the effect that she was forced to make the deed, or that she made it against her will; and such other like statements, which, if true, would show that she was dissatisfied with what she had done. In addition to this, appellees undertook to show that Luther Barbee was lazy and trifling, and that he was really supported by his grandmother, rather than that he took care of her by working on the farm. Much of this evidence was from the appellees themselves, or those of near kin to them by blood or marriage. Waiving all questions of the competency of most of this evidence, we think it is more than met and rebutted by the evidence in behalf of the appellant. In his behalf, the neighbors and friends of Elizabeth Prather showed that he was industrious in his habits and faithful to his grandmother, and that she had the utmost affection for him. This was especially shown by the declarations of the old lady, that Luther had stood by her and taken care of her in her old age, when her other children and grandchildren were out in the world looking after their own interests.

If the evidence in favor of the appellant is to be believed, Luther Barbee more than paid the full market value of the property he received from his grandmother, by services rendered her. He was about thirty-five years of age at the time the deed was made, and had lived with his grandmother all his life. After the death of her second husband, she had, for many years, lived with Luther, alone upon the farm. He had stayed with her and never married, devoting his whole time to looking after her property and her interests. That the grantor should have conceived an affection for him much greater than that she bore her other children and grandchildren, under these circumstances, is entirely consonant with nature. The deed was made about four years before the death of the grantor. It was at once placed upon record, and the evidence adduced in behalf of appellees shows that they knew all about it from the time it was made. If it was true, as they undertook to show, that Luther Barbee was mistreating his grandmother, and defrauding her—that he kept her in fear and used her fear of him to induce her to convey to him all of her property—it seems to us that it was the duty of her children and other grandchildren to have gone to her rescue and made an effort, within the four years intervening from the execution of the deed to the death of the old lady, to alleviate her miserable situation. If she was so old and feeble of intellect that she could not resist the sinister and undue influence of the appellant, they might have had a committee appointed for her, and the deed set aside, when her condition was plainly visible, and when there could be no doubt as to whether she was able to manage her property or convey it, according to a will of her own. But, on the contrary, well knowing (if their evidence be true) that the grantor had made

the deed, they allowed it to stand, without a word of protest, or without doing anything to aid her in her helpless condition, for four years, and then, after her death, this action was immediately instituted.

It seems to us that, taking all the facts and circumstances of this case into consideration, Mrs. Prather, in conveying her property, which was not worth over three thousand or four thousand dollars, at the outside, to the appellant, whom she had raised from an infant, and who had remained with her faithfully during her old age and helpless condition, did no more for him than he deserved; that her action in the premises was just what any grandmother would have done for such a grandson, under the same circumstances.

For these reasons, the judgment is reversed, with directions that the petition of the appellees be dismissed.

GRAHAM, &c. v. RICE, &c.

(Filed May 12, 1908—Not to be reported.)

Injunction Bond—Action On—Damages Recoverable—Relief Sought—Liability of Bondsmen—In an action between two sets of claimants to be the officers of an electric light and power company, in which one set procured an injunction restraining the other set from acting as such officers, which injunction was dismissed, Held—In a suit on the injunction bond, that the injunction was not sought to aid the plaintiffs in their efforts to show the legality of their election, but it was the means they employed to secure possession and control of the property of the corporation, in order that they might reap the benefits of its business, and, therefore, under the relief sought, the bondsmen are not liable for the expenses incurred in defeating same.

W. J. Webb, T. N. Smith and Robbins & Thomas for appellants.

Lee & Hester for appellees.

Appeal from Fulton Circuit Court.

Opinion of the court by Judge Lassing, affirming.

In 1906, appellants and appellees were each claiming to be the officers of the Fulton Electric Light & Power Company. Appellants were in possession of the plant and property of said company, and refused to recognize the validity of appellees' claims to the offices. Thereupon, appellees brought suit against appellants and prayed for an injunction against them, enjoining and restraining them from further interfering with the rights of appellees in managing, controlling and operating the said electric light and power company, and requiring them to surrender said property up to appellees. On February 9th, 1906, the relief asked for was granted by the circuit judge of the district, after he had required the plaintiffs to execute a bond to the defendants in the sum of \$5,000.00.

The defendants thereupon gave notice that they would, on the 26th day of February following, make a motion before Hon. Ed. C. O'Rear, one of the judges of this court, to have the injunction dissolved. This motion was made, and on the 28th of February was sustained by said judge, and the injunction dissolved. Thereupon, at the next succeeding term of the Fulton Circuit Court, the plaintiffs dismissed their petition. Thereafter the defendants in the injunction suit brought suit on the injunction bond, wherein they

sought to recover of the sureties on said bond the costs and expenses to which they had been put in defending the injunction suit, amounting to \$479.55; and also for the sum of \$55.00, to which they alleged they were entitled as fees which would have accrued to them during the fifteen days which they were prevented from managing the affairs of the company, and for the further sum of \$50.00, estimated value of time lost in attending the trial, making a total of \$584.55, which they sought to recover of the bondsmen.

On motion of the bondsmen, the plaintiffs were required to elect whether they would prosecute their claim for value of time and salary, and if so, in whose name and against whom, or for the expenses, attorneys' fees, &c., incurred in defending the injunction suit. The plaintiffs elected to prosecute the suit for expenses, attorneys' fees, &c., and the claim for lost time and salary was dismissed without prejudice. The answer denied all liability, on the ground that the sole object and purpose of the suit in which the bond was executed was a mandatory injunction, by which means the plaintiffs in that suit sought to get possession of the electric light and power company. That this was the only relief sought in said suit. The record of the injunction suit was made a part of the answer.

Upon final hearing, the trial judge, to whom the case was submitted without the intervention of a jury, found that the plaintiff had expended, in attorneys' fees and costs, the sum of \$477.30, and that these sums so expended were reasonable and necessary in the defense of said suit. The court further found that the main purpose and object of the suit in which the bond was executed was to secure an injunction, and that, therefore, the plaintiffs, defendants in that suit, were not entitled to recover the money which they expended for attorneys' fees and necessary costs in their efforts to defeat the application for an injunction, and dismissed the petition, and denied to plaintiffs the right to recover any sum whatever on the injunction bond.

Two questions are presented for our consideration on this appeal. First, was there a mis-joinder of actions; and, second, did the trial court err in denying to plaintiffs the right to recover on the bond?

Appellants urge that, inasmuch as the bond was a joint undertaking, and the parties were officers and named in the bond, and interested in who should manage and receive the fees of the corporation, that they are jointly liable for any damage or any loss which accrued to the defendants by reason of the execution of the bond. This contention, however, is not sound. There was no obligation whatever, on the part of the sureties on the bond, to be answerable to the defendants for any loss of salary, or for loss of time which they might sustain by reason of their being deprived of the offices. If such an action existed in favor of any of the defendants, it was an independent action in favor of each officer individually against the company, and no one officer had any interest in the salary that might be due any other officer, nor did any officer have any interest in any claim which any other officer might have due him for time lost. Clearly these claims, if they existed at all, could not be prosecuted in one and the same suit, and the court did not err in requiring plaintiffs to elect.

On the second ground urged for reversal, it is necessary to determine whether or not the injunction was the object sought by plaintiffs in the prosecution of their suit. If it was, then, under a long line of decisions of this court, there could be no recovery on the bond, but, if the injunction was merely asked in order to aid plaintiffs to preserve their rights until they had obtained the desired relief, or to prevent the commission of a wrong before they could prosecute their suit to a judgment, then a recovery could be had on the bond

for such reasonable fees and expenses as were incurred in the efforts expended by defendants in procuring the discharge of the injunction.

In the case of Chicago, St. Louis & New Orleans R. R. Company v. Sullivan, 26 Ky. Law Rep., 46, in discussing a similar question, this court said:

"The only question involved in the proceedings was whether the railroad company was entitled to the possession of the condemned right of way after having deposited the amount assessed in favor of appellee by the ad quod damnum jury, with the county clerk. If the injunction in that case had been sustained, it covered all the relief sought, and the judgment, therefore, dissolving the injunction, does not authorize the recovery of attorneys' fees."

And, in the case of the New National Turnpike Company v. Dulaney, &c., 86 Ky., 518, it was held:

"That when the attachment or injunction is merely ancillary or in aid of the relief sought, or is relied on to secure the relief, when obtained, or to prevent the commission of a wrongful or tortious act, that would result in irreparable injury before the termination of the prime cause of action, then a recovery may be had on the bond for the payment of reasonable counsel fees, when the defendant has succeeded in discharging the attachment or dissolving the injunction; but, on the contrary, when the injunction is the relief sought, and, in fact, gives the relief, if sustained, no recovery for counsel fees can be had."

To the same effect are *Burgen v. Sharer*, 53 Ky., 399; *Bennett v. Lambert*, 100 Ky., 731; *Tyler & Apperson v. Hamilton*, 108 Ky., 120; *Simpkins v. Well*, 22 Ky. Law Rep., 542.

In the injunction suit under consideration, the defendants were enjoined from interfering with the plaintiffs in said case in the management, operation and control of the corporation, and the defendants were all ordered and commanded to surrender and deliver to the plaintiffs in said case, the possession and control of the property and effects of the corporation. This injunction was granted in strict conformity with the prayer of the petition, and it gave to plaintiffs the full and complete relief sought. The prayer of the petition asked for no other remedy or right, and, as the best evidence that the plaintiffs in the injunction suit sought no other relief, upon the dissolution of the injunction by the judge of this court, they dismissed their suit, and did not seek to have any other rights tried out or determined.

Appellants insist that the titles to the offices in question were involved in the injunction suit, and that, therefore, the injunction proceedings were merely steps taken in aid of their efforts to secure possession of the offices. The relief sought must be determined by the prayer of their petition, and that prayer was for a mandatory injunction requiring the defendants to surrender the offices and property of the corporation to the plaintiffs, and enjoining them from further interfering with the plaintiffs in the possession thereof. In order that this might properly be done, plaintiffs asked that they be declared the duly elected officers, &c. To secure the injunction at all, it was necessary for the plaintiffs to show themselves entitled to the offices. This was a condition prerequisite to their right to the injunction. It was the possession and control of the property which they sought to secure through the injunction, and the granting or refusal of the injunction necessarily determined the case, for, in order to show themselves entitled to it, it was necessary to establish the legality of their election. Plaintiffs' right to the offices might have been determined in a suit wherein no injunction was sought, but such a suit, if prosecuted to a successful termination,

would not have brought to the plaintiffs the desired result, and this, as above stated, is the real test of their right to recover herein.

Being of opinion that the injunction herein was not sought to aid plaintiffs in their efforts to show the legality of their election, but, on the contrary, that it was the means which they employed to secure possession and control of the property of the corporation, in order that they might reap the benefits which would accrue to them from the conduct of its business, and was, therefore, the relief sought, the bondsmen are not liable for the expenses incurred in defeating same, and the trial court did not err in so holding.

Judgment affirmed.

CAMPBELL v. DREHER, BY NEXT FRIEND.

(Filed May 12, 1908—Not to be reported.)

1. Action by Infant, by Next Friend—Failure to File Affidavit—Motion to Dismiss Action—Tender of Affidavit Pending Motions—In an action by an infant, by next friend, for damages for injuries received by being run over by an automobile, under sections 35 and 37, of the Civil Code, it was not error in the trial court to refuse to dismiss the action because of the failure of the plaintiff to file with his action the affidavit required by section 37, showing his right to sue as next friend, where the plaintiff tendered such affidavit when the motion to dismiss was made.

2. Motion for Continuance—Absent Witness—Diligence Used—Cumulative Evidence—It was not error in the trial court to refuse a motion for continuance of a case, where it was not shown that any diligence was used by the party in securing the attendance of his witnesses at the trial, and where the evidence of the absent witness was merely cumulative.

3. Evidence—Extent of Injury—Excessive Verdict—In an action by a sixteen year old boy for damages for being negligently run over by an automobile, where the evidence was conflicting on the question of negligence and the extent of the injury, a verdict for \$500.00 in damages can not be held to be excessive, under the evidence.

4. Automobiles—Prejudice Against—Consideration—The fact that there may be a prejudice against automobiles will not be considered in a case where a sixteen year old boy, riding on a bicycle, was run over and seriously injured by an automobile, where it is shown by the proof that the owner of the automobile, after the accident, immediately ran away with his automobile, without offering any aid to the boy, or to learn the extent of his injury.

Carruth, Chatterson & Blitz for appellant.

Harry W. Robinson and Isaac Sherman for appellee.

Appeal from Jefferson Circuit Court, Common Pleas Branch, Second Division.

Opinion of the court by Judge Lassing, affirming.

In a collision between appellee, a sixteen year old boy, on a bicycle, and appellant's automobile, appellee was injured. Conceiving that his injuries were the direct result of appellant's negligence in operating his machine, appellee, through his father, as next friend, instituted suit to recover damages. Appellant denied liability, and pleaded that the injuries, if any, to the boy, were the result of his own carelessness and negligence. Upon the issues thus joined, a trial was

had, which resulted in a verdict in favor of appellee for \$500. To reverse this judgment, this appeal is prosecuted, and appellant relies upon four grounds: First, that the trial court erred in overruling his motion to dismiss appellee's petition because he failed to file with his petition the affidavit of his next friend, as provided for by section 37, of the Code of Practice; second, because the trial court erred in refusing him a continuance on his showing, made at the time of the trial, that the witness, Dr. Geo. W. Leachman, was absent from the State, and that his testimony could not be procured at that time; third, because the verdict was against the evidence; and, fourth, because it was excessive. These objections are taken, and will be considered in chronological order.

Sub-section three, of section 35, of the Code, provides that:

"The action of an infant, or of a person of unsound mind, who resides in this State, and who has no guardian, curator, or committee residing herein, or whose guardian, curator or committee refuses to sue, or his action against his guardian, curator or committee, may be brought by his next friend."

And section 37 provides:

"No person shall sue, as next friend, unless he reside in this State, and be free from disability, nor unless he file his own affidavit, showing his right to sue as next friend, according to the provisions of this chapter."

Upon being served with process, appellant at once filed a motion to dismiss the petition, because it was not accompanied by the proper affidavit, showing the right of appellee's father to sue as next friend. While this motion was under submission, the affidavit, conforming to the provisions of section 37, of the Code, was tendered and permitted to be filed. Appellant insists that it came too late. That the provisions of section 37 are mandatory, and that, upon motion being made to dismiss, the trial court should not have permitted the affidavit to be filed.

Appellant relies upon the cases of *Staton v. Bryant*, 5 Ky. Law Rep., 426, and *Hall v. Snipes*, 10 Ky. Law Rep., 435, to support this contention. We are of opinion, however, that the court's ruling in neither of these cases will bear the construction placed upon it by appellant, for, in the former case, the court distinctly held that the affidavit, which was tendered when the motion to dismiss was made, should have been filed, and, in the latter case, which was reversed upon other grounds, in dealing with the question of the failure of the next friend to file the required affidavit, it said:

"On the failure of appellant (if appellee requires it) to show, by his affidavit, his capacity to sue, the action should be dismissed without prejudice. The affidavit being made, the action should be heard on its merits."

In the more recent case of *Spicer v. Holbrook*, 23 Ky. Law Rep., 1812, the question was again before this court, and it was there held that the motion to dismiss the petition because the required affidavit was not filed should have prevailed. The case was reversed and remanded, with instructions to the trial court to require the plaintiff to comply with the provisions of the Code, as to affidavit, &c. In each of these cases, practically the same question was before this court as is here presented, and, while the court, in each case, recognized the provisions of section 37 as mandatory, it was held that a compliance with its terms might be waived by the defendant, but that, if not waived, and a motion was made for a rule to show cause why the petition should not be dismissed for non-compliance with this provision of the Code, then, if the affidavit was not made, the motion should be sustained and the petition dismissed. We are of opinion that the trial judge did not err in permitting the affidavit to be filed.

Appellant's second ground for reversal is not well taken, for two reasons. First, it is not shown that he used any diligence whatever to secure the presence of this witness at his trial. The record shows that his answer was filed on the 15th day of December, 1906; the reply was filed on the 22d day of December, 1906, completing the issues; the case was called for trial the 26th of March, 1907, or more than ninety days after the issues were made up. During all of this time, save about two weeks prior to the date of the trial, as shown by the affidavit, the witness, Dr. Geo. W. Leachman, was within the jurisdiction of the court, and could have been subpoenaed, and his attendance procured. This was not done, and the fact that appellant did not know he was going to leave offers no excuse for his failure to have a subpoena issued for this witness at a time when he knew he was within the jurisdiction of the court, and could have been served.

The court did not err in refusing to continue the case because of the absence of this witness for the further reason that it is shown that his evidence would have been merely cumulative. He was in the automobile with the witness, John Straus, and the facts to which he would have testified, if present, as disclosed by the affidavit, were testified to by the witness, John Straus. The ruling of the trial judge, in permitting this affidavit for continuance to be read, as the deposition of the absent witness, was certainly as favorable to appellant as he could ask.

We come next to consider the verdict of the jury. Was it against the weight of the evidence and excessive?

Appellee testifies plainly and clearly that the accident was caused solely by the negligent act of appellant and his son, who was in charge of the automobile, in attempting to pass from the south side of the street across to the north side, directly in front of him, and when so close to him that he could not avoid a collision. His testimony is corroborated, in part, by three other witnesses, and, while they do not agree with him in his statement that the machine ran over him, they do agree that it ran into him and knocked him down upon the street, and the witness Hepler says that, although he did not notice them until just as the collision occurred, still he saw the automobile run right into the bicycle.

As opposed to this testimony, appellant says that the accident was caused by the negligence and carelessness of the boy, who ran his bicycle into the automobile in spite of all his son, the chauffeur in charge, could do to prevent him from so doing, and this version as to the manner in which the accident occurred is supported, in the main, by the witness John Straus. It was for the jury to say, under the proof before them, who was in fault. On appellant's motion, they were shown the automobile, and were given an opportunity to see the imprint or dent which appellant alleges the bicycle made in the fender of the machine when it struck it. They were also permitted to hear the explanation which appellant offered of his conduct after the collision, and his reason for not stopping his machine after the accident occurred, that he might learn the extent of appellee's injuries, if any, and, with these witnesses and facts before them, they decided in favor of appellee. We are not prepared to say that they were not warranted in so doing.

The automobile in question is shown to have been a large machine, some ten feet or more in length, with a seating capacity for four passengers. The witness Straus testifies that it was traveling at the rate of six or eight miles an hour, which is the speed limit on Broadway. Appellee testifies that it ran over him, after knocking him down; other witnesses who saw the accident say that it did not, but that it knocked him down and whirled over him, and Mr.

Straus testifies that when he came back, the boy appeared excited and was crying. Whether the machine ran over him or not is immaterial; it ran into him and knocked him down, and the doctor who waited on him testifies that he was severely bruised in the side and about the legs, and had a knot upon his side about the size of a goose egg, and suffered from shock, and the pain was very severe; and he was confined to his bed for some days. The boy testifies that he was in bed for three weeks, and could not work for a month, and suffered severe pain in his side and legs. In our opinion, a verdict for \$500 is not excessive, in a case where one is injured to the extent that appellee in this case is shown to have been injured.

It is urged, by counsel for appellant, that the verdict in this case is entirely the result of the prejudice existing in the mind of the average jurymen against automobiles and their owners. It may be said, in response to this argument, that if such a prejudice exists, it is no doubt due largely to the fact that the owners of automobiles, when accidents occur, too frequently, as was done by appellant in this case, instead of stopping to learn the extent of the injury inflicted, if any, put on more steam and speed away, leaving the victim to care for himself as best he can. Appellant testifies that the reason why he did not stop his machine or make an effort to learn the extent of the damage done, was because he had with him in the machine a sister-in-law, who was in delicate health, and who could not stand excitement, and he feared that if he stopped it would be very injurious to her health.

The reason offered would have justified him in not bringing her back, but he had his son with him, an experienced chauffeur, who was in charge of and managing and driving the machine, and we see no reason offered in the record before us why he did not stop the machine, when he had passed beyond the point where the accident occurred, and get out and go back, and at least learn the extent of the injury, if any, which had been inflicted upon the boy. Had he done this, and offered such assistance as he could to relieve his suffering, it would have tended, at least in a degree, to remove the prejudice of which his counsel so bitterly complains. The instructions given by the court admirably presented the law of the case, as warranted by the facts.

Perceiving no error in the conduct of the trial prejudicial to the rights of appellant, the judgment is affirmed.

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N., C. & ST. L. RY. CO. v. RUSSELL.

(Filed May 8, 1908—To be reported.)

1. Railroads—Cattle Guards—Reasonable Construction—Sufficiency—Under Kentucky Statutes, section 1793, requiring "all corporations and persons owning or controlling and operating railroads, to erect and maintain cattle guards at all terminal points of fences constructed along their lines," if a cattle guard is not reasonably sufficient to prevent cattle from going across it, then it is not such a guard as the statute contemplates, although it may be in general use by all railroads.

2. Same—Care Required of Railroads—Question for Jury—This does not mean that a cattle guard must be so constructed as that, under no condition, cattle can pass over it, or that it must afford absolute or perfect protection against trespassing or wandering stock, but railroad companies should at least exercise ordinary care to provide and maintain guards reasonably sufficient for the purpose intended,

and no better test can be applied to determine the statutory sufficiency of a guard than to submit, under competent evidence, the question of its reasonable sufficiency to a jury.

Wheeler, Hughes & Berry for appellant.

Oliver, Oliver & McGregor for appellee.

Appeal from Marshall Circuit Court.

Opinion of the court by Judge Carroll, affirming.

The principal questions in this case are, whether or not the appellant company erected and maintained at a public road crossing on its line of railway, at a point near Hardin, in Marshall county, Kentucky, a sufficient cattle guard within the meaning of the statute, to entitle it to a verdict under direction of the court, and whether or not the trial court properly instructed the jury.

The action was brought to recover damages for the value of stock killed by one of appellant's trains, and, upon a trial, there was a verdict and judgment for appellee. The stock killed had passed over a cattle guard, and were on the right of way at a point where they could not escape, and it is not contended that the trainmen were guilty of any negligence. So that, the entire case turns upon the proposition whether or not the cattle guard was erected and maintained in the manner required by the statute, and reasonably sufficient to prevent stock from going from the public road onto the right of way, where they were killed. The cattle guard in question was eight feet square, made of iron plates attached together and placed on the ties, and on the surface of the iron, at spaces of a few inches apart, there were sharp, pointed projections, also made of iron, intended to be so arranged that an animal walking across would necessarily step on the pointed iron, thereby hurting or injuring its feet. This particular cattle guard is known as "Cook's Standard," and is in general use on the line of appellant's railroad, and is used by other railroad companies, and was shown by the evidence of witnesses for appellant to be one of the best and most approved styles of cattle guards in general use. There was evidence for appellee tending to show that a number of the sharp projecting points had been bent, and that the ties upon which the iron plate was laid were embedded in the ground, so that the iron was almost-level with the top of the earth, and that cattle and horses habitually passed over it. As all of the evidence introduced on the trial was to the effect that the cattle guard was a practical one, of approved pattern and in general use, appellant insists that it fully complied with the statute, although cattle may have walked across it—the argument being that when a cattle guard, the utility of which has been tested and approved by railroads, is erected and maintained, the company has discharged the full measure of its duty and can not be held liable, although it may not be sufficient to prevent stock from passing over it.

It is not necessary, nor, indeed, proper, that we should express an opinion as to the kind of cattle guard that should be erected and maintained. But the fact that the cattle guard was the same as that in general use on the line of appellant's railroad, and also on other roads, is not conclusive evidence that it was a sufficient cattle guard within the meaning of section 1793, of the Kentucky Statutes, which reads, in part, as follows: "All corporations and persons owning or controlling and operating railroads as aforesaid, shall erect and maintain cattle guards at all terminal points of fences constructed along their lines." This statute does not undertake to prescribe the character of cattle guards that shall be used, but manifestly the intention was that it should be such a one as is reasonably sufficient

to prevent cattle from crossing it, otherwise it would be of little or no service. Nor does the erection of cattle guards, however sufficient they may be, meet the demands of the statute, which declares that they shall not only be erected, but maintained. It is, therefore, as much the duty to maintain them in proper condition, for the purpose intended, as it is to erect them. Whether or not a cattle guard comes up to this requirement, is a question of fact that can not be conclusively determined by either the opinion of railroad experts or farmers who own land adjoining the railroad, although it is admissible for the railroad company to prove that the cattle guard is one in general use by well-managed railroads, and that it is of the most approved make and construction, and, on the other hand, it is equally competent for the person who is attacking its sufficiency to show that cattle have passed over it, for the purpose of illustrating that it does not answer the purpose for which it was intended. Each case must be adjudged by the particular facts disclosed by the evidence, and under the facts shown by this record, the trial court properly refused the request of appellant for a peremptory instruction in its behalf. (Chicago R. Co. v. Bryant, 29 Ill. App., 17; St. Louis R. Co. v. Busick, 74 Ark., 589; Elliott on Railroads, section 1198; Smead v. Lake Shore R. Co., 58 Mich., 200; Pennsylvania R. Co. v. Newly, 164 Ind., 109.)

In Louisville, H. & St. L. R. Co. v. Beauchamp, 21 Ky. Law Rep., 1476, this court said:

"The term 'cattle guard,' as employed in section 1793, of the Kentucky Statutes, means such an appliance as will prevent animals from escaping from enclosures, in which they are confined, over the railroad track, and going upon land of others adjoining the right of way; and any neglect or failure on the part of the railroad to keep them in such a condition as will effect this purpose, renders it liable for any injuries that may result therefrom. No particular form of appliance is prescribed by the statute, but it certainly can not be contended that they should be so constructed that cattle could pass over them with safety.

"This would defeat the very purpose of their requirement."

If a cattle guard is not reasonably sufficient to prevent cattle from going across it, then it is not such a guard as the statute contemplates, although it may be in general use by railroads. This does not mean that a cattle guard must be so constructed as that, under no condition, cattle can pass over it, or that it must afford absolute or perfect protection against trespassing or wandering stock. It would not be reasonable to demand of railroad companies this high measure of care, but they should at least exercise ordinary care to provide and maintain guards reasonably sufficient for the purpose intended. And we do not know a better test that can be applied to determine the statutory sufficiency of a guard, than to submit, under competent evidence, the question of its reasonable sufficiency to a jury, and this the court did, in the following instructions:

"1. It was the duty of the defendant, at the time and place complained of by the plaintiff, to exercise ordinary care to keep and maintain its cattle guards in reasonably safe condition to keep stock from straying from the public road over the same onto its enclosed right of way, and if you shall believe, from the evidence in this case, that defendant failed to exercise such care, and that said cattle guard was insufficient to prevent stock from straying over same, and on its enclosed right of way, and that, by reason thereof, plaintiff's horses did stray from the public highway over same, and onto the enclosed right of way of defendant, and were there struck by one of defendant's engines and trains, then the law, in this case, is for the plaintiff, and you will find for him damages for killing the horse sued

for, not exceeding \$175.00, and damages for the mare sued for, not exceeding \$135.00, and damages for the mule sued for, not exceeding \$60.00, and, in all, not exceeding \$370.00. But, unless you shall so believe, from the evidence in this case, then the law is for the defendant, and you will so find.

"2. The term 'ordinary care,' as used in instruction No. 1, herein, means such care as ordinarily careful and prudent persons are accustomed to use in their own affairs, and when engaged in a like business, and under like or similar circumstances of this case, and 'negligence' means the failure to exercise such care."

The point is further made that the court erred in discharging two of the jurors, on motion of the plaintiff below, after the jury had been accepted, and while counsel for defendant was stating the case. The record does not disclose why the trial judge took this action, nor does it appear that the rights of appellant were in any wise prejudiced by it. In the absence of any showing to the contrary, we must assume that the trial judge had sufficient reasons for his ruling. At any rate, there is nothing in the record to indicate that appellant was prejudiced by the ruling, and we are not disposed to assume that it was.

Wherefore, the judgment of the lower court is affirmed.

SCOTT v. O'BRIEN.

(Filed May 12, 1908—To be reported.)

1. Husband and Wife—Alienating the Affections of a Husband—Abandonment by Husband—Proof of Enticement—To support an action for alienating a husband's or wife's affections, it must be established that the defendant is the enticer. Mere proof of abandonment, and that the husband or wife maintains improper relations with the defendant, is not sufficient.

2. Action by Wife—Proof Required—Intentional Conduct of Defendant—Rebuttal Evidence—In an action by a wife against another woman, for alienating the affections of her husband, it is necessary for the plaintiff not only to show alienation of her husband's affections, but that such alienation was due to the intentional conduct of the defendant, and the defendant could introduce any evidence that would tend to rebut either of these facts.

3. Same—General Denial—Evidence Admissible—On the trial of an action for the alienation of a husband's affections, it was competent for the defendant to prove that the husband sought her, and made love to her, and that she endeavored to get rid of him and have him return to his wife, and that he really sought her for the purpose of getting her money, and not because of any affection for her, and his letters to, and conversations with, her, as well as her financial condition, and the money she had given him by reason of his threats, and all this evidence was admissible under a general denial by the defendant.

Sims, DuBose & Rodes, for appellant.

Proctor & Herdman, Watkins & Birkhead and L. P. Tanner for appellee.

Appeal from Warren Circuit Court.

Opinion of the court by Wm. Rogers Clay, Commissioner, reversing.

Appellee, Virgin O'Brien, instituted this action against Florence Scott, to recover damages for the alienation by the latter of her

husband's affections, and for the loss of his society and support, resulting therefrom. The petition charges that the defendant, by various "acts, devices, blandishments and seductions, alienated the love and affections of plaintiff's husband, and destroyed the happiness of her home." Appellant's defense was a general denial. Upon trial of the case, the jury awarded appellee damages in the sum of \$5,500.00. Defendant's motion and grounds for a new trial were overruled, and she appeals.

The principal grounds relied upon for reversal are, (1) the exclusion of relevant and competent testimony offered by appellant, and, (2) errors in giving and refusing instructions.

From the evidence in the case, it appears that the appellant's husband, Brownie Scott, died in September, 1905. At that time she had two little girls, four and nine years of age, respectively. Scott left to appellant and his two children insurance amounting to about \$4,000.00. With this money she paid some \$500.00 of his indebtedness, and bought the home where she lived at the time of the trial, paying therefor the sum of \$1,400.00. At the time of Brownie Scott's death, he lived adjoining his tobacco factory, in Bowling Green, Kentucky. Appellee's husband was then in his employ. Some little time after Scott's death, O'Brien, the husband of appellee, began to pay attentions to the appellant. She was frequently seen at the factory where he was still employed, although she claims that she went there for the purpose of getting mail, which she had been accustomed to do prior to her husband's death. Appellant was also frequently seen out riding with O'Brien, and she wrote at least one letter to O'Brien, which is couched in endearing terms.

The theory of appellant's defense was, that appellee's husband voluntarily left his wife, and sought appellant, without any intentional or wrongful acts on her part; that his real purpose in seeking her society was to obtain the insurance money which her husband had left her; that she protested against his attentions and advised him to return to his wife; that he resorted to all sorts of threats and attempts to over-awe her; that he carried a pistol upon his person, and would make violent protestations of love for her, and threaten to kill himself and her. With the view of presenting this defense, appellant offered to introduce letters which she received from O'Brien, and to testify to his acts, conduct and conversations with her, as well as her conversations with him, upon occasions prior to the time he abandoned his wife. She also offered to testify to the amount of money she had, and to the amount which she, by reason of O'Brien's threats and persuasions, had given to him. The trial court excluded all such testimony, and proper avowals were made by appellant. Counsel for appellant contend that this testimony was properly admissible, under a general denial, or, if not admissible under the pleadings in that form, the trial court should have permitted appellant to file the amendment which was offered immediately after the ruling of the court excluding the testimony.

For the purpose of determining the question involved, we shall consider (1) whether such evidence is admissible or not, under the circumstances, and, (2) whether it is admissible under a general denial.

The ruling of the trial court seems to have been based upon the case of *Hart v. Knapp*, 76 Conn., 135. That was an action for criminal conversation, and not an action for alienation of affections. In an action for criminal conversation, adultery must be shown. In that case, the court held that it was no defense that the husband was the active and aggressive party, and that the defendant listened to his persuasions, and lived in adulterous intercourse with him. It is manifest that that case is somewhat different from the one under

consideration. Here no adultery is shown. There the action was based on adultery, and the court held that it was no defense to show that the husband was a seducer. The mere fact that the defendant lived in adultery with plaintiff's husband showed, to some extent, at least, wrongful and intentional conduct on her part. But, whatever may have been the reason for reaching the conclusion at which the court arrived in that case, we are of opinion that the view therein expressed is contrary to the weight of authority. The general rule is, that there is no ground for an action where a spouse voluntarily gives his or her affections to another, the latter doing nothing wrongfully to win such affections. To support an action for alienating a husband's or wife's affections, it must be established that the defendant is the enticer. Mere proof of abandonment, and that the husband or wife maintains improper relations with the defendant, is not sufficient. (21 Cyc., 1621; Buchanan v. Foster, 23 N. Y., App. Div., 542; Churchill v. Lewis, 17 Abb. N. Cas., N. Y., 226; Warner v. Miller, Id., 221.) In the Am. & Eng. Ency. of Law, volume 15, page 865, the rule is thus stated:

"In order to sustain an action for the alienation of the husband's affections, it must appear, in addition to the fact that alienation or the fact of the husband's infatuation for the defendant, that there had been a direct interference on the defendant's part, sufficient to satisfy the jury that the alienation was caused by the defendant, and the burden of proof is on the plaintiff, to show such interference."

Again, on page 866, it is said:

"But to maintain this action, it must be established that the husband was induced to abandon the wife by some active interference on the part of the defendant."

In the third volume of Elliott on Evidence, section 1643, it is said:

"To entitle the plaintiff to recover, in an action for alienating affections, the burden of proof is upon the plaintiff, and the plaintiff must show that there was a direct interference upon the part of the defendant, that not only was there infatuation of the husband or wife for the defendant, but that the defendant, by wrongful act, was the cause of it."

In the case of Waldron v. Waldron, 45 Federal Reporter, 315, the court, in an elaborate discussion of the question, said:

"Defendant should not be held to answer on damages because plaintiff's husband left her, though without good cause, and afterwards fell in love with, and finally married, defendant. If the husband alienated his own affections from his wife, or, if alienated by the plaintiff's own conduct, or both, without the interference of defendant, or if they were alienated by any other cause, known or unknown, over which defendant had no control, or exercised no intentional direction or influence, then the plaintiff, howsoever unfortunate or wronged, can not recover damages from the defendant."

We, therefore, conclude that, by the weight of authority, it was proper for appellant to show that the alienation of O'Brien's affections from appellee was a voluntary act of O'Brien's, and was not due to any wrongful or intentional act on the part of appellant.

The next question is, whether or not such evidence is admissible under a general denial. Manifestly, appellant was confined to two defenses; either to deny the allegations of the petition, or to set forth new matter, avoiding the facts therein contained; but the latter is, in effect, simply a confession and avoidance. We do not think appellant should be compelled to confess the fact that appellee's husband had transferred his affections to her, and seek to avoid the effect of such confession by showing that the alienation was due to his voluntary act. We think she should be entitled to place in issue both the fact of alienation and the cause thereof. For appellee to

recover, it was necessary not only to show alienation of her husband's affections, but that such alienation was due to the intentional conduct of appellant. These were, then, the two facts in issue. Appellant could introduce any evidence that would tend to rebut either one of these facts, and such evidence would be relevant to the issue. We, therefore, conclude that the evidence of appellant's defense was properly admissible under a general denial.

It appears that the court excluded evidence of conversations between appellant and appellee's husband, prior to the time of the abandonment, wherein appellant sought to show that appellee's husband first sought her, and made love to her, and was, himself, a seducer; that she endeavored to get him to leave her alone and return to his wife and children; and that he really sought her for the purpose of getting her money, and not because of any affection for her. All this evidence was excluded by the court, upon the idea that it consisted of self-serving declarations, and occurred at a time when appellee was not present. In the case of *Bailey v. Bailey*, decided by the Supreme Court of Iowa, and reported in 63 N. W., 341, the very question before us was under discussion. In that case, the wife had brought an action against the parent of her husband for alienation of her husband's affections. The defendant offered to show that, instead of alienating the affections of her husband, he had tried to get him to live with his wife, and had offered him inducements to do so; that he had offered to give the husband a farm if he would take his wife there and live with her, and that the husband responded that he did not love her, and would not live with her on the farm, or anywhere else. The court said:

"The court sustained objections to the proffered testimony, on the ground that it called for self-serving declarations, made at a time when plaintiff was not present. He did admit testimony as to what was done by defendant towards providing a home for plaintiff and her husband, but held that offers of the use of a farm made to the husband by defendant, and the husband's reply thereto, giving the reason why he would not accept them, were not admissible. In this, we think he was in error. The fact that the statements were not made in the presence of plaintiff was wholly immaterial, for they were not offered as bearing upon her knowledge of defendant's treatment of his son. The purpose of the testimony was to show that defendant had, as a matter of fact, tried to induce his son to do the very thing the plaintiff was insisting upon, and to show the condition of her husband's mind and the state of his affections towards her. Such testimony would have a tendency to negative the idea that defendant was trying to induce his son to abandon the plaintiff. It was substantive testimony of verbal acts tending to show that he was trying to induce his son to live with plaintiff, and that the son's refusal to do so was not brought about by his conduct. The expression of the son, made long before the commencement of the suit, that he would not live with the plaintiff on the land offered by defendant, or anywhere else, was certainly competent as bearing upon his feelings towards her. The court permitted defendant to show what he did to induce his son to live with plaintiff. What he said to accomplish the same purpose was a part of the *res gestae*, and was, it seems to us, equally admissible."

We think the evidence offered by appellant was within the rule above laid down; it was a part of the *res gestae*. The question was: Did the appellant, by her intentional conduct, alienate the affection of appellee's husband, or did the husband voluntarily leave his wife, or transfer his affections to appellant, or seek appellant, not because he loved her, but for the purpose of obtaining her money? The real facts in issue can only be determined from the acts and conduct of ap-

pellant and appellee's husband, and from the conversations and communications which passed between them. The only way the jury could properly determine the issue involved was to have all these facts properly before them. It is true, the admission of such testimony may give opportunity for perjury; but the fact that a witness might lie in reference to matters about which he has a right to testify, is not a good reason for excluding such testimony. The jury, who are the judge of the weight to be given the testimony, will consider such alleged conversations in the light of appellant's conduct, as shown by other witnesses, and in the light of all the circumstances of the case, and they will be able to determine what credit should be given to such evidence.

For the reasons given, we also think that the testimony to the effect that appellee's husband remarked, shortly after the death of appellant's husband, "that the little widow with her money would be a good catch," as well as his conversations and letters showing constant demands on his part for money, were admissible. Such evidence tends to show his motive and purpose in seeking the companionship of appellant, and goes to rebut the idea that she was the enticer.

We further think it was competent for appellant to prove, in this case, her financial condition; not, however, for the purpose of increasing or diminishing the amount of damages, but for the sole purpose of showing the motive of appellee's husband in seeking appellant's society. In admitting such testimony, the court will admonish the jury accordingly.

It will be unnecessary to set out in full the instructions given by the court. Suffice it to say, that they do not properly present appellant's defense. Upon the next trial, the court will instruct the jury as follows:

"No. 1. If you believe, from the evidence, that the defendant, Florence Scott, by her acts, wiles or blandishments, intentionally alienated or took away from plaintiff her husband's affections, you will find for plaintiff, and award her such damages as you believe will fairly compensate her for the injury, if any, resulting to her feelings, for the loss of her husband's comfort and society, if there was such loss, and for loss of her husband's support, if there was such loss, except to the extent that he has contributed, or may, by law, be compelled to contribute, to her support, not exceeding the sum of \$10,000.00, the amount asked for. Unless you so believe, you will find for the defendant.

"No. 2. If you believe that the defendant alienated from plaintiff her husband's affections, in the manner set forth in instruction No. 1, and further believe that defendant's conduct in causing such alienation was wanton and malicious towards, and with the design to humiliate plaintiff, then, in addition to compensatory damages, you may, in your discretion, award plaintiff punitive damages, not exceeding, in all, however, the sum of \$10,000.00.

"No. 3. Although you may believe, from the evidence, that plaintiff's husband transferred his affections from plaintiff to defendant, yet, if you further believe plaintiff's husband alienated his own affections from plaintiff, without any intentional misconduct on the part of defendant, or that such alienation was occasioned by some other cause, over which defendant had no control, or exercised no intentional direction or influence, then you will find for the defendant."

Judgment reversed and cause remanded, with directions for a new trial, consistent with this opinion.

COLEMAN v. GRIMES, &c.

(Filed May 12, 1908—Not to be reported.)

1. Wills—Devise of Fund to a Daughter—As a Home for Herself and Family—Sale for Re-investment—Restrictions—Construction—A testator, by his will, devised to his daughter a house and lot of the estimated value of \$4,000, "as a home for herself and family, as long as she lives, free from the control of her husband, to have no power to encumber or sell same, except for re-investment, and, if sold, the proceeds to be re-invested in other property, suitable for a home for herself and family, and to be used for that purpose." She exchanged this home for a farm, which she subsequently sold for \$6,250, which the purchaser declined to pay, on the ground that she could not convey him a good title thereto. Held—That the word "family," in this will, includes children, and that the testator, in using the word "family," intended it to embrace not only his daughter, but her children, as well as her husband, and that the fund, when invested in a home, should be preserved in a home as long as his daughter lived.

2. Same—Exchange for Farm—Sale of Farm—Increased Price—Separation from Principal—Fund in Court—It does not follow, from the fact that, as only \$4,000 was set apart by the will for a home, that any increase in this fund might be used for other purposes. The increase can not be separated from the principal, and the entire fund, \$6,250, should be paid into the court by the purchaser of the farm, and retained until the devisee selects a home in which to invest it, subject to the approval of the chancellor.

E. H. Gaither for appellant.

J. F. Vanarsdall for guardian ad litem.

Appeal from Mercer Circuit Court.

Opinion of the court by Judge Carroll, reversing.

The fourth clause in the will of J. W. Taylor reads as follows:

"I direct that the house and lot, on which I now reside, at the corner of Second and Main streets, in Shelbyville, Kentucky, in the division of my property, be allotted to my daughter, Mattie L. Harbeson; same to be appraised by three disinterested persons, to be selected by my two daughters, and allotted and charged to my said daughter, at the amount fixed by said appraisers, but, in no event, to be appraised at more than \$4,000.00; nor is she to be charged with more than \$4,000.00 for same. She is to have and to hold same as her separate estate, free from the debts and control of her husband, or any husband she may have. She is to have no power to encumber same, nor to sell same, except she might sell same for the purpose of re-investment; and, if sold, the proceeds shall be re-invested in other property, suitable for a home for herself and family, and to be used for that purpose—my purpose being to provide a home for my daughter and family as long as she lives.

"I direct that a sum equal to the amount at which said house and lot is appraised, not exceeding \$4,000.00, be invested by my executor in a home for my daughter, Carrie D. Coleman, to be held in the same manner, and for the same purpose, and under the same terms and limitations, as provided about the house and lot devised to my daughter, Mattie L. Harbeson.

"My executor is to permit Mrs. Coleman to select the property she desires to be purchased, and is to make said investment and pay for same as soon as he can, without a sacrifice of my estate."

The money received by Mrs. Coleman, under this will, was invested in a house and lot in Harrodsburg, Kentucky; and, in 1897, she exchanged this property for a tract of land containing fifty acres, situated in Mercer county, Ky. Desiring to sell the land to a purchaser who was willing to pay for it \$6,250.00, provided he could be invested with a good title—the real purpose of this suit is to obtain a construction of the clause in the will mentioned, to ascertain whether or not Mrs. Coleman can sell the property, and herself invest the proceeds, without the purchaser being required to look to a re-investment, or without the sanction of the court, as to the property in which the re-investment shall be made.

To the petition her three infant children were made parties, and, by their guardian ad litem, filed an answer, in which he asked, on behalf of the children, that the proceeds of the property, to the extent of \$4,000.00, be invested under order of court, consenting, in so far as he could, that the excess over \$4,000 be paid to Mrs. Coleman, to do with as she pleased. The theory of the guardian ad litem being that it was only contemplated by the testator that \$4,000.00 be kept invested in a home, and that anything in excess of this sum that might be realized from the investment, became the absolute estate of Mrs. Coleman, to dispose of as she pleased.

Upon the pleadings and exhibits, the court adjudged that \$4,000 of the purchase price of the farm be re-invested in a home for Mrs. Coleman and her children, but that the remainder of the fund arising from the sale should be paid to her as her individual property, to do with as she pleased.

The purchaser was further directed to pay into court the sum of \$4,000.00, to be held for re-investment. To so much of this judgment as directed the re-investment of the \$4,000.00, Mrs. Coleman excepted, and prosecutes this appeal.

It will be observed that the \$4,000.00 given to Mrs. Coleman by the testator was to be "held in the same manner, and for the same purpose, and under the same terms and limitations, as provided about the house and lot devised to my daughter, Mattie L. Harbeson." That is to say, she was "to have and hold the same as her separate estate, free from the debts of her husband, or any husband she might have. She is to have no power to encumber same, nor to sell same, except she might sell same for the purpose of re-investment; and, if sold, the proceeds shall be re-invested in other property, suitable for a home for herself and family, and to be used for that purpose—my purpose being to provide a home for my daughter and her family as long as she lives."

The will does not provide, in terms, the manner or by whom the re-investment is to be made; nor direct that any other person than Mrs. Coleman is to have anything to do with the re-investment of the proceeds. Although the testator directed that the proceeds should be invested in other property, suitable for a home for herself and family, it seems that he intended to leave to her discretion and good judgment the character of the real property in which the investment should be made. The children of Mrs. Coleman are not expressly mentioned in the will, although she had at least one child living at the time the will was made, and when the testator died. And it was manifestly the purpose of the testator that the bequest under consideration should be invested in a home for her and her children. The word "family," in this will, includes children—it is a word of comprehensive and varied signification, depending upon the intention with which it is used. And, when it is considered that Mrs. Coleman, at the time the will was written, had children, it is clear that, in using the word "family," the testator intended it to embrace not only Mrs. Coleman, but her children, as well as her husband, and that the fund, when invested in a home, should be preserved in a

home as long as Mrs. Coleman lived. (Norwegian Old People's Home vs. Wilson, 176 Ill., 94; Crosgrove v. Crosgrove, 69 Conn., 416; Whelan v. Reilley, 3 W. Va., 597.) Her children have an interest in this fund, to the extent that with it they were, and are, to be provided with a home, so long as they are members of the family. In our opinion, Mrs. Coleman is not authorized to take this fund, or any material part of it, and apply it to any other purpose than the one mentioned in the will, under which it was received, and that the court should control its investment, or, if the proceeds are paid to Mrs. Coleman, she should execute in court a bond, with sufficient surety to secure the investment of this fund in a home.

This construction of the will is supported by the provisions of the fifth clause, in which the testator directs that "the remainder of my estate, real and personal, after providing for the devisees before mentioned, shall be equally divided between my two daughters, Mattie L. Harbeson and Carrie D. Coleman." Whatever they received, under this clause, was not charged with any trust, or encumbered by any restrictions. They have the right to do with it as they please. Thus further illustrating the fact that the testator had it in his mind that, after his daughters and their children were provided with a home, they might do as they pleased with the remainder that he gave them.

Nor do we concur in the view that the testator only intended to secure for investment in a home the sum of \$4,000.00. We do not find in the will any expression to support this conclusion. It does not follow, from the fact that, as only \$4,000.00 was set apart for a home, that any increase in this fund might be used for other purposes. The increase can not be separated from the principal of the fund. If, by judicious investment, the property in which the fund is invested enhances in value, the increase attaches to and becomes a part of the principal fund, subject to the trust under which it is held. (First National Bank of Carlisle v. Lee, 23 Ky. Law Rep., 1897.)

If Mrs. Coleman desires to execute a bond, she may retain possession of the money derived from the sale of this land until such time as she finds a home suitable in which to invest it. If she does not execute the bond, then the entire purchase price should be paid into court, and retained until Mrs. Coleman selects a home in which to invest it. It may be that Mrs. Coleman can not find property in which to invest the exact sum received from the sale of the farm, but the property should represent, as nearly as practicable, the full amount of the sum received by her from the sale of the property in which this trust fund is now invested. And this action should be either kept on the docket, or filed away, with leave to re-docket at any time, so that the chancellor may approve the investment made by Mrs. Coleman, whether the money is paid to her upon the execution of a bond, or retained by the court.

Wherefore, the judgment of the lower court is reversed, with directions to proceed in conformity with this opinion.

DAVIESS COUNTY BANK & TRUST COMPANY v. WRIGHT, &c.

(Filed May 12, 1908—To be reported.)

1. Principal and Surety—Release of Surety on Note—Contract Between Principal and Creditor—In order that a surety on a note be released, there must be an enforceable contract between the principal and the creditor, by which the creditor would be prevented from suing on the note when due, and, for that reason, the surety be prevented from paying off the debt that day, and thereupon subrogated to the creditors' rights, by suing or taking other steps to save himself from loss.

2. Same—Indulgence by Principal—Assent of Creditor—Ignorance of Surety—Mere indulgence of the principal in a note by his creditor does not operate to discharge the surety thereon, even though it be expressly assented to by the creditor, at the instance of the principal of which the surety is ignorant, even if the principal has, during such indulgence, become a bankrupt.

3. Same—Novation—Making New Contract—Definite Extension of Time to Principal—Consideration—A novation is the making of a new contract. Its elements are essentially the same as in the first contract, which are (1) parties, (2) a meeting of their minds, and, (3) a consideration. Hence, the further indulgence by a principal in a note of the creditor, if the surety is to be released thereby, must be upon an agreement for an extension for a definite time, and this agreement must be based upon a new consideration.

4. Same—Acts of Personal Representative—Authority of Court—It is not competent for a personal representative of an estate, without the authority of a court of competent jurisdiction, to enter into a contract with a debtor to the estate, by which the jurisdiction of the court may be ousted, or the statutory rights of other litigants or claimants be changed or postponed.

Hayes & Johnson for appellant.

Geo. W. Jolly for W. S. Hawes.

LeVega Clements for Mrs. Wright.

Wilfred Carrico for Hawes & Thompson.

Appeal from Daviess Circuit Court.

Opinion of the court by Chief Justice O'Rear, reversing.

Malcolm Thompson borrowed \$2,500 from the appellant bank on February 12, 1903, on which date he executed to it a note signed by appellee, Mary C. Wright, as surety, in which she pledged, as collateral, a certain real estate note belonging to her. The note was due twelve months after date, but was not then paid, the principal having died September, 1903, without having paid it.

About a month after the execution of the above named note, appellees, Hawes & Thompson, to indemnify Mrs. Wright in her suretyship for Malcolm Thompson, executed to her this obligation:

"Owensboro, Ky., 12 Feb., 1903.

"Mrs. Mary C. Wright has this day signed a note with Malcolm Thompson to the Daviess County Bank & Trust Company, for \$2,500; due 12 months after date, and as collateral to said note, she has placed with said bank 10 real estate notes for \$500 each, and one note for \$300, given by G. W. Bell and L. G. Bell, bearing 6 per cent. interest, payable annually, being the unpaid deferred payments for land sold said G. W. Bell and L. G. Bell by Mrs. Mary C. Wright. Part of the money received on the note to Daviess County Bank and Trust Company (\$2,000) was paid on account of purchase of land by Malcolm Thompson for Jeff Howard, the deed to said land being made to Malcolm Thompson, and the balance of said note, except the discount retained by the bank, Malcolm Thompson keeps for use in improvements, &c., on said land. We hereby agree to hold Mrs. Mary C. Wright harmless for signing said \$2,500 note for Malcolm Thompson, and also to pay the \$2,500 indebtedness, with all interest and costs, and return the said 11 land notes to her at the maturity of the note.

(Signed) "MALCOLM THOMPSON,

"W. S. HAWES.

"J. L. THOMPSON."

In January, 1894, the administrator of Malcolm Thompson's estate brought this suit in equity in the Daviess Circuit Court, to settle the estate of his intestate, procuring an injunction against creditors' suing the estate in any other action, and an order requiring them to produce and file their claims against his intestate's estate in that action. Malcolm Thompson's estate was apparently not equal to its indebtedness, and there was paid on the note first named only \$1,448.13, in the distribution of the assets.

While the suit to settle the estate was pending, and on September 30, 1904, the administrator of Malcolm Thompson paid to appellant bank, at the latter's solicitation, \$150. It is claimed by appellees that this payment was for one year's interest on the note, from February 12, 1904, and operated by law to extend the time of payment of the principal till February 12, 1905; and that, therefore, Mrs. Wright and her collateral pledged to secure the note were released from further liability to the bank.

Upon the facts and the law of the case, the circuit court sustained Mrs. Wright's contention, and adjudged that she was not liable, and that her collateral was released from liability to the bank.

Mrs. Wright was a married woman when she executed the note. She was not, therefore, personally bound upon it. She brought this suit to have her collateral adjudged released from its obligation. She pleaded and relied on her coverture in bar of her personal liability. But she did not aver that the notes pledged as collateral were her general estate, or not her separate estate. She did say she was the owner of the notes, which had been executed to her as part consideration for the conveyance to their obligor of a tract of land which she had owned. Construing her petition as it must be, most strongly against her (as she would presumably have pleaded the existence of any other facts concerning the nature of her estate in the matter that would have released her collateral, could she have truthfully done so), we assume either that the notes were her separate property, and, therefore, within her sole power to pledge to secure the debt of another, notwithstanding her coverture (*Bullock v. Commonwealth*, 96 Ky., 537), or, if her general estate, that her husband assented to their being so pledged. In the latter event, as we apprehend that, at common law, the so-called protection of the feme covert from liability on her executory contracts so as to relieve her general estate, pledged to secure their execution, was, in reality, out of consideration of the husband's marital rights, he assenting to the pledge, she will not be heard to complain, as he would have had the right, without her consent, to have reduced it to his possession and so applied it. Hence, we conclude that the question of the liability of the collateral is to be determined without reference to Mrs. Wright's coverture, but as any other collateral, put up to secure the debt by any other person as surety. For we think that, as the collateral is to be treated as security, it will be released under the same circumstances that a surety personally bound would have been released. (*Brandt on Suretyship*, 2d edition, section 34; *Price v. Dime Savings Bank*, 124 Ill., 317; 7 Am. St. Rep., 367; *Wirgman v. Miller*, 98 Ky., 620; *N. Y. Life Ins. Co. v. Miller*, 27 Ky. Law Rep., 230.) It will be conceded that, ordinarily, any extension of time by the obligee, based upon a consideration, will operate to discharge a surety not assenting thereto, and, by a parity of reasoning, will release collateral of a surety or of a third person pledged to secure the debt.

But, in order that a surety may be released, there must be an enforceable contract between the principal and the creditor, by which the latter would be prevented from suing on the debt when due, and for that reason, the surety be prevented from paying off the debt that day, and thereupon subrogated to the creditor's right to sue or take

other steps to save himself from loss. The whole doctrine is necessarily based upon the idea that the surety has been prejudiced in some substantial right which he had, as otherwise there would be no sense in releasing him because of such an act. It is true, the law will presume that he has been prejudiced by such extension, and will conclusively presume the fact, if the surety could, but for such extension, have paid off (that is, had the right to pay off) the principal obligation, and have sued and recovered judgment against the principal debtor upon it. In no case does mere indulgence of the principal by the creditor operate to discharge the surety, even though it be expressly assented to by the creditor, at the instance of the principal, of which the surety is ignorant. Nor even if the principal has, during such indulgence, become bankrupt. Much less does the simple agreement of the debtor to indulge the principal, even for a definite time, work a release of the surety. Though it is sometimes stated that the payment of interest in advance to the creditor by the principal operates to discharge the surety, we apprehend that, even in such cases, the rule is really rested upon the contract, implied, if not expressed, that the principal shall have a definite further time within which to pay the debt. The whole question always comes back to this: Was there a valid contract of extension? If there was, then the creditor could not, in violation of it, take any action to sue to collect the debt before the expiration of the time fixed in the last contract; and, as he could not do so, the surety could not derive such right from him by paying off the debt. The right of the surety to pay off the debt when it is due, thereby lessening it by the amount of interest that a further extension would entail, is an incident of his contract of suretyship. If it is changed without his assent, there is a novation, so to speak; and if he should be held in spite of his not agreeing to be so bound, it would end that he had a contract made for him, which he did not make, and probably would not have made. A novation is the making of a new contract. Its elements are essentially the same as in the first contract; which are, (1) parties, (2) a meeting of the minds, and, (3) a consideration. Hence, the further indulgence of the principal, if the surety is to be released thereby, must be upon an agreement for such extension for a definite time (as if it were not definite, then the creditor might immediately enforce payment of the debt, and if he might, the surety could pay and be as fully protected as if the agreement had not been made); and this agreement must be based upon a new consideration, as, without a consideration, the agreement would be unenforceable as against the creditor. (Robinson v. Miller, 2 Bush, 179.) This much has been said that a proper application of the particular facts of this case, bearing upon the payment of \$150 as interest, may be made.

In September, 1904, the note was past due—what the bank termed suspended paper. The bank was anxious that it be made to appear at least that it was not overdue, in order that it might not be required to charge it off to profit and loss by action of the public authorities charged with periodical examinations of the bank. The administrator was applied to, and the situation explained to him. He agreed to pay, and did pay, \$150 upon the note. There was nothing said between the administrator and the bank official conducting the transaction, as to any definite time when the remainder was to be paid. They each knew that the principal was dead, and that no other action could be taken before February 12, 1905, by either the bank or the surety, to collect the note from the estate of the principal. It was discussed that the estate would, as soon as it could, pay off the balance, or as much as it might be able to pay. The bank

official, however, in crediting the \$150, using a rubber stencil, and filling out with pen and ink, made this endorsement on the note:

"Extended 360 days, to Feb. 6, 1905.

"Interest \$150, paid Sept. 30, 1904."

It is argued for appellee that this is conclusive that interest was collected in advance from the principal, in consideration of which further indulgence was granted to him for a definite time, without the consent of the surety. Were this endorsement all the evidence on this point, we would have no hesitation in holding that the fact was as claimed. But this endorsement stands no higher as evidence than any other written memorial. It is impeached as being the result of mistake. Certainly there is no evidence (other than the endorsement) that the contracting parties had so agreed; and they, in their testimony, concur that such was not the agreement, nor is it sound that the mere payment of \$150, as interest, on September 30th, 1904, operated ipso facto to discharge accrued interest at 6 per cent., from February 12, 1904 (the day the note was due) and the remainder of the \$150 then operated to extend the time of payment for such additional period as, at 6 per cent. per annum interest, it would buy. If the payment of \$150 interest only were shown, it would still be open to explanation whether it was a usurious rate for the past indulged, but such inference is a matter of evidence, and not a presumption of law. We think the fact was established that there was no agreement to extend for a definite time; that the endorsement was by the mistake of the bank official, whose real aim was not to extend the time, but to create an appearance contrary to the actual transaction, and for a purpose wholly beside this case. Without pausing to reflect upon the nature of his motive, it is sufficient, we think, that it had no bearing upon the alleged agreement, and as the question is, was there a meeting of the minds of the parties as indicated by the endorsement, we must find that there was not.

But we deem the more important and controlling question in the case to be, had the administrator power to bind the estate by an agreement for extension? Obviously if there was no such agreement, the question could not arise. While we are strongly inclined, as argued above, to hold that there was not an agreement, we are not quite willing to rest there.

Administrators, and executors, too, for that matter, are officers of the court, appointed to settle decedents' estates. In this State administrators have not the authority to enter into contracts on its behalf, in the absence of an order of a court of competent jurisdiction, or, where they act under a will, or something in that instrument empowering them to do so, except by statute in certain rare instances not here involved.

Schouler in his article on Executors and Administrators, 18 Cyc., 881, thus states the prevailing rule:

"Contracts of executors and administrators, although made in the interest and for the benefit of the estate they represent, if made upon a new and independent consideration moving between their promisee and themselves, are their personal contracts, which do not bind the estate, and they must be sued on these contracts in their individual and not in their representative capacity."

This court has, in line with the rule of law just quoted, held that an administrator had not the power to bind his intestate's estate by charging and receiving usurious interest on its behalf against its creditor (*Heasley v. Dunn*, 5 B. Mon., 145); not to discharge a debtor of the estate by compromise, except as allowed expressly by statute (*Pullins' Administrator v. Smith*, 103 Ky., 418; 50 S. W., 833; 20 Ky. Law Rep., 1992); nor to release the surety upon a note owing the estate, even upon a consideration that might have supported

such an agreement as between others competent to contract about the matter. (*Bitteler v. Bitteler's Administrator*, 13 Ky. Law Rep., 368.) And in *Rice v. Strange*, 72 S. W., 756, it was held that an executor had not the power to borrow money on behalf of the estate (there being nothing in the will authorizing it), even though the estate may have been benefited thereby. An agreement to extend the time of payment of a debt owing by the estate is in a sense incurring additional liability against it. The statutes allow a suit at any time by the personal representative or any creditor or heir at law to settle the estate, and to distribute its assets. Upon the filing of such a suit, the chancellor directs the administration henceforward. It is not competent, then, for the personal representative, unauthorized by the court to enter into contracts by which its jurisdiction and control in the matter might be ousted, and the statutory rights of other litigants or claimants be changed or postponed. As the administrator was without power in this case to enter into the alleged contract extending the maturity of the note, the agreement would have been void. Hence the surety, notwithstanding it was entered into as claimed, might have disregarded it and paid off the debt at any moment.

There is a further question whether in any event the surety was prejudiced by the so-called agreement, had it been a valid one, but it is not now necessary to pass upon that point.

The indemnitors, Hawes and Thompson, were never bound upon their contract, if it was not executed coincidentally with the principal obligation, as it is not claimed that there was other consideration for it. For, if Mrs. Wright had already become bound (or her notes pledged, which is the same in principle) upon Malcolm Thompson's debt to the bank, when the agreement of indemnity was entered into, then she undertook nothing additional, parted with nothing, being moved thereto by the understanding of Hawes and Thompson. Their agreement must have a consideration of its own to support it. There is none in this case, unless it was contemporaneous with Mrs. Wright's pledging her notes, and her agreement to do so was based in part at least, upon that fact. Whether it was executed when or after Mrs. Wright become bound was not decided by the circuit court. That question will be for decision upon the return of the case. The whole purport of that agreement of indemnity was to indemnify Mrs. Wright, not to otherwise pay the debt.

For the reasons indicated, the judgment is reversed and cause remanded, for proceedings consistent herewith.

L. & N. R. R. CO., &c. v. ONAN'S ADM'R.

(Filed May 13, 1908—Not to be reported.)

1. Railroads—Crossings—Instructions—In this action to recover of appellant for the death of appellee's intestate which occurred at a crossing, so much of an instruction based on the idea that the crossing was unusually dangerous should not have been given. This instruction would have been proper, had the crossing been exceptionally dangerous, but it was only an ordinary country crossing.

2. Same—An instruction was also erroneous which told the jury that it was the duty of the railroad company to keep its crossings and approaches in "good repair" so as not to unreasonably interfere with travelers, &c., when the instruction should have directed that the crossing be kept in such repair as is reasonably safe for public travel.

3. Same—The proof showing that deceased was not seen until he came on the track about 100 yards ahead of the train, at which time it could not be stopped before it reached him, it was error to instruct the jury to find for plaintiff if the servants in charge of the train saw deceased, or could have seen him by the use of ordinary care in time to avoid injuring him.

Ira Julian and Shelby & Shelby for appellants.

J. H. Polsgrove and B. G. Williams for appellee.

Appeal from Franklin Circuit Court.

Opinion of the court by Judge Hobson, reversing.

About six miles west of Frankfort, and some distance east of Hatton station, the track of the L. & N. Railroad Co. crosses a turnpike road. On Sept. 16, 1906, about ten o'clock in the morning, as the eastbound C. & O. train was approaching this crossing, O'Bannon Onan drove upon the crossing in a top buggy. For some reason, the horse stopped or backed upon the crossing and the train ran into the vehicle, killing Onan. This suit was filed against the two railroad companies, by his administrator, to recover for his death, on the ground that proper notice was not given of the approach of the train and that, by negligence of the railroad company, the crossing was out of order, and that this caused the balking of the horse and brought about the accident. The jury found for the plaintiff in the sum of \$5,000, and the defendants appeal.

The plaintiff introduced proof, showing that no signal was given of the approach of the train until the alarm whistle was blown just before it struck the vehicle. The train was a heavy passenger train, pulled by two engines, running rapidly down grade. Onan approached the crossing from the north side. The front wheels of the buggy were on the track when struck by the train. The horse was knocked to the south side of the track and the buggy to the north side. The railroad crosses the turnpike at an acute angle, and as Onan approached the track, he was facing the direction in which the train came. There was proof by the plaintiff to the effect that some bushes obstructed his view more or less; also that it was obstructed by the fence at the cattle guard, and by some telegraph poles along the line of the railroad track. There was also proof showing that the crossing was in a rough condition; that the turnpike crosses the railroad on a considerable grade, and that the road was rough, and on the south side of the track and a short distance from it, there was a bank across the road from six to twelve inches high. The proof for the defendant was to the effect that the statutory signals of the approach of the train were given; that the crossing was in a fair condition; that as Onan approached the crossing when he was fifty feet from the track and until he reached it, he had a clear view of the approaching train for 1,150 feet down the track. The defendant also showed that the bank referred to was a row made to turn the water off the pike, and was no more than was common on such pikes for that purpose. Onan was not killed instantly by the collision. The defendant showed by four witnesses, that Onan was asked if he saw the train coming, and that he answered that he saw the train and thought he could get across; that he, in fact, did get across, but his horse stopped and backed him on the track; that he heard the train coming, and heard the whistle before he got on the track, and that he would not have been hurt but for his horse stopping. On the other hand, the plaintiff proved by other witnesses that Onan was suffering greatly when they got to him, and these witnesses gave a different version of what he said.

By the first instruction, which the court gave the jury, he told them among other things, that if the crossing was unusually dangerous, it was the duty of the defendant to use such means to prevent injury to travelers at the crossing, as in the exercise of a reasonable judgment by an ordinarily prudent person, operating a railroad, might be considered necessary, and if this was not done, they should find for the plaintiff. So much of the instruction as was based on the idea that the crossing was unusually dangerous should not have been given. This instruction has been held proper where crossings are exceptionally dangerous, but this was only an ordinary country crossing. It was no more dangerous than nine out of ten of such crossings are in the country. Every railroad crossing is dangerous, but the instruction referred to, should not be given unless the crossing is exceptionally dangerous. At usual crossings if the statutory signals are given of the approach of the train, the defendant is not responsible. On another trial, the part of the instruction referred to will be omitted.

By the fifth instruction, the court told the jury that it was the duty of the defendant to use ordinary care to maintain its crossing and any approaches thereto in good "repair and condition so as not to unreasonably interfere with or obstruct the progress of travelers attempting to use the same." In lieu of the words "in good repair and condition so as not to unreasonably interfere with or obstruct the progress of travelers attempting to use the same," the court, on another trial, will use the words "in such repair as is reasonably safe for public travel;" and instructions 1 and 5 will be united in one instruction.

By the fourth instruction the court told the jury that if the defendant's servants in charge of the train, saw Onan, or could, by the exercise of ordinary care, have seen him in time to avoid injuring him, they should find for the plaintiff. This instruction should not have been given. The uncontradicted proof on the trial was to the effect that Onan was not seen until he came on the track about 100 yards ahead of the train and manifestly after this, the train could not have been stopped before it reached him. There was some proof that Onan, by looking across the curve, could see the train for 1150 feet, as he approached the track and, if he could see the train, the men on the train could see him. But the men on the train are required to watch the track; they are not required to look across the curves for persons approaching the track. The court gave no instruction based on the evidence that Onan heard the signal of the approaching train and drove on the track, knowing of its approach, or on the evidence that the stopping and backing of the house caused the injury.

Instruction 3, which the court gave, defining the duty of Onan in approaching the track, does not conform to the rule laid down by this court in *Louisville Railroad Co. v. Winchester*, 105 S. W., 167. In lieu of the third instruction on another trial the court will tell the jury that it was the duty of the intestate, in approaching the crossing, to use such care as may be usually expected of an ordinarily prudent person, to learn of the approach of the train and keep out of its way; and that, if he failed to exercise such care, and but for this would not have been injured; or if he heard the signals of the approaching train or knew of its approach before he drove upon the track, and, with this knowledge, undertook to pass over the crossing ahead of the train; or if the proximate cause of the accident was the backing of the horse, and not a failure of the defendant to give notice of the approach of the train, or a failure on its part to keep the crossings in reasonable repair, as defined in instruction 1, then in any one of these events, the jury should find for the defendant.

The instructions of the court with the modifications we have indicated, present the whole law of the case. The defendant had a right to run its train at that point at any speed it saw proper, and on another trial the court will so admonish the jury, and will exclude all evidence tending to show that the train was running faster than usual. The court did not err on the whole evidence in submitting the case to the jury; but for the reasons given a new trial should be granted. The defendants may prove what Onan said as to how the accident occurred. The plaintiff may, in rebuttal, prove by any other witnesses, who were present and heard the statements made by Onan, that he did not say the things testified to by the defendants' witnesses, and they may show what he then and there did say; but the plaintiff can not give in evidence what Onan said on a different occasion, or in a different conversation for this would be to allow him to make testimony himself.

Judgment reversed and cause remanded, for a new trial and further proceedings consistent herewith.

HARRISON, &c. v. LOGAN COUNTY, &c.

(Filed May 13, 1908—To be reported.)

1. County Treasurers—Paying Out Money—Orders of Fiscal Court—Liabilities of Sureties—Under Kentucky Statutes, sec. 931, providing that all moneys received by the county treasurer shall be held by him subject to the order of the fiscal court of the county, where a county treasurer pays out money under the orders of the fiscal court of the county, he and his sureties are not liable therefor, though the court had no right to make such orders.

2. Same—The county treasurer is a ministerial officer or agent of the county, and may be removed at any time by the fiscal court for a failure to obey its orders, and there is no principle of law making an agent liable for its principal for money paid out in accordance to the orders of the principal, though the principal may afterwards discover that the money was paid to the person not entitled to it.

3. Same—Where a county treasurer pays out money in his hands on an irregular order, he should be allowed a credit therefor in his settlement with the court, if it appears that they were just claims against the county, and there is no doubt about his good faith in the payment of them.

Browder & Browder, S. R. Crewdson and T. B. Harrison, Jr., for appellants.

Selden Y. Trimble, R. W. Davis and John S. Rhea for appellees.

Appeal from Logan Circuit Court.

Opinion of the court by Judge Nunn, affirming.

In the month of April, 1905, the fiscal court of Logan county elected appellant, C. Henry Harrison, to the position of county treasurer. He qualified as such and executed bond with The United States Fidelity and Guaranty Company of Baltimore as surety. Harrison held the office for eleven months, settled his accounts in full with a committee appointed by the fiscal court, and resigned his office on March 8, 1906. This settlement was reported to the fiscal court by the committee and it was approved and ordered to be recorded by that court in the month of April, 1906.

In May, 1906, appellees, Logan county, and John W. Milliken, its then treasurer, brought this action against appellants, seeking a judgment against them for \$5,095.06. It was alleged in the petition that during Harrison's term of office there was paid to him, from various sources, different sums of public money, amounting in the aggregate to \$58,934.29; and that during his term of office he only paid out the sum of \$42,612.97, and in addition to that sum he paid over to his successor, John W. Milliken, \$11,226.26, thereby leaving in the hands of Harrison, the former treasurer, \$5,095.06, for which appellees prayed judgment.

After the case progressed for a time, it was ascertained that appellees sought to surcharge the settlement made by Harrison, and to show that about thirty of the vouchers filed with the settlement showed improper disbursements of some of the county's funds, and that appellant, Harrison, should not have been credited with these sums. The court, on the trial of the case, sustained appellee's contention to the extent of nineteen of the vouchers, and rendered judgment against him and his surety for the amount of them, which is about \$3,200.00; but decided in favor of appellants as to the other eleven vouchers. From this judgment Harrison and his surety appealed and appellees filed a cross-appeal.

Counsel for each party have filed able and exhaustive briefs, but after considering them and the record in the case, we deem it unnecessary to consider and discuss all the points presented.

Section 931 of the Kentucky Statutes is, in part, as follows:

"It shall be the duty of said treasurer to receive and receipt for all moneys due, or to become due, to said county from the several collecting officers thereof, or from any other person or persons whose duty it is to pay money into the county treasury; all moneys so received by him to be held subject to the order of the fiscal court of the county."

Thus it will be seen that the treasurer is purely a ministerial officer, and is the custodian of the funds belonging to the county, and must pay them out under the orders of the fiscal court. It is not charged that Harrison paid out this money without orders of the fiscal court, but the claim is, that he paid it out, as directed by that court, on orders which the court had no right to make. The majority of the claims which the lower court charged appellants with having wrongfully paid, were claims allowed the county judge and the several justices of the peace for their services as courthouse commissioners, county farm commissioners, road and bridge commissioners and payments made to persons for work on the roads of the county. It appears that the fiscal court appointed the county judge and three or four of the justices as commissioners to superintend the building of county courthouse, and the fiscal court allowed each of them pay for their services; and the same rule was adopted with reference to the management of the county farm, for the poor. Several of the justices were also appointed as commissioners to look after and manage the work on the roads in their respective districts. The fiscal court made allowances to each of them for their services, and the county clerk issued what is called a "warrant" upon the treasurer, with which he complied, for the payment of these allowances. It is claimed that these orders were void, the fiscal court having no right to pay these persons for such services and, therefore, the treasurer should not have been credited therewith in his settlement; and they cite many cases which they claim support their view of the matter. The first of these cases is *Morgantown Deposit Bank v. Johnson*, 22 Ky. Law Rep., 210. The matter in litigation in that case was a claim allowed the county court clerk for recording a school census report. The clerk assigned his claim to the bank and it instituted an action against the sheriff and the county for the recovery of the

amount of the claim. The lower court refused the bank a judgment for the claim, and this court affirmed it upon the ground that the fiscal court had no jurisdiction to appropriate county funds, except as it is authorized by law to do, and there was no provision in the statutes which authorized it to pay the county clerk for his services in recording the list of children's names filed in his office by the trustees of the school.

The second case is *Davless County, &c. v. Goodwin*, 25 Ky. Law Rep., 1081. In that case the fiscal court appointed the county judge as supervisor of the public roads and bridges of the county, and fixed his salary as supervisor at \$900 per year, and his salary as judge of the county at \$1,000 per year. Appellee, William Goodwin, a citizen and taxpayer of the county, filed that suit to enjoin the treasurer from paying Haskins, the county judge, the \$900 per year as supervisor. The circuit court granted the relief prayed for, and the county judge appealed. This court affirmed the judgment upon the ground that, as the statutes then stood, the county judge could not be made supervisor of the roads, and that he had no right to receive a salary from the county, other than the one fixed for him as county judge.

The third case is *Pulaski County v. Sears*, 117 Ky., 249. In that case the fiscal court of Pulaski county appointed a justice of the peace in each magisterial district with the power to assist the county judge in keeping the roads in repair in that county, in their respective districts, and were subsequently allowed, by an order of the fiscal court, a sum in payment for their services, and the county refused to settle. Sears, one of the magistrates, brought the action to recover the money allowed him. The lower court sustained his claim, but upon appeal to this court the judgment was reversed upon the ground that the fiscal court had no power to appoint the magistrates to that position or make themselves allowances for their services.

The fourth case is *Vaughn v. Hulett*, 27 Ky. Law Rep., 35. In that case the fiscal court allowed the overseers of the roads in the county a salary, not exceeding \$50 per annum. This court decided that the fiscal court was without power to make such an allowance, as the statute fixed the compensation for overseers, and the fiscal court had no right to change the statutes in this manner. The action was brought by a taxpayer.

The fifth case is *Boyd County v. Arthur, &c.*, 118 Ky., 932. In that case the fiscal court made appropriations to work the roads in each of the magisterial districts, and then appointed the justices of the peace to work in their respective districts in constructing and maintaining the county roads, and allowed each of them \$3 a day. The county judge ordered an appeal from the order and appointed an attorney to take and prosecute the appeal. This court decided that the order was improperly made; that the fiscal court had no right to appoint the members thereof to the position named, and they had no right to hold dual positions, and could only receive as pay or fees such compensation as was allowed by law to justices of the peace.

The sixth case is *Mitchell v. Henry County*, 30 Ky. Law Rep., 1051. In that case the fiscal court made an annual allowance to the jailer of the county in lieu of all fees allowed him by statute. This court decided that the order was void because the fiscal court had no power to change the statute and make an allowance not authorized by it.

These cases have no direct application to the one under consideration. In all of them the parties in interest were owners of claims, improperly allowed, endeavoring to collect them, or by the county or some taxpayer therein who sought to prevent the payment of claims improperly allowed. In the case at bar, the action was brought by Logan county and its treasurer against its former treasurer and his surety, to compel them to pay to it claims which it im-

properly allowed and directed him to pay, with which orders he complied. In our opinion it would be unjust to require him to refund this money to the county. He held the money as the statute provides, subject to the orders of the fiscal court. He was not a member of that court; he was not the legal adviser, in any sense, of the county, nor did he have any supervisory power whatever over the fiscal court. He was merely a ministerial officer, or agent, of the county. He was subject to be removed at any time by the fiscal court for failure to obey its orders. We know of no principal of law that will make an agent liable to his principal for money paid out in accordance to the orders and directions of the principal, even though it turns out that the principal afterwards discovers that the money was paid to a person not entitled to it. Such is the case at bar. If it had been charged and shown in evidence, that Harrison had been in collusion with any person or persons who obtained improper allowances against the county, and realized some benefit to himself thereby, the case would be different. But it is shown in the record that appellant conducted his office with fidelity. There is not an intimation that his conduct was otherwise. If the county has paid out money through its treasurer to persons not entitled to it, its remedy is against those persons to whom it was paid, and not against its agent, whom it directed to pay the money out.

It is also claimed that the warrants issued by the clerk and the orders of the overseers upon the treasurer were without authority of law. The form of the warrants issued by the clerk is as follows:

"No. 346. State of Kentucky, Fiscal Court of Logan County.

"October Term, 1904.

"It is ordered by the court that J. W. Clark be, and he is hereby, allowed the sum of Five Hundred Dollars, payable out of levy, 1905.

"For Court House Comm'r.

Attest: "M. B. MORTON, Clerk F. C. L. C."

Appellees' counsel claim that there is no law authorizing the clerk to issue such a warrant; that his duty was to copy the whole of the order of the fiscal court. The statute is silent as to the duty of the clerk in this regard. We know that this manner of issuing warrants has been in vogue by the county clerks of the State for a great many years. An order of the fiscal court, in allowing claims against the county, often covers several pages of an order book, the form, however, is about as follows: It is ordered by the fiscal court, naming the county, that the following claims be and they are hereby allowed, and then continues giving the names of the persons and the amounts allowed each of them, and a short statement of the services rendered for which the money was appropriated. It would be unnecessary and a great hardship to require the clerk to copy for each person named in the order, the whole of it. In our opinion it was no violation of the law for the clerk to issue the warrant referred to. Appellees also contend that the orders with reference to payments made for labor on the roads were made without authority of law. By section 4311, of the Kentucky Statutes, the overseers of roads are required to work them in the manner directed by the fiscal court. The statute does not give the details as to how the fiscal court should conduct this duty, therefore, the court could exercise its discretion with reference thereto. It is presumed that it will comply with its duty and devote its best efforts to the interest of the county. In this case the court had adopted, in substance, the following method: If set apart a sum of money for that purpose, and placed it in the hands of the treasurer, and called it the road and bridge fund; and it was ordered that, so long as the roads of Logan county were worked by taxation, the money should be spent in various road districts of the county.

under the supervision of the road overseers. And it was further ordered that the clerk of the fiscal court should issue vouchers against the road fund in the hands of the treasurer of the county, and to be issued upon the written certificate of the various overseers of the county as work was done, the same to be approved by the county judge. This method was followed, except in a few instances where the person signing the certificate, or order failed to add to his signature the word "overseer." This error should not have the effect to make the treasurer responsible for the payment of them. He had the right to presume that it was the overseer of the road who signed the order, and furthermore they were attested by the clerk and approved by the judge of the county, and the presumption is that the county judge, knew who the overseers of the county were. What we have said with reference to the claims charged to appellant by the judgment of the lower court, will also apply to the claims which the treasurer paid and with which the lower court refused to charge him, and which are involved on the cross-appeal.

Appellees' counsel also claims that there was no evidence introduced showing that appellant, Harrison, had paid these claims. It appears that the case was prepared in the lower court upon the idea that there was no contest with reference to the fact that he had actually paid the claims on the orders referred to. As stated, appellant made a settlement with the committee appointed by the fiscal court in the month of March, 1906, which was a final settlement, and under section 933, of the Kentucky Statutes, this settlement was approved by the fiscal court, and ordered to be recorded by the county clerk. This settlement so made and approved, made out for appellants a prima facie case, and the burden was on appellees to show mistakes therein. (Green County v. Howard, 32 Ky. Law Rep., 243.)

Appellant, Harrison, paid some small claims, amounting in all to about \$100, upon orders which were irregular; but it appears they were proper and just claims against the county. Appellant, Harrison, should not be required to pay these claims for they were just claims against the county, and there is no doubt about his good faith in the payment of them. This principle was expressly enunciated in the case of Sweeney v. Commonwealth, 26 Ky. Law Rep., 877.

For these reasons the judgment of the lower court is affirmed on the cross-appeal, and reversed on the original appeal and remanded, for further proceedings consistent herewith.

Whole court sitting.

CITY OF MIDDLESBOROUGH v. COAL & IRON BANK, &c.
MIDDLESBOROUGH TOWN & LAND CO. v. CITY OF MIDDLESBOROUGH.

(Filed May 13, 1908—Not to be reported.)

1. Taxes—Lien of City Therefor—Negligence of Officials—Effect on Lien Notes—Whatever might be the rule between individuals, it can not be held that a city shall lose its right to collect its public dues by reason of the failure of its officers to present its claim in a suit of which they have no knowledge, the city not being a party to the suit.

2. Same—Execution Sale—Purchasers—Conveyance to Wife—Effect—Where in a proceeding to sell a lot in a city, under execution, and on which the city had a lien for taxes, and of which lien the purchaser had notice, the fact that the purchaser had the deed to the

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lot made to his wife did not make her a bona fide purchaser without notice—she being a *lis pendens* purchaser took the property subject to the lien of the city which it had asserted in the action.

T. G. Anderson for appellant and appellee, City and Henry Steele, Receiver.

N. B. Hays, J. R. Sampson for appellant, Middlesborough Town & Land Co.

Appeals from Bell Circuit Court.

Opinion of the court by Judge Hobson, affirming.

On December 1, 1893, the Secretary of State, under section 616, Ky. Statutes, caused proceedings to be instituted against the Coal and Iron Bank, of Middlesboro, upon the ground that the bank was insolvent. A receiver was appointed to close up and settle its affairs in insolvency. In that action by the Commonwealth it appeared that the bank was hopelessly insolvent, and at the July term of the circuit court a judgment was rendered directing a sale of all the property of the bank. The sale was made and confirmed, the city of Middlesborough not being a party to the proceedings. The purchaser of the property of the bank, at the sale, transferred his bid to the Bell County Investment Company, and the Middlesborough Town and Lands Company. In December, 1897, the city of Middlesborough filed this petition against them, setting up taxes against the bank for the amount of \$2,829.40, which it alleged were a lien upon the property they held under the judicial sale made in the Commonwealth action. The defendants demurred to the petition. Their demurrer was sustained, and the petition was dismissed. On appeal to this court the judgment was reversed. It was held by this court that the city had a lien on all the property of the bank for its taxes and that the city, not being a party to the suit in which the property of the bank had been sold, was not affected by the judgment in that case. (City of Middlesborough v. Coal and Iron Bank, 108 Ky. 680.) On the return of the case to the circuit court, the defendant's demurrer having been overruled, they filed an answer. During the progress of the case the Bell County Investment Company had conveyed some of the lots it bought to L. C. Saulsberry. On final hearing the circuit court adjudged the city a lien on all the property except that conveyed to Mrs. Saulsberry, and as to that property the petition of the city was dismissed. From this judgment the appeals now before us are prosecuted.

The opinion on the former appeal is the law of the case, and settles substantially a majority of the questions now raised. The city having a lien upon the property had a right to bring its action against the person then owning the property. It was unnecessary for it to bring before the court the former owners of the property for its proceeding was in rem and only the persons then interested in the property were necessary parties to the proceeding. The rule of *caveat emptor* applies to judicial sales. It was unnecessary for the city to assert its lien in the Commonwealth suit to wind up the defunct bank. It is true it might have done so but the purchasers of the property might also in that suit have brought the city before the court and had its tax lien adjudicated before paying for the property or before the money was distributed. The holder of a lien on property can not be defeated of his rights by the proceedings in an action to which he is not a party. These questions were considered on the former appeal and were determined in the opinion then rendered. It is said that the city knew of the suit that was pending to settle the affairs of the bank, but it is equally true that the purchasers

of the property knew that the city was asserting a lien on its property for the taxes, and it was as incumbent on them as on it to have the matter adjudicated. Whatever might be the rule between individuals it can not be held that a city shall lose its right to collect its public dues by reason of the failure of its officers to present its claim in a suit of which they have knowledge, the city not being made a party to the suit. The city government cannot be maintained without the payment of its public dues, and the knowledge of its officers that a suit was pending will not estop the city from afterwards asserting its claim where, as here, the persons affected also knew all the facts and were as much required to take action as the officers of the city were. (Seibert v. Louisville, 101 S. W., 325.)

The city, not being a party to the action brought by the Commonwealth to wind up the affairs of the bank, and that action having proceeded to a final order discharging the receiver, a subsequent motion of the city to set aside that order being overruled, did not have the effect of concluding the city by anything that had been done in that action. The only effect of the order of the court overruling the motion of the city was a refusal on the part of the court, at that stage of the proceeding, to allow the city to enter into that case. If the court had sustained the motion no good could have come of it, as the property had all been sold and the proceeds distributed.

No statute of limitation is applicable as the action was brought by the city in 1897, and within less than five years after its cause of action accrued. The Common Council, after the reversal of the case in this court, undertook to settle the matter by the defendants paying it \$200 each. The Council had no authority to compromise the city's claim for taxes. (Louisville v. Louisville R. R. Co., 111 Ky., 1.) It is insisted that in that case the taxpayers were released, but here there was a compromise with a third person and not with the taxpayer. This distinction cannot be maintained. The taxes are a lien upon the property. The property is released by a compromise, not the taxpayer. To say that the property may be released by a compromise is to say that the taxes may be released for the lien is the security for the payment of the taxes. To release the property is to release the taxes; and whether the original owner has the property or it has passed into the hands of another can make no difference as to the power of the Common Council to release taxes.

We, therefore, conclude that the judgment in favor of the city on the appeal of the Middlesboro Town and Lands Company, is correct.

As to Mrs. L. S. Saulsberry a different question is presented. The record shows that she now owns Block 511, sec. S. E. On Nov. 15, 1893, the sheriff of Bell county levied an execution upon this block as the property of the Coal and Iron Bank. This was after the lien of the city for taxes had accrued. The lot was sold and purchased by Ed Saulsberry, who assigned his bid to the Bell County Investment Company, of which G. W. Saulsberry was president. The company was indebted to Saulsberry and he agreed to take the lot on what it owed him. He then had the deed made to his wife, L. S. Saulsberry, on June 2, 1900, or three years after this suit had been brought by the City of Middlesboro against the Bell County Investment Company to assert its lien on the land. Mrs. Saulsberry relies on the fact that no notice had been filed in the county court clerk's office of the pending action as provided by section 2358a, Kentucky Statutes. But the notice provided for in that section is only necessary as to a subsequent purchaser for value and without notice. G. W. Saulsberry had full notice of the lien of the city. He paid the consideration; he was the real purchaser. The deed was simply made to his wife by his direction and for his convenience. She is not a bona fide purchaser without

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notice, but takes the property subject to the lien of the city which it had asserted in the action. (Thomas v. Southard, 2 Dana, 480; Wickliffe v. Breckinridge, 1 Bush, 442; Taylor v. U. S. Building Association, 110 Ky., 84; Hall v. Manns, 100 S. W., 222.)

As the title to the property was in the Bell County Investment Company at the time that the suit was filed, the action was properly brought against it; and when it conveyed the property, pending the action, to L. S. Saulsberry, she was a *lis pendens* purchaser; and not being a purchaser for value and without notice, took the property subject to the result of the litigation. The order placing the property in the hands of the receiver was not, therefore, void as to her, although she was not a party to the action. When it was finally determined that the city of Middlesboro had no lien on one of the pieces of property, its petition was properly dismissed as to this property, but the order placing it in the hands of the receiver was not for this reason void. The city had asserted a lien upon the property, but had failed to establish a lien by its proof. Mrs. Saulsberry is entitled to the rents collected from this piece of property, but the receiver is entitled to credit for his services and reasonable expenses about the property. The order discharging the receiver and directing him to pay over, to Mrs. Saulsberry all the money in his hands, and giving him no credit for his services or expenses was erroneous.

On the appeal of the city against Mrs. Saulsberry, the judgment is reversed as to block 511, sec. S. E. As to the lien asserted on the other property conveyed to her, the judgment is affirmed. The judgment discharging the receiver and ordering him to pay over to Mrs. Saulsberry all the money in his hands, derived from both pieces of property conveyed to her, is reversed, and the cause is remanded, for a judgment and further proceedings consistent herewith.

On the appeal of the Middlesborough Town & Lands Company the judgment is affirmed.

CROSS, BY, &c. v. BOARD OF TRUSTEES OF WALTON COMMON SCHOOL.

(Filed May 13, 1908—To be reported.)

1. Graded Common Schools—Pupils—Disobedience to Authority of Teacher—Suspension by Teacher—Under Kentucky Statutes, sec. 4367, providing that "all pupils admitted to common schools shall comply with the regulations for the government of such schools. Willful disobedience of the authority of the teachers * * * shall constitute good cause for the suspension or expulsion from school," where a pupil in a graded common school was assigned by his teacher the task to take part in a dialogue in the commencement exercises thereof, which the pupil refused to accept, such refusal was an act of disobedience to the authority of the teacher for which he had the right to suspend the pupil from the school for the remainder of the term.

2. Same—Report of Teacher to Trustees—Approval of Trustees—Where a teacher in a graded common school suspended a pupil for a willful disobedience of his assignment to a part in a dialogue in the commencement exercises thereof, and reported such suspension to the board of trustees, who offered to allow the pupil to return to school if he would take a different character in the dialogue from the one assigned him by the teacher, the refusal of the pupil to accept the terms offered by the trustees, rendered him not

only guilty of disobedience, but also of insubordination, and their approval of the suspension of the pupil for the remainder of the term was final and conclusive, and can not be questioned by the courts.

S. W. Tolin, John S. Gaunt and Greene & VanWinkle for appellants.

Frank E. Curley for appellee.

Appeal from Boone Circuit Court.

Opinion of the court by Judge Settle, affirming.

This is the second appeal prosecuted by appellants in this case. On the first appeal (Cross, By. &c. v. Board of Trustees Walton Graded Common School, 28 Ky. Law Rep., 449,) the judgment of the circuit court was reversed because of error committed by that court in sustaining a general demurrer to the petition; it being the opinion of this court that the facts alleged in the petition stated a good cause of action. The present appeal is from the judgment rendered by the circuit court on a trial of the case upon the merits, which dismissed the action at appellant's cost.

Briefly stated, the cause of action alleged is that appellant Waite Cross, who was a student of the Walton Graded Common School, was by the act of W. P. Dickey, principal of the school, with the approval of appellees, the trustees, maliciously, arbitrarily and without cause, expelled from the school "without condition or limitation," and that the latter have refused to permit him to re-enter the school, threaten to persist in such refusal, and will continue to exclude him therefrom, unless compelled by judgment, and process of the court, to permit his return. The petition closed with a prayer for a mandatory injunction requiring the trustees to allow the appellant, Waite Cross, to re-enter the school, and resume his studies therein. The action was instituted against the trustees alone; the board being composed of the appellees, A. N. Jones, T. F. Courley, G. B. Powers, A. M. Rouse, Richard Jones and Wm. Ransler.

The answer of the trustees denied that the appellant, Waite Cross, was maliciously, arbitrarily or without cause, expelled by the principal, or that such alleged expulsion was without condition or limitation or approved by the Board of Trustees, or that he was expelled at all. It, however, contained the admission that appellant was, on April 4th, 1904, suspended from further attendance at school during the remainder of the term, which closed April 29th, 1904, for disobedience of an order of the principal, the rules and regulations of the school, and for insubordination as a student. That the suspension was ordered by the principal, and later approved by the Board of Trustees, after numerous meetings attended by Waite Cross, a full hearing of the charge, and sufficient proof of his guilt thereof; and that the suspension was necessary for his good and the discipline of the school.

The action of the Board of Trustees with respect to the suspension of the appellant, Waite Cross, is shown by the following resolution or order, entered upon the record book kept by the board, at the time of its adoption:

"The principal's report, suspending Waite Cross, a pupil in junior grade, for disobedience, was read and the board having previously heard the statement of the principal and also that of the student, Waite Cross, and the board being fully advised in the matter, it is moved and unanimously carried that the action of the principal

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be sustained and that the pupil, Waite Cross, be and is hereby, suspended from further attendance at school during the remainder of the present term, for disobedience and insubordination."

Section 4473, Kentucky Statutes, provides that such action as was taken by the trustees in this instance shall be entered in the journal kept by them, "which shall be open at all times to the inspection of any citizen of the graded common school district in which he or she may reside."

The language of the foregoing resolution plainly shows that the student, Waite Cross, was not expelled from the Walton Graded Common School, as alleged, but was merely suspended from attendance thereat, during the remainder of the term, viz: From April 4th to April 29, 1904, a period of only twenty-five days.

It appears from the record that the decision of the trustees approving his suspension by the principal of the school was announced to Waite Cross and his father when made, April 4th, and whether then made or not they could have ascertained, at any time, by an inspection of the trustees' journal, that suspension and not expulsion, was the penalty for his offense; yet notwithstanding such knowledge on their part, or means of information at hand, they delayed bringing this action until July 28th, 1904, nearly three months after the period of Waite Cross' suspension had expired and when there was no obstacle in the way of his attending the school at the next succeeding session, which had not then commenced. In other words, when the action was instituted there was no necessity for appellant's applying to the court for such relief as was thereby sought; for the way of appellant, Waite Cross', return to the school was open and unobstructed, because the term of his suspension had previously expired. It would do appellants no injustice if we should hold that the affirmance of the judgment appealed from might be rested on this ground alone. In making this suggestion we do not overlook appellants' claim that the trustees' journal has, in some mysterious way, been changed since their decision was rendered, to make it appear that Waite Cross was suspended, instead of expelled from the school; but there is no testimony save that of appellants, father and son, to support this claim, and theirs amounts to only an inference arising from what they contend was declared by the trustees to be their decision at the meeting of April 4th, 1904. On the other hand the testimony introduced by appellees is of such convincing weight and character as to leave no doubt that the only penalty imposed by the principal and approved or announced by the trustees of the Walton Graded Common School for the breach of discipline charged against the appellant, Waite Cross, was that of suspension during the remainder of the school term then nearing an end. The same testimony is equally convincing of the further fact that the decision as thus made by the principal and trustees was immediately entered upon the journal of the Board of Trustees in the precise form in which it now appears.

All of appellants' testimony introduced for the purpose of showing that the resolution in question does not truthfully express the decision of the trustees, or their approval of the act of the principal of the school with respect to the suspension of the appellant, Waite Cross, or that it was not entered in the trustees journal as adopted, was and is incompetent, as neither the petition nor reply attacks it upon any of these grounds, or alleged fraud or mistake in its form or language. However, as none of this incompetent evidence was excepted to by appellees, we do not hold that the court should have excluded it.

An important question presented by the record for our consideration is, was the refusal of the appellant, Waite Cross, to accept and prepare for the part in the approaching commencement exercises

of the school, assigned him by the principal, such an act of disobedience as amounted to a violation of a reasonable rule or regulation, adopted by the board of trustees, for the proper discipline of the school?

The Walton School is a graded school, maintained, like all other common schools of the State, by taxation; therefore, all white youths or children, residing in the Walton Graded Common school district, who are within the school age, may attend the school in question, upon such conditions as the statute with respect to common schools may prescribe. Section 4367, Kentucky Statutes, provides:

"All pupils who may be admitted to common schools shall comply with the regulations established in pursuance of law for the government of such schools. Willful disobedience or defiance of the authority of the teachers, habitual profanity or vulgarity, or any other gross violation of proprietary law, shall constitute a good cause for suspension or expulsion from school."

Section 4473 provides:

"Said trustees may adopt such by-laws and rules for the government of themselves and their appointees, and for the control, government and management of graded common schools in their respective districts, as they may deem necessary, not in conflict with law, and shall keep a journal of their proceedings, which shall be open at all times to the inspection of any citizen of the graded common school district in which he or she may reside."

We find in the record, as a part of the evidence, a catalogue of the Walton Graded Common School for the school year beginning in the fall of 1903, and ending in the spring of 1904, containing a number of rules and regulations adopted by the board of trustees for the government of the school. Many of these apply to the principal and teachers, others to the pupils. Among the former, we note the following:

"1 It shall be the duty of the principal to exercise general supervision over the conduct of all pupils.

"2. He (i. e. principal) shall have the power to suspend any pupil for cause, but he must report such suspension on the same day to the president or secretary of the board of trustees."

Among the rules applicable to pupils we quote the following:

"3. It shall be the duty of all the pupils to treat all the teachers with respect and courtesy, and to obey whatever is commanded by any teacher, whether of his department or not."

W. P. Dickey was a teacher in, as well as principal of, the Walton school.

The catalogue also contains an announcement of the annual commencement exercises to be held at the close of the school, April 29th, and the evidence showed that from the date of its establishment the Walton Graded Common School had closed its school years with such commencement exercises, and that on such occasions it was the universal custom of the school to have, in addition to essays or addresses from its graduates, declamations, dialogues and other similar exercises, conducted by such of the pupils as the principal or teachers might select and appoint for the purpose. As the appellant, Waite Cross, according to the evidence, attended the school from its beginning and had frequently taken part in commencement exercises, he was familiar with the rules, regulations and customs of the school, and must have known that when directed by the principal of the school to take part in a dialogue at the approaching commencement, it was his duty to obey. He had the right to ask to be excused from taking the part assigned him and to give his reasons for wishing to be relieved by the principal. But if the latter, upon hearing his grounds of excuse, regarded them insufficient, and never-

theless thought appellant a suitable person to take the part, in his capacity of principal and teacher, or either, he had authority to command him to do so, and it was the duty of appellant to obey the command.

We observe that the curriculum of the Walton Graded Common School embraced many of the higher studies, both in English and Latin, history and literature, as well as advanced mathematics, economics and other important sciences; also that it requires pupils to write compositions and practice declamation. The latter exercises, together with the study of literature, necessarily include the study of elocution, and no better plan for improving the voice, acquiring ease of manner and power of expression, can be devised for the training of the average common school pupil, than declamation and dialogue. Moreover, such exercises occurring at intervals, or at the school commencement, give the patrons of the school, witnessing them, some information as to the progress made by the children, and tend to inspire them with confidence in those in charge of the school and also in the methods of teaching employed.

So, in assigning the appellant, Waite Cross, a character to personate, or part to perform, in dialogue or play, at the commencement, the principal acted in accordance with a long established custom of the Walton school and in pursuance of a reasonable regulation of the board of trustees, of which appellant as a student had full knowledge. While the appellant, Waite Cross' version of his suspension by the principal of the school, differed in some details of statement from that of the latter, when they appeared before the board of trustees, it was patent from the statements of both, that though the former sought to be relieved of taking the part of the Irish character assigned him in the dialogue upon the ground that he was unequal to the task of personating it, when the principal advised him that he underrated his capacity and insisted that he take the part, the young man refused to do so, and then and there so notified the principal. For this act of disobedience, the principal suspended him for the remainder of the term and ordered him to get his books and go home, which he at once did.

The discipline of the school required that some sort of punishment should have been meted out for this willful act of disobedience on the part of the pupil. Obviously, the infliction of corporal punishment would have been unwise, for young Cross, being then 18 years of age, and a member of the Freshman class, was too large to be subjected to a whipping. In view of the situation confronting the principal, we are not prepared to say he transcended his authority in suspending the culprit or that the penalty inflicted, though amply sufficient, was more severe than it should have been. The evidence fails to show that the principal, in suspending young Cross, acted arbitrarily, from malice, or other improper motive. There had been no previous collision between them, and Cross himself admitted, that the principal's treatment of him had always been kind and helpful.

The principal immediately gave the board of trustees written notice of appellant, Waite Cross' suspension, and of the cause thereof, and the board had a meeting on the evening of the same day for the purpose of determining whether the act of the principal in suspending him should be approved. The principal of the school and Waite Cross both attended that meeting; each giving, at the request of the trustees, his version of the suspension and the cause thereof. As already indicated there was, substantially, no disagreement between them as to what took place when the suspension was declared. Notwithstanding this, the trustees seemed anxious to adjust the matter without approving the suspension of the young man. For

this reason, no action was taken at the first meeting. During that meeting, however, appellant, Waite Cross, was, in substance, advised by the trustees that if he would agree to take a character or part in a play or dialogue other than that assigned him by the principal, they would cause the latter to remove the sentence of suspension and permit him to return to the school; but this offer was rejected by him. Following the first meeting of the trustees, several, if not all of them, visited Waite Cross and his parents at their home, and again proposed that the former re-enter the school upon the condition proposed at the first meeting; but the proposal was, as in the first instance, rejected. One of the trustees then proposed to the family that he be allowed to send Professor Dickey, the principal of the school, to the Cross home to talk the matter over with the family; but the appellant James Cross, father of Waite, objected to a visit from the principal and said his son should not return to the school unless the former was removed as principal. Three meetings of the trustees were held in investigating the matter of young Cross' suspension, at least two of which he attended, and one of which was attended by his father; at these meetings and between them, every effort that could reasonably be demanded was made by the trustees to procure the return of Waite Cross to the school; and not until they became satisfied that he would not return without action upon their part condemning the principal for suspending him, did they, in their official capacity, adopt the resolution approving the act of the principal in ordering and enforcing his suspension. The resolution in question was adopted by unanimous vote of the trustees at the third and last meeting held by them in investigating the suspension of the appellant, Waite Cross. Their action in approving his suspension was final and conclusive, and can not be questioned by the courts, unless they acted arbitrarily or maliciously. (Board of Education v. Booth, 23 Ky. Law Rep., 288; Cross v. Board of Trustees, 28 Ky. Law Rep., 440.)

A careful examination of the record convinces us that it contains no reliable evidence conducing to show that the trustees, in approving the order of the principal suspending Waite Cross from further attending the Walton Graded Common School during the remainder of the term, which ended April 29th, 1904, acted arbitrarily, maliciously or without legal cause.

The fact that the resolution of the board of trustees declares the appellant, Waite Cross, suspended for insubordination as well as disobedience does not affect the case. He was disobedient to the principal because he refused to accept the part assigned him by the latter for the school commencement, and by continuing in such disobedience, and also rejecting the repeated offers permitting his return to the school, upon taking another part than that assigned him in the first instance, he became insubordinate as well as disobedient, either of which was an offense justifying suspension. As well said by this court in the opinion on the former appeal, "Nothing can be more important to the upholding and maintenance of the common school system, in its integrity, than the enforcement of wholesome and reasonable discipline among the students. This high duty is cast upon the trustees, and the court will never interfere with them while acting within their legal province." * * *

For the reasons given the judgment is affirmed.

The whole court sitting, except Judge Lassing.

BLOCKER v. CITY OF OWENSBORO, &c.

(Filed May 14, 1908—To be reported.)

1. Obstruction in Street—Injury to Pedestrian—Joint Liability of City and Person Placing Obstruction—Liability as Between Wrongdoers—Although a person injured by an obstruction in a street may sue the city alone, or both the city and the person who placed the obstruction in the street, and recover damages against both and look to either for satisfaction of the judgment, yet as between the wrongdoers the city may, if it is required to satisfy the judgment, recover the amount thereof from the person who placed the obstruction in the street.

2. Same—Judgment Against City—Negligence of Another—Assignment of Judgment—Purchase by One Jointly Liable—Enforcement of Judgment—In an action by D. against Mr. B. and the city of O. for damages for an injury in falling over some bricks negligently allowed to be in the street of the city in the building of a house on a lot owned by B., the plaintiff recovered a judgment for \$500 and costs. The wife of B. paid the judgment and took an assignment thereof and proceeded by mandamus to collect same from the city. It was shown by the evidence that the house was built and owned by Mrs. B. who, though not a party to the record, was the real party in interest. It also appeared that Mr. B. owned property subject to execution. Held—That the court has the right to look beneath the surface to ascertain the truth and to adjudge the case as appears right, and it was properly adjudged that the purchase of the judgment was not made in good faith by Mrs. B. but was done by agreement with her husband who was the real purchaser and that no action could be maintained by her against the city.

Little & Slack for appellant.

J. A. Dean and Geo. W. Jolly for appellees.

Appeal from Daviess Circuit Court.

Opinion of the court by Judge Carroll, affirming.

In 1906, Augusta Dieco, in an action brought by her against the City of Owensboro and J. J. Blocker, the husband of appellant, Clara Blocker, to recover damages for personal injuries sustained by obstructions on the sidewalk in the city, over which she stumbled and fell, obtained a judgment for \$500, and costs.

The defendants in that action prosecuted an appeal to this court, where the judgment was affirmed. In 1907 Mrs. Dieco, in consideration of the sum of \$672 paid her by Clara Blocker, assigned to her the judgment without recourse. Thereupon the appellant, Clara Blocker, brought this suit against the city of Owensboro, setting up the purchase and assignment of the judgment and the fact that she had demanded payment thereof from the city, which was refused, and the further fact that the city had no property subject to execution, but did have in its treasury a sum sufficient to pay the judgment. She asked for a mandamus against the city and the mayor and board of councilmen, who were made parties defendant, requiring them to satisfy the judgment, and if necessary that they be compelled to levy a tax to pay the same.

In its answer, the city set up in substance that J. J. Blocker, the husband of Clara Blocker, was the owner of a lot in the city, and that he and his wife re-constructed the building, making additions and improvements thereto, and that while so engaged in the erection of the building, they permitted bricks to be placed or fall on the

sidewalk, and that Mrs. Dieco stumbled and fell over said bricks, causing the injuries for which she recovered judgment, and that the injuries sustained by her were due to the carelessness and negligence of Blocker and his wife, the appellant. That Clara Blocker had notice of the institution and prosecution of the suit of Mrs. Dieco against the city and Blocker, and, although not a party of record to the action, she was the real party in interest, and voluntarily paid the judgment, and afterwards procured the assignment which was a mere pretense and not made in good faith. That the judgment was satisfied and extinguished by the payment, which was made at the request of her husband J. J. Blocker, and because she had the house in which the brick were used over which Mrs. Dieco fell re-constructed and built, and was in fact the owner thereof. And furthermore, that J. J. Blocker owned ample property out of which an execution upon the judgment could have been collected at any time.

In a reply, it was denied that appellant and her husband re-constructed or made the improvements on the lot referred to, or were engaged in re-constructing the building or that the improvements were made for her, except that the building as erected by him at her instance, and she voluntarily furnished the money to pay for same. She denied the other material averments of the answer, and that she paid the judgment at the request of J. J. Blocker, or that the assignment of the judgment was not in good faith, and that the city, as between it and J. J. Blocker, was primarily liable for the damages.

No other pleading was filed, and on motion of plaintiff, now appellant, the action was submitted to the court upon the pleadings and the exhibit filed with and as a part of the answer. This exhibit consisted of a complete transcript of the record in the action of Mrs. Dieco against Blocker and the city. The court separated its conclusions of law and fact, and found the following facts: 1. That an action was instituted by Mrs. Dieco against the city and Blocker to recover damages. That a trial resulted in a judgment against both defendants, which judgment was affirmed by the Court of Appeals. 2. That Mrs. Blocker, wife of J. J. Blocker, paid the amount of the judgment to Mrs. Dieco, and took an assignment thereof, and afterwards brought this suit. That the house was being erected by appellant and in the course of the work, bricks were negligently placed in a position where they fell, and encumbered the sidewalk, and the injuries to Mrs. Dieco were sustained in consequence of this negligence on the part of appellant and her agents, and that she had notice of the suit by Mrs. Dieco, and is chargeable with notice of the result and bound by the judgment.

From these facts the court concluded, as a matter of law, that appellant was concluded by the proceedings had in the case of Dieco against Blocker and the city as fully as if she was a party to the record. That if the city had paid the judgment, it might have recovered the amount from the appellant, on the principle that when one is compelled by the judgment of a court of competent jurisdiction, to respond in damages for the wrongful act or negligence of another, a cause of action arises in favor of the party who pays the judgment against the actual wrong-doer or party whose act of negligence produced the injury. That, being primarily liable to Mrs. Dieco, if the city paid or satisfied the judgment, it could proceed against her and recover the amount thereof, and consequently her purchase of the judgment and the assignment thereof did not give her any right of action against the city.

The first question we need consider is whether or not the findings of fact by the trial court, are supported by the record. If they are, his conclusion of law is correct. It is well settled that

although a person injured by an obstruction in the street may sue the city alone, or both the city and the person who placed the obstruction in the street, and recover damages against both, and look to either or both for satisfaction of the judgment, yet, as between the wrong-doers, the city may, if it is required to satisfy the judgment, recover the amount thereof from the person who placed the obstruction in the street. (Dillon on Municipal Corporations, sec. 1035.)

As Blocker, one of the judgment defendants, was solvent, Mrs. Dieco, the judgment creditor, might have collected her judgment from him by execution, or have attempted to collect the same from the city; and if it failed to pay, have proceeded by mandamus to require it either to pay the judgment from funds on hand or levy a tax to pay the same. Indeed, no question is made by counsel for appellee that mandamus is not the proper remedy. (Palmer v. Stacy, 44 Iowa, 340; Am. & Eng. Ency. of Law, page 800.) But, back of this, there is an issue, the settlement of which is decisive of the case. The bricks over which Mrs. Dieco fell were not placed in or upon or about the street by the city. They were placed there by the persons constructing the building, or at any rate those persons were responsible for injuries caused by the obstruction. The city had nothing to do with the construction of the building, and it had the right to recover from the original wrong-doers, the amount it might have been required to pay to Mrs. Dieco. And if Mrs. Blocker was jointly liable with her husband, or if the house was being erected for her, then the city, if required to pay the judgment, might have instituted an action against Blocker and his wife to recover the money so paid, or if the purchase of the judgment was in truth made by Blocker, acting through his wife, as a willing agent, then neither of them can recover the amount so paid from the city. If Blocker had himself satisfied the judgment, it is clear that he could not have succeeded in an action brought against the city to recover the money paid in settlement of the judgment—because, as between himself and the city, it was his duty to have paid it; and the city, if it satisfied it, might have recovered the amount from him. And so, if Mrs. Blocker was liable to the city or if she satisfied the judgment for her husband by an arrangement between them, in which she was acting for him, the judgment of the lower court was correct.

In the consideration of these questions, we can not overlook the fact that the appellant is the wife of J. J. Blocker, who was undoubtedly liable to the city for the amount of the judgment, and the inference is very persuasive that Blocker furnished the money to his wife to satisfy the judgment, or prevailed on her, for and in his behalf and to protect his property from levy and seizure to satisfy it. It is difficult in this transaction to separate Blocker and his wife. If a stranger had bought the judgment, he could have prosecuted an action against the city to recover it, and in turn the city could have proceeded against Blocker. The transaction has every appearance of being an effort upon the part of Blocker, aided and assisted by his wife, to evade the payment of the judgment.

In cases of this character, we are not necessarily confined to what appears on the face of the record. We have the right to look beneath the surface to ascertain the truth of the matter being investigated, and to adjudge the case as appears right from an understanding of its substance. Under the facts of this record our conclusion is that the purchase of the judgment was not made in good faith by Mrs. Blocker, that it was done under an arrangement or agreement with her husband and he was the real purchaser.

Upon the trial in the lower court, a transcript of the record in the case of Dieco against the City of Owensboro and Blocker was

considered as evidence by the court. This transcript was filed and made a part of the answer of appellee, but was not filed with the answer, nor until the appellant obtained a rule against the appellee to file it. No objection or exception was made or taken to the competency or sufficiency of the transcript as filed. After the judgment was rendered, the clerk taxed the fee for the transcript as a part of the costs against appellant, who thereupon moved the court to correct the taxation of costs, and strike from it this item. This motion was overruled, and we are now asked to review the ruling of the lower court in this particular. Section 904, of the Kentucky Statutes, provides in part that "one copy of any of the pleadings or exhibits obtained shall be taxed as costs, and the cost of any copies made exhibits." And in section 128 of the Civil Code, it is provided that, "in addition to the writings which a party is required by section 120 to file as the foundation of his action or defense, he may file as an exhibit with his pleadings, or with leave of court, at any time pending the action, any writing upon which he may intend to rely as evidence." The defense of appellee was rested upon the evidence and proceedings taken and had in the case of Dieco against Blocker and the city, and we are of the opinion that the city in this case had the right to file as a part of its answer, a copy of this record, and therefore, it was proper to tax it as costs under the provisions of the statute supra. The point is made that the transcript filed was an uncertified copy, and for this reason it was not competent as evidence. And further that it was a copy of the transcript filed in the clerk's office of the Court of Appeals, made from the original record on file in the Daviess Circuit Court, and therefore, it was a copy of a copy, and not a copy of an original record, and hence incompetent. It is also said that as the original record was in the Daviess Circuit Court at the time this action was tried, the plaintiff should have produced it, as it has a right to do, to be read as evidence, thereby saving appellant the unnecessary cost of a copy. In answer to the objection that the copy was not certified, and that it was a copy of a copy of the record, and for these reasons not competent, it is sufficient to say that it was read and considered by the court without exception or objection and it is now too late to raise any question as to its competency. In respect to the point that appellee might have used the original record in the Daviess Circuit Court, we are of the opinion that it is permissible for the parties to a suit to introduce on the trial of the case any original record in the clerk's office of the court in which the case is being tried, without subjecting them to the expense of procuring a copy, and that the court trying the case may direct that this be done. But, appellant did not ask this or make any question about the matter until after the case had been heard and disposed of: and as the transcript was filed upon motion of appellant, and read without exception or objection, we do not feel at liberty to disturb the ruling of the circuit court.

Upon a consideration of the entire case, the judgment is affirmed.

EWELL & SMITH v. JACKSON'S ADM'R., &c.

(Filed May 14, 1908—Not to be reported.)

Second Appeal—Action of Lower Court—Compliance with Opinion—On a former appeal of this case (28 Ky. Law Rep., page 9) the trial court was directed to determine two questions: 1st. Were the 350 acres in controversy embraced in the 687-acre tract? 2d. Had appellants previously bought and paid for the 350 acres? Held

—That the lower court having found that the 350 acres were not embraced in the 687-acre tract, or in any other survey with which appellants were charged in the former judgment, therefore appellants were, properly chargeable with the 350 acre tract in controversy.

R. L. Ewell and Sam C. Hardin for appellants.

Henry C. Hazelwood for appellees.

Appeal from Laurel Circuit Court,

Opinion of the court by Wm. Rogers Clay, Commissioner, affirming.

This is the second appeal of this case. The opinion on the former appeal may be found in 28 Ky. Law Rep., 9.

Jarvis Jackson was the owner of large bodies of land in Laurel county, Kentucky, and, prior to his death, which occurred in 1883, he sold to appellants several surveys and executed to them bond for title. Some of these lands he sold for fifty cents per acre, and some for seventy-five cents per acre. It was agreed that the purchase price was to be paid when the number of acres in each tract was ascertained and deeds executed therefor. Jarvis Jackson died leaving one son, J. C. Jackson, who inherited all his property, and he executed to the appellants a bond for title, agreeing to convey to them a tract of land supposed to contain 1,500 or 1,800 acres, at the price of one dollar per acre. Soon after this, J. C. Jackson died, leaving surviving him his widow and two children, as his only heirs at law. In the month of March, 1899, the appellants filed a petition in the Laurel Circuit Court against J. C. Jackson's widow and his two children, who were then infants under the age of fourteen years, by which they sought to have the lands surveyed for the purpose of ascertaining the number of acres in the several tracts, and to obtain a conveyance therefor. This case remained on the docket undisposed of until the month of December, 1903, when the court rendered a judgment fixing the amount due from the appellants for the respective surveys of land purchased by them, and from that judgment they appealed to this court. On that appeal, this court held that the trial court erred to the prejudice of appellants in that two of the surveys—one of 100 acres and the other of 30 acres—were to be sold for fifty cents per acre, and another survey, containing 300 acres, was to sell for seventy-five cents per acre, while the court, by its judgment, made appellants pay one dollar per acre for each and all of them. The court also held that the 30-acre piece should be eliminated for the reason that it was included in the calculation of the larger boundary. After pointing out the above errors, the opinion of this court concluded as follows:

"It appears that the court in its judgment fixed the number of acres in the tract known as the Helton survey at 687 acres, and charged appellants therefor at the price named. It appears, however, but not very satisfactorily, that Jarvis Jackson, in his lifetime sold and conveyed 350 acres of this survey to the appellant, R. L. Ewell. If this be true it would be wrong to make them pay for it again.

"For the errors hereinbefore stated the judgment is reversed and the cause remanded, and if it should be made to appear that the appellant, R. L. Ewell, had previously bought and paid for the 350 acres referred to, then the appellant should not be charged therewith."

Upon the return of the case, appellees moved the court to require appellants to make their second amended petition more specific and certain by setting out therein a description of the boundary of land

claimed. To this motion there was no objection, and appellants, for compliance therewith, set forth that the 350 acres were conveyed to them by Jarvis Jackson on the 20th day of January, 1872, by deed recorded on the 20th day of April, 1872, in deed-book "F." at page 553, in the Laurel county court clerk's office. The description contained in the deed is as follows: "Also one tract supposed to contain one hundred and fifty acres boundary unknown, but being all the unsold land between the lines of Sol Barton, and the old Hardin Guinn place, the land of R. L. Ewell and old man Sutton, and the place on which Wilburn Turner lives." Appellees filed an answer, denying that any of the aforesaid boundary of land was contained in the 687-acre tract, or in any tract for which appellants were charged. Upon this issue proof was taken and judgment entered in favor of appellees. From this judgment, Ewell and Smith prosecute this appeal.

The proof shows that the boundary described in the above deed was a well-known body of land. It is bounded by four tracts of land that were well known at the time the deed was made to Ewell. The fifth tract bounding upon it was occupied at the time by Siguel Turner, a brother to Wilburn Turner. The latter lived nearby, on another tract of land owned by Jarvis Jackson. It further appears, from the plats, which we have carefully examined, and from the testimony of the surveyors with reference thereto, that the tract of land claimed by appellants to contain 350 acres, embraces only about 148 acres, and its nearest point to the 687-acre tract is 84 rods distant. Furthermore, it is several miles from the 1,500-acre tract with which appellants were charged in the judgment. Without detailing the evidence at length, we are of opinion that no part of the tract in question is embraced either in the 687-acre survey or in any other survey with which appellants were charged in the judgment.

Appellants contend, however, that the only question, upon the return of the case, to be determined by the lower court, was, whether or not the 350 acres had previously been bought and paid for by appellants. Manifestly, this was not the meaning of our former opinion. Whether or not appellants were to be charged with the full 687 acres, depended on whether they had previously bought and paid for the 350 acres which were embraced in that tract. They could not be charged a second time for the 350 acres, unless the latter tract was embraced in the 687 acres. Upon the return of the case, the trial court was directed to determine two questions: First, were the 350 acres embraced in the 687 acres? Second, had the appellants previously bought and paid for the 350 acres? In fixing the price due from appellants for the 687 acres, there would be no reason for crediting them with the 350 acres merely because they had previously bought and paid for the 350 acres, unless it also appeared that the 350 acres were actually embraced in the 687-acre tract. The lower court did precisely what the former opinion of this court directed. Its judgment was also proper in holding that the 350 acres were not embraced in the 687-acre tract, or in any other tract with which appellants were charged.

Several other errors are assigned upon this appeal, but, as they were all considered and determined on the former appeal, they cannot again be inquired into, as the former judgment is conclusive.

For the reasons given, the judgment is affirmed.

LOUISVILLE RY. CO. v. BOUTELLIER.

(Filed May 14, 1908—Not to be reported.)

1. Street Cars—Collision With Wagon—Injury to Driver—Care Required—The only duty required by travelers or persons using streets that are occupied by street car tracks and cars thereon, is to exercise ordinary care for their own safety, and, in the exercise of such care, they have the right to change their course in any way they please, and to use any part of the street necessary for their purpose. While this is the rule, as applied to the individual, it is proper to define, with more particularity, the duty resting upon persons in charge of engines or cars, because of their dangerous character.

2. Same—Relative Care—Lookout Duty of Motorman—The duty of lookout and warning is included in the ordinary care required of persons operating engines or cars, and it is the duty of the motorman of street cars to keep a lookout for persons and vehicles on the track, and to give timely warning of the approach of the car, when he discovers, or, in the exercise of ordinary care by keeping a lookout, should have discovered, the presence of persons or vehicles on the track, in apparent peril, and to exercise ordinary care to avoid a collision.

Fairleigh, Strauss & Fairleigh, Forcht & Field, Kohn, Baird, Sloss & Kohn and Greene & VanWinkle for appellant.

Edwards & Ogden for appellee.

Appeal from Jefferson Circuit Court, Common Pleas Branch, Third Division.

Opinion of the court by Judge Carroll, affirming.

The appellee was driving a wagon on Market street, going west, when his vehicle was collided with by one of appellant's street cars, going east. As a result of the collision, appellee was thrown to the ground and severely injured. Upon a trial before a jury, he recovered \$500, and we are asked to reverse the judgment awarding him this sum, first, because the trial court failed to direct the jury to return a verdict in favor of appellant; and, second, for error in instructing the jury.

At the place where appellee was injured, there are two street car tracks. Cars going west run on the north track, and eastbound cars on the south track. Appellee, in his vehicle, was driving down the north track, following close behind a covered wagon, that obstructed his view of the cars and tracks in the direction he was going. Desiring to cross the south track, to go to a point on the south side of the street, where he wished to stop, he turned the mule he was driving, for the purpose of crossing the street, and when his vehicle reached the south track, he saw a car, going east, rapidly approaching, and he attempted to get out of its way, and, although he succeeded in getting his mule off the track, the car struck the wagon, with the result stated.

Appellee testified as follows:

"I was driving west on Market street, and I started to pull out from behind the covered wagon, to stop on the south side, and, as soon as I pulled out, I noticed the car, which was 75 feet from me; the motorman was not looking in front of the car, and there was somebody on the front with him, and I tried to pull back to where I came from."

Q. "Which direction was the motorman looking?"

A. "On the south side of the street, and there was no alarm given, and I tried to get back in there the best I could; he just caught the shaft of my wagon."

Q. "Did your mule get clear from the track—the south track?"

A. "Yes, sir; he didn't hit the mule—just hit the wagon."

Q. "How far was that car from you when the motorman made the first effort to avoid the collision?"

A. "I don't think over 10 or 12 feet."

Q. "From the distance of 75 or 80 feet, until he got within 10 or 12 feet of you, tell the court what the motorman did in the way of stopping the car?"

A. "He was looking to the south side of the street, and did nothing at all until he was within 10 or 15 feet from me."

Q. "Was there any change in the speed of the car?"

A. "Not until he started to set the brakes."

Dr. Whittenburg, who was seated on the north side of the car, as a passenger, testified as follows:

Q. "I will ask you to state if you noticed when Mr. Boutellier pulled upon the track?"

A. "The first I saw was—it seems that he was on the track the time I first noticed it; when the accident came, he was seemingly trying to pull off the track."

Q. "You didn't see him when he first drove on the track?"

A. "No, when I first saw it, it looked like he was trying to get back on the north side of the track."

Q. "When he was trying to get back on the north side of the track, off of the rail, how was the car running, and what was the motorman doing?"

By the Court: "How far was the car from him at the time?"

A. "That is pretty hard to state; it seemed to be a distance from here to the south wall here—about that distance."

Q. "Was he trying to pull off?"

A. "Yes—something near about that."

Q. "What was the motorman doing when you first observed it?"

A. "It didn't seem like he was doing anything; it seemed like he must not have seen him, or noticed him at the time—that is, when I first saw him; but he tried to stop the car after a while."

Q. "How far was the car from Mr. Boutellier before you noticed the motorman attempting to do anything?"

A. "It must have been a little short of that distance; immediately after that, I saw this, and saw the accident was going to occur, he took hold of the brake, or turned the brake; he might have had his hand on the brake at the time."

Q. "State to the jury whether there was any change in the speed of the car up until the time that you saw the plaintiff pulling off of the track?"

A. "No, there was no change then that I detected."

Q. "Could you say, in feet, or by indicating by some objects in the court room, how far that car was from Mr. Boutellier or the mule when the car began to lessen its speed?"

A. "That would be pretty hard to state; it seemed like it must have run a short distance; it seemed like he didn't commence exactly to stop the car at the time I saw the accident was going to occur; I was impressed very forcibly of that. I don't know exactly how soon afterwards; it must have been pretty soon afterwards, though."

Q. "Had you heard any signal given?"

A. "I never noticed any signal; if it was given, I didn't notice it."

Q. "Have you any recollection of hearing one?"

A. "I don't recollect of hearing the signal."

On cross-examination, he said:

Q. "What was the first thing that attracted your attention to the calamity—with the collision between the car and the wagon?"

A. "That is the first thing I saw; I saw there was going to be an accident."

Q. "And you knew there was going to be an accident, and you brightened up and became excited?"

A. "I knew the rate the car was going, and no checking of the speed."

Q. "You knew there was going to be an accident when you saw this man on the track?"

A. "Yes, sir."

The motorman testified that when appellee pulled his mule on the track, the car was about 60 feet from him, and that he at once commenced ringing the gong, but Boutellier did not seem to realize anything until the car was within about 10 feet from him, when he looked up and saw the car, and then pulled his mule out to the side a little, and the car struck the side of the mule's head and knocked it out of the way, and struck the shaft of the wagon. Asked what he did as soon as Boutellier left the north track, to cross the south track, he answered:

"I cut off the current; I began to stop the car as quick as I could; I did all in my power to stop the car, to keep from hitting the man."

Other witnesses, who were in the car, said that as soon as they observed Boutellier about to get on the track ahead of the car, the motorman commenced sounding his gong, and trying to check the speed of the car.

Although the weight of the evidence tends to show that the motorman was keeping a lookout, and exercising ordinary care to prevent colliding with appellee's wagon, yet there was sufficient evidence to take the case to the jury, and we are not disposed to say that the verdict was flagrantly against the evidence. If the evidence introduced for appellant was true, and the jury had the right to so receive and accept it, the motorman did not exercise ordinary care to prevent the collision. In the exercise of ordinary care, he should have discovered the peril in which appellee was placed, in time to have avoided striking his wagon. It was the duty of the motorman to keep a lookout, and, as soon as he discovered appellee on the track, in a position of apparent danger, it was his duty to sound the gong, and to endeavor, by the exercise of ordinary care, to prevent injury to him.

The instructions given by the lower court, which are as follows, set out, in apt and appropriate language, the duty imposed by law upon the appellee, and were not prejudicial to appellant:

"The law made it the duty of the defendant's agent, the motorman in charge of the eastbound street car in the evidence referred to, to exercise ordinary care in its control and operation to avoid colliding with persons or vehicles in the use of the highway; and, if you shall believe, from the evidence, that the defendant's agent, the motorman in charge of the eastbound street car, failed, on the occasion in the evidence referred to, to exercise ordinary care in its control and operation, and that, by reason of such failure on his part, he caused the car to collide with the plaintiff's wagon, and the plaintiff was thereby injured, the law is for the plaintiff, and the jury should so find. But, unless you shall believe, from the evidence, that the defendant's agent, the motorman in charge of the eastbound street car, failed, on the occasion in the evidence referred to, to exercise ordinary care in its control and operation for the safety of others in the use of the highway, and that, by reason of such failure on his part, he caused the car to collide with the wagon of the

plaintiff, and the plaintiff was thereby injured, the law is for the defendant, and the jury should so find.

"2. If you should believe that the defendant's agent was negligent in the operation of the car, nevertheless, if you shall also believe that the plaintiff himself failed to exercise ordinary care in the control and operation of his wagon, and that, by such failure upon his part, he either caused the collision between his wagon and the car, or so far contributed to bring about the collision that, but for such negligence upon his part, if there was any, the collision would not have occurred, and he would not have been injured, the law is for the defendant, and the jury should so find. -

"3. The law made it the duty of the defendant's agent, in charge of the car, after he saw, or, by the exercise of ordinary care, could have discovered the presence of plaintiff's wagon in peril of collision, to exercise ordinary care to prevent the collision, and if you should believe, from the evidence, that the defendant's agent, the motorman, saw the plaintiff's peril, or, by the exercise of ordinary care, could have discovered it, although brought about by his negligence (that is, the plaintiff's negligence), in time to have enabled the motorman, by the exercise of ordinary care, to prevent the collision, and he failed to do so, the law is for the plaintiff, and the jury should so find.

"3½. The court instructs the jury that the defendant's motorman was not bound, in the exercise of ordinary care, to anticipate that the plaintiff would change the course of his wagon at the time he appeared, from the evidence, to have done so, and defendant's said motorman was not, in the exercise of ordinary care, required to check the speed of his car, with a view of averting a collision with plaintiff's wagon, until he saw, or, by the exercise of ordinary care, could have discovered, plaintiff's peril.

"4. If the jury shall find for the plaintiff, they should award him such a sum in damages as they shall believe, from the evidence, will fairly and reasonably compensate him for any pain and suffering, mental and physical, directly resulting from his injury, and for any impairment of his power to earn money caused thereby, and for any doctor's bills necessarily incurred by him by reason of his injury, not exceeding the sum of \$190 on that account, the whole award not to exceed the sum of \$10,000, which is the amount claimed in the petition. If the jury find for the defendant, they will say so by their verdict, and no more.

"5. By the term 'ordinary care' as I have used it in the instructions given you, as applied to the motorman, is meant the degree of care which men of average prudence and skill engaged in operating street cars by electric power in a city like Louisville, and on a street like Market street, between Eleventh and Chapel, usually exercise under similar circumstances. As applied to the plaintiff, it means the degree of care which a man of average prudence, driving a wagon in such a city, and along such a street, usually exercises under such circumstances, for his own safety. 'Negligence' means the failure to exercise ordinary care."

Appellant asked the court to give the following instruction, which was, in our opinion, properly refused:

"It was the duty of the plaintiff, in driving westwardly on Market street, to use ordinary care for his own safety, and to exercise all of his senses, as persons of ordinary prudence usually do, under the same or similar circumstances, to ascertain whether or not a car was approaching, and it was his duty not to change his course and turn across the track without exercising ordinary care to discover whether or not he was in danger of colliding with street cars, or other vehicles on the street, and, if the jury believe, from the evidence,

that the plaintiff did not exercise ordinary care in these regards, and thereby caused, or helped to bring about, his injuries, then the law is for the defendant, and the jury shall so find their verdict for the defendant, notwithstanding that the jury may also believe that the defendant's motorman, at the same time, was guilty of negligence or violating any or all of the duties charged upon him under these instructions."

The only duty imposed upon travelers or persons using streets that are occupied and used by street car tracks and cars thereon, is to exercise ordinary care for their own safety, and the appellee, if exercising such care, had the right to change his course in any way he pleased, and to use any part of the street necessary for his purposes. It has been frequently held improper to point out, in an instruction, the particular things concerning which it is the duty of the traveler to exercise ordinary care. He is required to exercise this degree of care generally, and with reference to one situation as well as another. Whilst this is the rule applied to the individual, it has also been considered proper to point out and define, with more particularity, the duty resting upon persons in charge of engines or cars. This distinction is made because of the dangerous character of the machines they are operating; and it has become firmly fixed, as frequently held by this court, that the duty of lookout and warning is included in the ordinary care required of persons operating engines or cars. These well-established principles we are not disposed to depart from, and the court would have been well within the settled rule in this State. If, in the instructions given, he had pointed out that it was the duty of the motorman to keep a lookout for persons and vehicles on the track, and to give timely warning of the approach of the car when he discovered, or, in the exercise of ordinary care, by keeping a lookout, should have discovered, the presence of appellee on the track, in a place of apparent peril, and to exercise ordinary care to prevent a collision. (South Covington & Cincinnati St. Ry. Co. v. McHugh, 25 Ky. Law Rep., 1112; Thiel v. South Covington & Cincinnati St. Ry. Co., 25 Ky. Law Rep., 1590; Green v. Louisville Ry. Co., 27 Ky. Law Rep., 316; South Covington & Cincinnati St. Ry. Co. v. Cleveland, 30 Ky. Law Rep., 1076.)

The judgment of the lower court is affirmed.

MERCHANTS ICE & COLD STORAGE CO. v. BARGHOLT.

(Filed May 14, 1908—To be reported.)

1. Excessive Verdict—Motion to Set Aside Verdict—Absence of Prejudice or Passion—Courts are always slow to disturb the finding of a jury on the ground that it is excessive, in the absence of some evidence tending to show that it was the result of prejudice or passion.

2. Negligence—Relative Term—Depending on Circumstances—Question for Jury—Negligence is a relative term, depending upon the circumstances in each individual case. Facts which would show negligence in one case would not be construed to be such in another, hence it is peculiarly the province of the jury to determine, from the facts in each particular case, whether or not one is guilty of negligence.

3. Peremptory Instructions—When Allowable—Absence of Doubt—The courts will only instruct the jury to find for the defendant when the facts admitted or proven leave no room for doubt that he failed to exercise that degree of care which an ordinarily prudent person

would have exercised under like or similar circumstances for his own safety.

4. Sidewalks—Use by Pedestrians—Presumption of Safety—Injury by Obstruction—Negligence—Question for Jury—A pedestrian on a sidewalk in a city has a right to the free use of any portion thereof which is open for public use, and he has a right to assume that it is free from obstruction and in a reasonably safe condition for travel, and if, while passing over and upon a sidewalk of a street, his attention is distracted, so that he fails to observe an obstruction placed thereon, where he has no right to expect it, and is injured by falling over it, the question as to whether or not he was proceeding with due care for his own safety is properly a question for the jury.

Gibson, Marshall & Gibson for appellant.

Walter S. Lapp and Louis F. Steuerle for appellee.

Appeal from Jefferson Circuit Court, Common Pleas Branch, First Division.

Opinion of the court by Judge Lassing, affirming.

This suit was instituted by appellee against appellant and the Trustees of the Norton estate to recover damages for the negligent placing of a block of ice on the sidewalk in front of the Norton building, and suffering and permitting it to remain there, in such a manner as to render the sidewalk dangerous to passing pedestrians. That, while passing along the street, appellee, unaware of the dangerous condition of the street at that point, or that the ice had been left there, fell over and upon said ice, and sustained serious injury.

A demurrer was sustained to the petition, on behalf of the trustees of the Norton estate, and the petition was dismissed as to them. Appellant denied liability, and pleaded contributory negligence. On these issues the case was tried, and resulted in a verdict in favor of appellee, to reverse which this appeal is prosecuted.

Appellant insists that it was entitled to a peremptory instruction, at the close of appellee's testimony, and, if not then, certainly at the close of all the testimony, and that the court erred in refusing to give same. That the verdict is not sustained by the evidence, or is flagrantly against the evidence, and is excessive. We will not consider these grounds for reversal in the order in which they naturally occur, for the reason that, in our judgment, the only point which appellant seriously urges is, that the jury should have been peremptorily instructed to return a verdict in its favor.

There can be no question but what the ice over which appellee fell was placed upon the sidewalk by appellant company; whether near the curbing, as its employe testifies was his custom and habit to do, or whether it was left at the point at which appellee fell over it, was properly left for the determination of the jury. Appellant did offer evidence tending to show that the ice over which appellant fell was delivered to the Johnson & Morgan Company, tenants to the east, but the janitor of the later company testifies that on the morning in question the ice for his company was delivered in the doorway, and the witness Ben Pillow, while somewhat shaken in his testimony as to the exact location of the delivery of the ice by the appellant company, states that the ice over which appellant stumbled and fell was taken into the Norton building. It is clear, from this testimony, and is not seriously denied, that it was the ice delivered by appellant over which appellee fell. The question as to what point on the pavement it was placed was the only real question in dispute; the servant of appellant testified that it was placed near the curbing; at the time when appellee fell over it, it was near the center of the

pavement. About this there is no dispute. As to how it got there, the record is silent; no one saw it moved, four witnesses testify that it was near the center of the pavement when appellee fell over it, and it was the province of the jury to say whether or not its presence at that point was due to the negligence of appellant company.

The evidence on this point was certainly sufficient to warrant the submission of the matter to the jury, and they found, as, in our opinion, they must have found, that the ice was placed there by appellant's agent. Whether he carried it and deposited it at that point, or whether he "skated" it across the pavement and it rebounded to that point, when it struck the building, is not clear. The incontrovertible fact remains it was there, and appellant was, under the proof, responsible for its presence.

The contention that the verdict is excessive, is not borne out by the facts. That appellee was painfully and seriously injured there can be no doubt. The physician who treated him has since died, but, from the undisputed testimony of appellee himself, it is shown that two ribs on his right side were broken; that it was necessary for him to remain five weeks with his body in straps; that during this time he suffered intensely; that he spit blood, and that the pain in his right side continued for more than a year; that he had lost flesh and his health had become seriously impaired; that, before the injury, he was a strong, active and robust man; that, since the injury, he has lost strength, his health is seriously impaired, and it is with difficulty that he can labor. It seems that he fell with his right side across and upon this lump of ice, and it was in this way that he was injured, and his ribs broken. For the injury which he sustained, and the pain and suffering which he endured, we are of opinion that the verdict of \$1,000 returned by the jury is not unreasonable.

This court, in a number of cases, has upheld larger verdicts for injuries less serious. In the case of the City of Richmond v. Martin, 25 Ky. Law Rep., 1516, a lady fell into a hole, sprained her leg and bruised her body so that she was confined to her bed for from three to five weeks, though no bones were broken, she recovered a verdict of \$1,500.00, and this court was asked to set it aside on the ground that it was excessive; although it was not clear that she was injured to the extent which she claimed, yet this court refused to set it aside, on the ground that it was excessive. And, in the case of Louisville Gas Company v. Page, 27 Ky. Law Rep., 885, a woman sixty years old stumbled and fell over a defectively constructed gas box, and injured her elbow, for which she recovered a verdict of \$2,000. On review here, this court refused to set this aside on the ground that it was excessive, it being shown that she had suffered considerably from it from the time of the injury down to the time of the trial, about a year, and, in denying appellant's right to a reversal, this court said:

"In a case like this, where there has been a severe injury and much physical pain and suffering, and there being some evidence from which the jury might conclude that the injury may be permanent, it is difficult, if not impossible, for a jury or a court to determine, with exactness, the proper compensation. The mere fact that the court would not have fixed the compensation as high as the jury had done, is no reason for setting the verdict aside, and granting a new trial."

And, in numerous other cases, this court has held that a verdict seemingly large would not be disturbed on the ground that it was excessive, where there was evidence tending to show that the injury was serious, and the pain and suffering which accompanied it were severe, and were extended through a considerable period of time. Courts are always slow to disturb the finding of a jury on the ground that it is excessive, in the absence of some evidence tending to show

that it was the result of prejudice or passion. In the case at bar, there is nothing that warrants such a conclusion.

This brings us to a consideration of the question as to whether or not appellant was entitled to a peremptory instruction, for which he asked at the conclusion of appellee's testimony, and at the conclusion of all the testimony. The undisputed evidence shows that the accident which resulted in the injury of appellee occurred between 6:30 and 7 o'clock in the morning. As appellee approached the block of ice, he could have seen it, as there was nothing in his way to prevent, had he been looking at it, but he admits that his attention was attracted to the Paul Jones building, which was being erected on the opposite side of the street, and that, with a friend, he was discussing the wonderful growth of the city during the last few years, and they were commenting upon the appearance of the Paul Jones building, and how it could have been improved had its owner acquired the adjacent vacant lot and made it extend over said lot, and that, while his arm was extended in the direction of the Paul Jones building, about which they were talking, his foot struck the cake of ice in question, over which he fell and was injured.

For appellant it is urged that this is conclusive evidence of such negligence on his part that he should be denied a right to recover. This is the question in the case. Was it negligence for him to fail to see the cake of ice on the sidewalk, when he could have seen it if he had been looking in that direction, or might he, while walking along the sidewalk, at a point other than a public crossing, presume that the walk was clear, and the way safe, and take notice of objects across the street, or passing, or overhead, and not be guilty of such contributory negligence as would deny him a right to recover? Negligence is a relative term, depending upon the circumstances of each individual case. Facts which would undoubtedly show negligence in one case, would not be construed to be such in another, hence, it is peculiarly the province of the jury to determine, from the facts in each particular case, whether or not one is guilty of negligence, and so, in the case at bar, it was the duty of the jury, taking into consideration all of the facts, the time of day, the place where the accident occurred and the surroundings, to say whether or not appellee was exercising ordinary care for his own safety in walking along the sidewalk while he was looking at the Paul Jones building, across the street. Might he walk down the sidewalk without keeping his eye upon the ground in front of him in order to observe any obstruction that might be there, and not be guilty of negligence? Was he negligent in failing to see the block of ice, almost transparent, lying upon a white, or, at least, light stone pavement; if, as a matter of law, he was, then a peremptory instruction should have been given. If not, or if, as above indicated, it was the province of the jury to determine this question, then the court did not err in permitting them to do so, and in refusing a peremptory instruction.

Appellant insists most earnestly that it was entitled to have this instruction given, and cites, as supporting its contention, in part, the opinion of Lord Ellenborough, in the case of *Butterfield v. Forrester*, 11 East, 60, wherein he said:

"A party is not to cast himself upon an obstruction which has been made by the fault of another, and avail himself of it, if he do not himself use common and ordinary caution to be in the right. In cases of persons riding upon what is considered to be the wrong side of the road, that would not authorize another purposely to ride up against them. One person being in fault will not dispense with another's using ordinary care for himself. Two things must concur to support this action: An obstruction in the road by the fault of the defendant, and no want of ordinary care to avoid it on the part of the plaintiff."

The doctrine announced by the learned judge in this opinion is recognized as the correct rule, and has been followed in any number of cases, not only in this, but in other courts in this country. But, it will be observed, in this citation from the opinion, the question at last presents itself as to what is ordinary care, or what amounts to a want of ordinary care on the part of the plaintiff to avoid the injury? This, we say, and our courts have held, is to be determined in each case by the facts and circumstances surrounding it, and has been invariably held to be a question for the jury.

Appellant also cites the case of *Creamer v. West End Street Railway Company*, 156 Mass., 320, as supporting his contention, but an examination of that case shows that, while the court recognized the rule, that the question of ordinary care is, in most instances, a question of fact, and hence, properly to be left to the jury; still, cases would be found where, from the undisputed facts, the court could see that the plaintiff was not in the exercise of ordinary care, and, in such cases, the court could properly instruct the jury to find for the defendant, and the court cited, with approval, in that case, the case of *Chaffee v. Boston*, 104 Mass., 108, in which we find the following sentence:

"The question of ordinary care is, in most cases, even where the facts are undisputed, a question of fact, which it is peculiarly the province of the jury to settle."

It is only in that class of cases where the whole evidence introduced by the plaintiff has no tendency to show care on his part, or, on the contrary, shows a want of care, that the duty of the court is to direct a verdict for the defendant. Undoubtedly, if appellee saw the cake of ice, and, seeing it, walked against it, or fell over it, it would have been the duty of the court to have instructed the jury to find for the defendant, and, likewise, if the evidence had shown that appellee's attention had not been distracted at the time, and he had not been looking at the building across the street, or at some other object, which took his attention and vision from the sidewalk, then a case might have been made out which would have warranted the court in instructing the jury to find for the defendant, though, upon this point, the decisions are not uniform. In other words, the court will only instruct the jury to find for the defendant when the facts admitted or proven leave no room for doubt that he failed to exercise that degree of care which an ordinarily prudent person would have exercised under like or similar circumstances for his own safety, and this is all that the case of the *Ashland Coal & Iron Company v. Wallace*, 101 Ky., 637, decided.

Many cases involving questions similar to the case at bar have been passed upon by our court, and, in those cases, it has been held, with a degree of uniformity, that the correct rule is, that when the court is in doubt as to whether certain acts proven show a failure to use that degree of care which an ordinarily prudent person would have used under similar or like circumstances, for his own safety, it is proper to submit the case to the jury.

In the case of *West Kentucky Telephone Company v. Pharis*, 25 Ky. Law Rep., 1839, appellee was passing over a street at an early hour in the morning, on a cloudy day, when the ground was covered with snow, which was still falling, when she tripped and fell over a telephone wire, and sustained serious injury. On the trial she admitted that she knew of the presence of the wire at that point, but stated that she had her mind distracted at the time by reason of the serious sickness of a sister. That she was thinking about her sister at the time, and forgot about the wire, and, failing to notice it, fell over it. This court held that the mere knowledge on the part of appellee of the presence of the wire upon the street was not, by itself, sufficient to show contributory negligence, though this was a fact for the jury

to consider, along with the other facts proven as to whether or not she was guilty of negligence. And, in the case of the City of Maysville v. Guilfoyle, 23 Ky. Law Rep., 43, appellee was injured by falling into a low place in the street, while going to her brother-in-law's, where his child was sick. It developed, during the progress of the trial, that appellee knew of the defect in the street. She stated that, on account of having the sickness of her brother-in-law's child uppermost in her mind, she momentarily forgot about the low place in the street, and failed to notice it. A peremptory instruction was asked for and refused, and this court held, upon review here, that the court did not err in so ruling, but that it was properly left a question for the jury to determine, from all the facts and circumstances, whether or not she was guilty of contributory negligence.

In each of the cases above cited, the plaintiff knew of the existence of the defect or obstruction in the street, but momentarily forgot its presence there because her mind was distracted by reason of the sickness of a member of the family, and the court held, in each case, that the fact that her mind was so distracted was a circumstance which authorized the submission of the case to the jury; and it was for the jury to determine whether or not, under such circumstances, she was exercising that degree of care for her own safety which an ordinarily prudent person would have exercised under like or similar circumstances.

The case at bar presents a much stronger reason why the peremptory should have been denied, for the evidence clearly shows that the plaintiff did not discover the presence of the cake of ice on the sidewalk for the reason that his attention was attracted to the structural work of the Paul Jones building, then being erected.

It is urged, for appellant, that there was ample room to have walked on either side of the cake of ice, and that the slightest care on his part would have enabled him to avoid the injury, but, as said in the case of the City of Lexington v. Auger, 4 Ky. Law Rep., 23, where the appellee had fallen into a hole, and the city attempted to justify on the ground that there was ample room for appellee to have passed along the street without falling into the hole, had he exercised ordinary care for his own safety, this court, upon review here, said that, while this was true, and, as a matter of fact, appellee had to go somewhat out of his way to fall into the hole, yet he had a right, even though drunk, if he was, to presume that no such danger existed in one of the great thoroughfares of the city, and he was not confined to the use of any particular part of the street, but that he had a right to walk upon any part of it. To the same effect is the City of Louisville v. Keher, 25 Ky. Law Rep., 2003.

And, in the case of the Brush Electric Lighting Company v. Kelley, 10 L. R. A., 250, where a lady walking along Main street, in the city of Lafayette, in the day-time, had fallen over a wire and sustained an injury, in passing upon the question, the Supreme Court of Indiana said:

"We do not think that it necessarily follows that the appellee was prima facie guilty of negligence in not observing the obstruction. She had the right to presume that the sidewalk was free from obstruction until her attention was, in some way, called thereto, and to act upon such presumption. * * * A small wire lying along a sidewalk might very reasonably be overlooked by a passer-by, who has no notice thereof, and the fact that it is overlooked does not necessarily indicate negligence. We can not hold, as a question of law, that a person may not pass along a sidewalk cautiously and fail to observe a small wire along or across it; and then, we can imagine many circumstances whereby the attention of the pedestrian might be attracted from the sidewalk, which would be sufficient to divert the attention of a reasonably prudent person."

In the case of the City of Chicago v. McLean, 8 L. R. A., 765, in passing upon a similar question, the court said:

"The plaintiff in this case was bound to make a reasonable use of her faculties when walking along the sidewalk, in order to avoid danger; but what was such reasonable use was a question of fact, to be determined by the jury, under all the circumstances disclosed by the evidence. * * * What particular facts amounted to an exercise of ordinary care, or what particular facts amounted to a want of ordinary care, it was for the jury, and not for the court to determine."

And, in the case of Berry v. Terkilsden, 72 Cal., 254, in passing upon a similar question, the court said:

"A sidewalk of a street in a city, not near a crossing, may be taken by one passing over it to be safe, and not a dangerous place. In this case, the respondent had the right to presume that the sidewalk was in the same condition in which she had always found it; and the fact that her attention was momentarily attracted in another direction—a thing of most common occurrence to travelers along the street—falls far short of that contributory negligence which, in law, defeats an action for damages."

And, in the case of McGuire v. Spence, 91 N. Y., 303, where the plaintiff was injured by falling into an uncovered hole in the sidewalk of the street, in the city of Brooklyn, fronting upon premises owned by the defendant, the court said:

"Negligence is a relative term and depends upon the degree of care necessary in a given case. He who approaches a railroad crossing, approaches a place of danger, and he must look and listen. for he is bound to anticipate a possible harm. But one who passes along a sidewalk has a right to presume it to be safe. He is not called upon to anticipate danger, and is not negligent for not being on his guard."

And, in the case of the City of Chicago v. Babcock, 143 Ill., 358, the court said:

"A person passing along a sidewalk in a city is required to use ordinary and reasonable care and diligence to avoid danger, but what is such ordinary and reasonable care and diligence depends upon the circumstances of each particular case, and is a question of fact for the jury. A pedestrian upon such sidewalk may ordinarily assume that the sidewalk is in a reasonably safe condition for travel. To hold that such person is absolutely bound to keep his or her eyes constantly fixed on the sidewalk in search for possible holes or other defects, would be to establish a manifestly unreasonable and wholly impracticable rule."

In the case of Le Beau v. Telephone & Telegraph Construction Company, 109 Mich., 302, the plaintiff had fallen over a barrel placed over a hole in the middle of the sidewalk, in the day-time, on a May morning. As he approached the sidewalk, his attention was attracted to workmen who were doing construction work on the street, and, while his attention was so attracted, he fell into the barrel in the hole and was injured. In passing upon his right to recover, the Supreme Court said:

"Whether one who, in passing along a sidewalk, and while absorbed in watching the workmen in an excavation being made from the street into an area under the sidewalk, walks into a manhole, left open for the purpose of hoisting through it material excavated from the area, without seeing a barrel which had been placed beside the manhole as a means of guarding it, is guilty of contributory negligence, preventing a recovery for the resulting injuries, is a question for the jury."

And, in the case of West v. City of Eau Claire, 89 Wis., 36, the Supreme Court of Wisconsin said:

"The momentary diversion of the plaintiff's attention could not be contributory negligence, as a matter of law."

And, in the case of *Jennings v. Van Schaick*, 108 N. Y., 530, the plaintiff fell into an unguarded hole in the street. and in reviewing the case, on appeal, the court said:

"She had a right to assume the safety of the sidewalk, and so was not called upon to give attention to her steps until in some manner warned of danger. Undoubtedly, she knew that vaults and coal-chutes were common under and adjacent to sidewalks, and that they were the ordinary openings through which coal was deposited in the vaults. But she had a right to assume that they were securely covered, or, if left open, were guarded by some one to give warning, or by the crib or box prescribed by said ordinance, neither protection was provided in the present case. * * * In a crowded street it might not be observed in time to avoid a fall, but she swears no such sign of possible peril was present, and, though contradicted, we must take the verdict of the jury as settling the fact in her favor."

To the same effect are the cases of *McGrain v. Kalamazoo*, 94 Mich., 52; *Russell v. Monroe*, 116 N. C., 720; and *David v. Austin*, 54 S. W. (Texas), 927.

Courts generally hold, and our court has recognized it to be the correct rule, that a pedestrian has a right to the free use of any portion of the sidewalk which is open for public use, and he has a right to assume that it is free from obstruction, and in a reasonably safe condition for travel, and if, while passing over and upon a sidewalk in a street, his attention is distracted, so that he fails to observe an obstruction placed upon the sidewalk where he has no right to expect it, and falls over same and is injured, the question as to whether or not he was proceeding with due care for his own safety, is properly a question for the jury.

It is likewise held that if, while passing along the pavement, the attention of the pedestrian is attracted across the street, or overhead and away from the pavement, and, while so attracted, he comes upon and falls over an obstruction in the street, at a point where he has no right to reasonably expect it to be, and is injured, it is the province of the jury to say whether or not, under all of the circumstances, he is guilty of such contributory negligence as to deny him the right to recover. We are aware that, in some jurisdictions, a contrary rule is held, notably in Pennsylvania, and a distinction is there made between subjective cases and cases external or objective, but no such distinction is made in this State, and the same rule applies, whether the detracting cause is some external object, or the concentration of the plaintiff's mind and thought upon some absorbing topic or question.

We are of opinion that, in denying the appellant's motion for a peremptory instruction, the trial judge did not err, and the judgment is, therefore, affirmed.

HAZEL GREEN OIL AND GAS CO. v. COLLIER, &c.

(Filed May 15, 1908—Not to be reported.)

Oil and Gas Wells—Contract for Boring—Construction of Lease—Expiration of Lease—A gas company leased a farm on which to bore for oil and gas in February, 1903, for three years, and "as much longer as oil and gas are found, provided wells are completed during said term, and if gas is found in sufficient quantities to market it," and, if piped away, to pay \$100 a year for each well as long as the gas is marketed, and to sink a test well within one year. Held—That to entitle the lessee to a longer term than three years it was incumbent on it that other wells beside the test well should be completed during three years from the date of the lease, and failing to do so, the lease expired at the end of the three years.

McGuire & McGuire and Hazelrigg, Chenault & Hazelrigg for appellant.

Eli H. Brown, Jr. and Finley E. Fogg for appellees.

Appeal from Morgan Circuit Court.

Opinion of the court by Judge Hobson, affirming.

On February 23, 1903, Holly Wilson made a lease to the Hazel Green Oil and Gas Co. It put down no wells upon the property during the first year of the lease, but paid Wilson a royalty as provided therein. In the second year of the lease it did put down a well that struck gas about July 1, 1904. The well flowed about 200,000 cubic feet of gas a day. It did not market the gas, or make any use of it, but simply capped the well in. It had struck, before that, gas on a neighboring farm in a well that flowed over 700,000 cubic feet of gas a day. This well it had turned into its mains, and supplied all of its customers. Wilson then complained that they were not using his gas, and it was agreed between him and the directors, that the company would furnish him, at cost, the piping and some other articles so that he could run the gas to his house and use it for heating and lighting purposes, if he would release the company from paying any royalty while he was thus using the gas. He agreed to this, and did run the gas to his house and use it from that time on. Before this was done, the company had torn down its derrick and moved it to another place, and was doing no further work on the land.

Nothing further was done until the summer of 1906, when Wilson made another lease to S. R. Collier. The latter entered upon the land and was preparing to bore for gas when the Hazel Green Oil and Gas Co. entered and hauled off his lumber and other things, preventing him from going to work. Thereupon this suit was brought by him and Wilson against The Hazel Green Oil and Gas Co. to recover for trespass. Upon the trial in the circuit court the plaintiffs recovered a judgment for \$100, and the defendant appeals.

The only question we deem it necessary to consider on this appeal is, whether the lease to the Hazel Green Oil and Gas Co. was in force at the time the lease of Collier's was made, for if its lease had terminated, the lease to Collier was valid, and it had no right to interfere with Collier in his work upon the land. The lease made to the Hazel Green Oil and Gas Co., so far as material, is in these words:

"Memorandum of agreement made and entered into this 23d day of February, A. D., 1903, by and between Holly Wilson and Angeline Wilson, his wife, of the county of Morgan and State of Kentucky, of the first part—witnesseth.

"That said party of the first part, for the consideration of one dollar, the receipt of which is hereby acknowledged, and the covenants and agreements, rents and royalties hereinafter mentioned, has granted, demised and let, unto the party of the second part, their heirs and assigns, for the purpose and for the exclusive right of drilling and operating for petroleum, oil and gas, to have and to hold for and during the term of three years from date hereof, and as much longer as oil and gas is found, provided wells are completed during said term, as hereinafter provided, with rights necessary to do those things and the right to assign and sub-divide a certain tract or parcel of land (here follows description).

"The said parties of the second part in consideration hereof, agree to give to the party of the first part one-eighth of all the petroleum oil obtained or produced on the premises herein leased, to deliver same in tanks or pipe lines to the credit of the party of the first part. It is further agreed that if gas is found in sufficient quantities

to market same, and be piped away from the premises to such market, the consideration in full to the party of the first part shall be \$100 per annum for each well as long as the gas from said well is marketed.

"The said parties agree to sink a test well on the above described land within one year, and also agrees to commence operations in the county inside of six months.

"This lease to become void if well is not completed within said time, unless said parties shall pay as rentals for said premises at the rate of ten cents per acre, per year, during the time drilling is delayed. The second parties may, at their option, pay any rentals monthly.

"And it is further agreed that the first party, in consideration of the agreement of the second party herein contained, agrees that the second party, his heirs, successors or assigns, may at any time after the payment of said rentals due, surrender up this lease by delivering the same back to the first party, his heirs, or assigns, endorsed with the surrender thereof and signed by the said second party, and be thereby forever discharged and released from all moneys due, or to become due, and from all obligations accrued, or that may accrue, under this lease, and thereupon this lease shall remain null and void and of no further value, and whatever moneys shall have been received by the first party herein shall be retained by him as full and stipulated damages for the non-fulfillment of the conditions of this lease.

"Which is agreed by the parties hereto as the consideration moving from said second parties to their rights under this lease for the first (party) named herein."

As the lease was made on February 23, 1903, if it was only a lease for three years, it expired on February 23, 1906. It will be observed that the lease is for "the term of three years from date hereof, and as much longer as oil and gas is found, provided wells are completed during said term, as hereinafter provided." It will also be observed that the lease provides that if gas is found in sufficient quantities to market the same, and be piped away from the premises to such market, the consideration in full to Wilson shall be \$100 a year, "for each well as long as the gas from said well is marketed." It is also provided in the lease, that the gas company is to sink a test well on the land within one year. Reading these provisions of the lease together, we think it manifest that the writing draws a distinction between the test well, which it provides for, and other wells. In other words, the expression "provided wells are completed during said term." means that other wells are to be completed during the term, besides the test well, and that the mere sinking of a test well during the term, without marketing the gas found in it, does not entitle the lessee to an extension of the term beyond the three years. Wilson was to have a royalty of \$100 a year on each well. The more wells were sunk the greater would be his royalty. And this clause also shows that the parties contemplated the sinking of other wells than the test well. The test well was to be sunk in one year or the lessee was to pay the lessor yearly a rental of ten cents an acre. It was also to pay him a royalty of \$100 a year for each well as long as gas from the well was marketed, and the lease was for a term of three years, and as much longer as gas was found provided wells were "completed during said term."

What occurred between Wilson and the directors would excuse the company from the payment to Wilson of any royalty on the test well, but it did not excuse it from its obligation to put down other wells. The gas was struck in July, 1904. After striking the gas it pulled down its derrick and moved off, and for two full years did nothing on the land. It did not market any of the gas from the well which it had bored, and had made no effort to put down other wells, or to

market any gas from the land. The words, "as much longer as oil and gas is found," are to be read with the words, "provided wells are completed during said term." The term is the three years from the date of the lease just above provided for, and so to entitle the lessee to any longer term than three years, it was incumbent upon it that wells should be completed during that term. No well, however, but the test well was put down. It, therefore, failed to comply with the conditions of the lease, and its term ended with the expiration of the three years. To give the contract any other construction would be to make it binding upon Wilson indefinitely, when it imposed no substantial obligation upon the lessee. It could put down no wells after the test well was sunk, and escape all payment of royalty except on the gas from that well.

Under the facts the lease to the Hazel Green Oil and Gas Co. had expired. The circuit court, in effect, so instructed the jury, and in this there was no error.

Judgment affirmed.

ADAMS v. CURRAN.

(Filed May 15, 1908—Not to be reported.)

Industrial Mutual Deposit Companies—Selling Coupons—Loaning Money—Building Houses—Mortgages—Enforcement—Legality—A contracted with the Industrial Mutual Deposit Co., to build him a house on his lot at a cost of \$650, to be paid for by buying coupons in the company and out of the money arising from the maturity of the coupons, he could pay for the building, and executed a mortgage on the lot to C, who was an officer of the company for the \$650. The house was built and accepted by A and the company failed and became insolvent. A had paid \$138 and received \$148.31, which had gone as a credit on his house. In an action by C on the mortgage. Held—That the scheme, though impractical, was not illegal, and the lower court properly enforced the mortgage.

A. M. Baker for appellant.

Forman & Forman for appellee.

Appeal from Fayette Circuit Court.

Opinion of the court by Judge Hobson, affirming.

In the year 1900 J. J. Adams owned a vacant lot in the city of Lexington. J. H. Baker was the general manager of the Industrial Mutual Deposit Co., and William Curran was one of the officers of the company. Baker suggested to Adams that he could have a house built on his lot by buying coupons in the company, and out of the money arising from the maturity of the coupons, he could pay for the building of the house; that he could execute a mortgage on the lot and arrange with Mr. Curran to build the house in this way. After some negotiation Adams executed a mortgage on the lot to the Industrial Mutual Deposit Co. for \$650. The mortgage contained this clause: "First parties are to let all the money herein loaned remain in the hands of the Industrial Mutual Deposit Co. and are to take out eight hundred coupons in said company and all of said money is to be applied upon the dues of said coupons, the profits on maturities of said coupons are to be paid to William Curran, until he is paid the price of erecting a building upon said property, then the maturities are to be applied to the liquidation of the six hundred

and fifty dollars loaned herein, and first party binds himself to keep (800) eight hundred coupons in force in said company, or so many as said company may require, until the debts herein are discharged, and to pay on said coupons each week the amount determined by said company to keep said coupons in full force, and said coupons are to be in lien and as fully covered by this mortgage to secure the payment of said debt as the real estate herein, and if said first parties fail to comply with any provision of this mortgage, then the whole debt shall become due."

At the same time Adams made a written contract with Curran, which was in these words:

"These presents witnesseth:

"That on the 28th day of September, 1900, the following contract was made and entered into between Wm. Curran, party of the first part, and J. J. Adams, party of the second part, both of Lexington, Ky., to-wit:

"That for and in consideration of one dollar in hand paid by the first party, and the further consideration hereinafter named, the party of the second part borrows from the Industrial Mutual Deposit Co., of Lexington, Ky., \$650 with which he takes out 800 coupons and allows all of said \$650, except the cost of securing said loan, go as advanced dues on said coupons, to be placed in the hands of the party of the first part, all the profits arising each week out of maturing coupons, to be collected by the first party, and to be applied as a credit on a note given for the building of a house in Arlington Heights, and said second party agrees each and every month to pay into said company \$8 to be applied in the payment of dues on the said coupons or renewals of the same, until enough coupons have matured to pay said Curran \$686.

"Now in consideration of the above agreement and promises the party of the first part agrees to build a one-story cottage in Arlington Heights, according to specifications and plans set forth in a contract for said building of even date herewith."

Curran built the house and Adams accepted it; but the maturities on the coupons were not sufficient to pay Curran; on the contrary the company failed and became insolvent. Adams had paid in \$138. He had received \$148.31, which had gone to Curran as a credit on the cost of the house. In this action Curran sought to enforce a lien on the house for the balance due him. The circuit court adjudged him the relief prayed, and Adams appeals.

It is insisted for Adams that the business of the Industrial Mutual Deposit Co. was in effect the running of a lottery; that the contract for the building of the house was in furtherance of the lottery business and that the court should leave the parties where it finds them. We do not find in the record any evidence that Curran had any other purpose in the arrangement than to build a house for Adams, for which Adams was to pay him \$686. Adams has the house and if he is not now required to pay Curran for it, he will get Curran's money for nothing and keep the house which Curran has built without paying for it. If Adams had lost anything in the Industrial Mutual Deposit Co. a different question might be presented, but he lost nothing by that company as he got out \$10 more than he paid in. The business of the Industrial Mutual Deposit Co. was, in effect, the same as that described in *Taylor v. Commonwealth*, 25 Ky. Law Rep., 374; *O'Day v. Bennett*, 26 Ky. Law Rep., 702; *Ebelhar v. German American Security*, 28 Ky. Law Rep., 1144. The scheme upon which the business of the company was conducted was utterly impractical. The company was insolvent from the time it began business. It is astonishing that persons of ordinary intelligence, upon reading the schemes of the company, would have put their money into it; but there was no concealment. The officers of the company, and the

investors, both seemed deluded with the notion that in some mysterious way, by reason of the lapsing of certificates, the scheme could work out. Nobody imposed upon Adams. The scheme was not illegal in the sense that it would render illegal the collateral contract to build the house. The fact is, the building of the house was not collateral to the business of the company. The building of the house was the main thing that Adams wanted to accomplish, and the buying of the certificates in the company was collateral to this or a means to secure the money to pay for the house. In the Ebelhar case we held that, as the investors in the company had the same knowledge as the directors, the directors must pay back the money they had received in so-called dividends, but that they were under no further responsibility. The chancellor properly settled this case on the same basis. By the judgment no injustice has been done Adams. He has the house; the only thing that he has not, is the profit he expected from his certificates; and in this expected profit he and Curran were both disappointed; and he had then as much facility for judging of the matter as he now has.

The business of these Mutual Deposit Companies has not been treated by this court as so far illegal that no action could be brought on contracts made by them. The court has not applied to them the rule that it will leave the parties where they placed themselves on the ground that the business was unlawful. On the contrary, it has applied the principle that the parties entered upon an impractical business by mistake or by reason of false representations and should be placed in statu quo. The judgment appealed from proceeds on this basis, and is correct.

The motion to transfer to the ordinary docket came too late as it was not made until the case had been prepared for trial. (*Chenault v. Eastern Ry., &c., Co.* 119 Ky., 170.)

Judgment affirmed.

FITZPATRICK v. FITZPATRICK'S ADM'R.

(Filed May 15, 1908—Not to be reported.)

This action having previously been tried in the lower court and appealed (30 Ky. Law Rep., 1011), and reversed and returned with specific directions as to future disposition of the case, which directions were fully carried out by the lower court, is now affirmed.

John W. Ray and William Lindsay for appellant.

Hazelrigg, Chenault & Hazelrigg for appellee.

Appeal from Franklin Circuit Court.

Opinion of the court by Judge Settle, affirming.

This is the second appeal in this case. On the first appeal S. M. Noel was the appellant and the present appellant, Eva Fitzpatrick, the appellee. (*Noel v. Fitzpatrick*, 30 Ky. Law Rep., 1011.)

On the first appeal the principal question was as to the ownership of a 260-acre tract of land under a decree of the Franklin Circuit Court; it being contended by Eva Fitzpatrick, plaintiff in the action, who is a daughter of Thos. Y. Fitzpatrick and Narcissa Fitzpatrick, deceased, that her mother, then and until her death, the wife of Thomas Y. Fitzpatrick, was the purchaser of the land at decretal sale, and that it was paid for with her money, for which reason the land, it was claimed, should have been conveyed to the wife instead of the husband. The answer of Thomas Y. Fitzpatrick ad-

mitted that the land in question was purchased at the decretal sale in the name of his wife, he doing the bidding for her, but averred that he was the real purchaser of the land, and that the method adopted of acquiring it was for convenience and in order that he might become her surety on the sale bond, and thereby avoid the necessity of calling upon some one outside of the family to become his surety. The answer also denied that Mrs. Fitzpatrick paid any part of the sale bond, and alleged that he (Thomas Y. Fitzpatrick) paid the whole of it out of his own means, and that his wife, knowing this to be true, upon the confirmation by the circuit court of the sale to her of the land, executed to him, in writing, an assignment of her bid, and in the same writing, requested the court to order a conveyance of the land, through the commissioner, to him.

After the institution by Eva Fitzpatrick of the action against her father, the latter sold the land in question to S. M. Noel at the price of \$8,000; of which amount \$3,000 was paid in cash by Noel, and the balance of \$5,000 he was to pay at the termination of the litigation between Thomas Y. Fitzpatrick and his daughter over the land, provided the daughter did not recover the land. By an amended petition, Eva Fitzpatrick attacked the sale to Noel made by her father. Noel, by petition to be made a party, set up his purchase of the land and the payment of \$3,000 of the consideration, and asked, in the event he failed to get the land under such purchase, to be subrogated to the rights of Thomas Y. Fitzpatrick and given a lien on the land for whatever sums of money, not exceeding \$3,000, the latter paid on the land by virtue of his purchase at the decretal sale. By adopting the answer of Thomas Y. Fitzpatrick he relied upon the defense interposed by him. His petition was taken as an answer, and cross-petition against Eva Fitzpatrick. Thomas Y. Fitzpatrick died, intestate, during the pendency of the action, and before there was a trial or decision of the case, J. K. P. South, who had previously been appointed and qualified as administrator of his estate, was, by an agreed order, made a party to the action and the same revived as to him. Following the order of revivor, Noel filed an amendment reiterating the averments of his petition, answers and cross-petition, and making it, as amended, a cross-petition against the administrator of Thomas Y. Fitzpatrick.

Upon the trial in the circuit court judgment was rendered holding invalid the assignment of Narcissa Fitzpatrick's bid at the decretal sale to Thomas Y. Fitzpatrick, also the sale of the land made by the latter to S. M. Noel, and directed the commissioner to convey the land to Eva Fitzpatrick. As before stated, S. M. Noel prosecuted an appeal from this judgment, which resulted in its reversal; this court being of the opinion that the assignment from Mrs. Fitzpatrick to Thomas Y. Fitzpatrick passed to him whatever title or interest she acquired in or to the land by virtue of her purchase at the decretal sale; and this being true that the contract whereby Thomas Y. Fitzpatrick later sold the land to Noel, was valid and entitled Noel to a conveyance thereof upon the payment by him of the \$5,000.00 yet due from him on the land. This court, in substance, further held that \$4,281.31 of Mrs. Fitzpatrick's money was used by Thomas Y. Fitzpatrick in paying the sale bond executed by himself and wife to the commissioner at the decretal sale, and, as this sum had not been re-paid by him to her estate or heirs at law, one-half of it should be paid out of the \$5,000.00, balance of purchase money owing by S. M. Noel on the land to Thomas Y. Fitzpatrick's estate, but that the latter estate should not be made to account for the other half of the \$4,281.31, for the reason that he, having survived his wife, was entitled, under the statute, to such half, as well as a half of all other personal estate left by her.

The opinion contains the following specific directions as to the steps to be taken upon the return of the case to the circuit court:

"Upon a return of this case to the trial court S. M. Noel will pay to the master commissioner of the Franklin Circuit Court the remainder of the purchase money due upon said land, according to the terms of his purchase, and upon receipt thereof the master commissioner of the Franklin circuit court will execute a proper release of the lien upon the record for the remainder of the purchase money. Out of the money so paid into court by Noel, one-half of the claim of Narcissa Fitzpatrick, to-wit: one-half of \$4,381.31, with interest from March 1, 1897, will be paid to appellee, and the remainder of funds in court, less the costs, will be paid to the personal representative of Thomas Y. Fitzpatrick. The trial court will set aside the order cancelling the deed from the master commissioner to Thomas Y. Fitzpatrick, and also the order directing the master commissioner to convey the property described in this suit to Narcissa Fitzpatrick, and all other orders made by him in signing and approving the deed from the master commissioner to Narcissa Fitzpatrick, and he will enter an order cancelling and holding for naught the deed from the master commissioner to Narcissa Fitzpatrick, and he will adjudge S. M. Noel the owner of the land in question under his purchase from Thomas Y. Fitzpatrick."

Upon the return of the case to the court below a judgment was entered in precise conformity to the opinion, *supra*, yet its reversal is asked upon the following grounds: 1. That this court was without power, on the former appeal, to direct the judgment of the circuit court, because Thomas Y. Fitzpatrick's administrator was not a party to that appeal. 2. That there was neither pleading nor proof upon which to base the judgment rendered by the court, or which authorized this court to direct the entering of such a judgment.

As to the first ground of complaint it may be said the controversy in this case was as to the title of a tract of land. It was claimed both by appellant, Eva Fitzpatrick, and by appellee, Noel. Appellant's claim was based upon the alleged purchase of the land by her mother; that her mother's money paid for it, and that she inherited it at her mother's death. Appellee's claim was based upon his purchase of the land from Thomas Y. Fitzpatrick, and that the latter had purchased it at decretal sale, paid for it and received a deed from the master commissioner conveying him the title. To support his claim to the land appellee had to show that Thomas Y. Fitzpatrick was entitled to it as against appellant, his daughter. When Thomas Y. Fitzpatrick died he was succeeded as a party to the action by his administrator. The latter, though not a party to the first appeal, became a party to the action before the judgment reversed on the first appeal was rendered. This court, on the appeal, held that the lower court should have caused the land to be deeded to Noel, because Noel's vendor was entitled to it as against his daughter. In reversing the judgment and remanding the case to the lower court, this court had to direct that court to have the land conveyed to Noel upon his paying the \$5,000, balance of purchase money he owed upon it; the administrator of Thomas Y. Fitzpatrick had no connection with the land, and was not a necessary party to the action in so far as a determination of the title to the land was concerned, but when as an incident to the determination of that question the money Noel yet owed for the land had to be paid into court, the administrator for the first time became a necessary party, because so much of the money as the estate of Thomas Y. Fitzpatrick was entitled to was directed by the opinion of this court to be paid to him. The money, as well as the land, had to be disposed of by the lower court upon the return of the case to that court, and, therefore, it was proper for this court to direct in its opinion what

disposition to make of it. In other words, it was proper for the circuit court to dispose of the whole case and for this court to direct it in so doing, but before disposing of the money paid into court by Noel, as directed by the opinion of the appellate court, the circuit court was charged with the duty of seeing to it that the administrator of Thomas Y. Fitzpatrick was before the court, or if not to make him a party. The latter step was unnecessary, for the administrator was already before the court. As the judgment entered by the circuit court upon the return of the case, in directing the payment to the administrator of so much of the \$5,000 as Thos. Y. Fitzpatrick's estate was entitled to, would have been proper as a result of the reversal of the original judgment and without any specific direction of this court, and the administrator was not prejudiced thereby, it was not necessary that he should have been a party to the appeal.

It is true, as urged in the second contention of counsel for appellants, that neither the pleadings nor proof specifically named the full consideration Noel was to pay T. Y. Fitzpatrick for the land. A pleading of the former alleged the payment in cash of \$3,000 of the consideration, and that the remainder was to be paid upon the determination of the litigation then pending, if decided in favor of T. Y. Fitzpatrick, but failed to indicate the amount of such remainder. In any event it was conceded, on the former appeal, by counsel for appellant and appellee, and stated in the brief of each, that \$8,000 was the consideration agreed to be paid by Noel; that \$3,000 of this sum was paid at the time of the sale and that \$5,000 of it was to be paid at the end of the litigation, upon the condition indicated. Eva Fitzpatrick, appellee on that appeal, was then represented by the same counsel by whom she and the administrator are represented in the present appeal. So, the matter of the consideration passing between Noel and T. Y. Fitzpatrick stands as if there had been an agreement of parties that it was \$8,000, \$5,000 of which remained to be paid. Therefore, this court had a right to accept this agreement as a basis for the direction given the lower court as to the disposition to be made of the \$5,000, and we think appellants are now estopped to complain of the absence of allegation or proof as to the full amount of the consideration.

Judgment affirmed.

SMITH v. SIMMONS.

(Filed May 15, 1908—To be reported.)

Local Taxation—Aid to Common School Districts—Adopted Prior to Present Constitution—Legality of Levy—There is nothing in the present Constitution of the State, adopted September 28, 1891, to indicate that taxes may not be levied after its adoption, pursuant to a local law in force when it was adopted, so long as the Legislature allows the local law to remain in force and the public needs require the levying of taxes.

S. R. Crewdson for appellant.

J. B. Grubbs and L. Y. Trimble for appellee.

Appeal from Logan Circuit Court.

Opinion of the court by Judge Hobson, affirming.

By an act approved March 4, 1888, the territory within the limits of common school district 49, Logan county, including the town of Adairville, was incorporated as a school district and placed under the

management of a board of trustees, who were authorized to levy an ad valorem tax not exceeding seventy-five cents on each one hundred dollars worth of property, and a poll tax not to exceed two dollars, in aid of the common school. The trustees made a levy for the year 1907, of seventy-five cents on each one hundred dollars worth of property, and also levied a poll tax of \$1.50. The appellants then brought this suit against the trustees to enjoin the collection of the tax on the ground that the act of 1888 is no longer in force. The circuit court dismissed their petition and they appeal.

The petition does not state any facts sufficient to show invalidity of the action of the trustees, if the act of 1888 is in force, and so that is the only question that it is necessary for us to consider. It is insisted that the act can not be in force under the present Constitution of the State, because, under it, special legislation is forbidden; taxes must be levied by general laws; and the Legislature must provide a uniform system of common schools throughout the State. That our Constitution has not the effect to repeal or make inoperative special laws passed before its adoption, has been often decided by this court. In *Long v. Louisville*, 87 Ky., 364, it was held that the provision of the Constitution that all taxes shall be levied and collected by general laws refers to the future, and does not affect powers conferred in the pre-existing laws. In *O'Mahoney v. Bullock*, 97 Ky., 774, it was held that the local act of 1890 for the purchase of turnpikes in Fayette county, the issuing of bonds and the levying of taxes to pay for them, was not affected by the adoption of the Constitution. In *Pierce v. Mason County*, 99 Ky., 357, a similar act as to Mason county was held in force and taxes levied under it were sustained. The same principles were applied in *City of Covington v. District of Highlands*, 113 Ky., 612, where a local act of the Legislature authorizing the District of Highlands to levy taxes was held still in force. The same rule has been uniformly applied to local acts creating school districts and authorizing taxes to be levied in them in aid of the common schools. In *Roberts v. Clay City*, 102 Ky., 88, there was an action similar to the one now before us. Bonds had been issued and a school house built. A part of the bonds were unpaid; the trustees were levying a tax to pay the bonds and carry on the school. It was held that the local act was still in force and the levies were valid. In *Board of Education of Hawesville v. Louisville, &c., R. R. Co.*, 110 Ky., 932, it was insisted that a levy of taxes by the trustees in the Hawesville district under an act approved Feb. 27, 1880, was invalid. In that case also, the trustees had issued bonds and had made a levy to meet the bonds and run the school. The act was held in force, and the levy was sustained. While in both these cases the district had issued bonds the court did not rest its opinion upon the ground that the levy was necessary to pay the bonds; for, if it had done this, only so much of the levy as was necessary to meet the bonds could have been sustained. The court sustained the levy not only for the purpose of meeting the bonds, but also for the purpose of maintaining the school. In *Louisville & Nashville R. R. Co. v. Trustees of Elizabethtown*, 23 Ky. Law Rep., 1169, a levy by the trustees of the school district under an act approved March 29th, 1878, was sustained upon the authority of the two cases above cited; and in that case there were no bonds, the levy being made simply to maintain the school. The cases of *Hickman College v. Trustees Colored District*, 111 Ky., 944, and *Board of Trustees v. Morris*, 24 Ky. Law Rep., 1420, in no way conflict with those above cited. In each of these cases the question presented was whether the railroad tax should be divided between the white and colored schools, and this was the only question in the case. The statute under which the tax on the railroad was levied provided that the money should be divided between the white and colored

schools. There is nothing in the opinion in these cases in conflict with the former opinions. The court held that the statute requiring the tax to be divided between the white and colored schools applied to all the schools in the State, whether the levy was made under the general law or a special act. The soundness of the former opinions holding the special acts still in force is expressly recognized; for otherwise the levies there in controversy were void.

The makers of the Constitution intended to prohibit special legislation, but they contemplated that existing special legislation should continue until changed by the Legislature, unless in conflict with some of its provisions. To have blotted out at once all special legislation in the State would have been to throw the business of the State into chaos. There was the same reason for continuing schools established under special acts, as for allowing other business established under special acts to continue. Debts had been created, buildings had been erected and the education of pupils had been begun. It was important not to interrupt the course of education, or to make a new system which might make unsuitable a large part of the property which had been thus acquired. The interest of the people required that these schools which they had thus established should not be disturbed and so the Legislature, when it came to revise the school laws continued them in force as before. There is nothing in the Constitution to indicate that taxes may not be levied after its adoption pursuant to a local law in force when it was adopted, so long as the Legislature allows the local law to remain in force and the public needs require the levying of taxes. It is true the Legislature must provide a uniform system of common schools, but when the Legislature has so provided, there is nothing to inhibit a local tax in aid of the common school to improve and perfect it. The Adairville school is a part of the common school system, and the fact that there is a local tax to give the people a better school than the common school fund alone would give them, makes it none the less a common school, and in no wise infringes the constitutional provision requiring a uniform system of common schools.

Judgment affirmed.

SOUTHERN RY. CO. IN KENTUCKY v. MILLER.

(Filed May 19, 1908—To be reported.)

1. Railroads—Passenger on Caboose—Delay of Train—Evidence Excluded—In an action by a passenger on a railroad train for damages for delay in being carried to his destination, and for being compelled to ride in a caboose without fire, and for being put off of the train a long distance from the depot. Held—That the court erred in excluding the evidence offered by the defendant to show the cause of the delay.

2. Carriers of Passengers—Responsibility for Delay—Unavoidable Accidents—A common carrier must use ordinary care to carry its passengers to their destination in a reasonable time, but is not responsible for delays which are caused by accidents that ordinary care may not guard against. If there was a wreck on the road, not due to defendant's negligence, which prevented the train running to plaintiff's depot, the defendant is not responsible for the delay which could not be avoided by ordinary care.

3. Negligence of Carrier—Instructions Applicable—Measure of Recovery—The court should have instructed the jury that if the defendant negligently failed to keep its caboose in a reasonably comfortable condition, under the circumstances, or negligently failed to deliver

plaintiff at the regular place for the landing of passengers at B, and as the proximate result of these things, or any of them, plaintiff suffered pain or was made sick, they should find for him a fair compensation for the time lost, for any physical or mental suffering he endured and for any permanent reduction of his power to earn money, if such there was.

4. Same—The plaintiff can not recover for any suffering or sickness which he might have prevented by the exercise of ordinary care on his part or for anything which the carrier, by the exercise of ordinary care, could not reasonably have guarded against, and if when there was no negligence delaying the train, the plaintiff voluntarily left it, and walked to the station, the defendant is not responsible for any sickness brought upon him by the walk.

E. H. Gaither, Humphrey & Humphrey, Alex. P. Humphrey and L. R. Yeaman for appellant.

Robert Harding, E. V. Puryear, E. M. Hardin and Greene & Van-Winkle for appellee.

Appeal from Mercer Circuit Court.

Opinion of the court by Judge Hobson, reversing.

J. P. Miller is a merchant residing at Burgin in Mercer county, Kentucky. In March, 1907, he went to Louisville to buy goods, and after staying in Louisville several days, took the evening train home. When he reached Harrodsburg, which is a few miles from Burgin, he changed cars, the regular train going on to Danville. At that point he took a freight train which also carried passengers. The train was a little late and did not leave Harrodsburg until about ten thirty P. M. The ticket office was not open and so he did not get a ticket. When he got upon the steps of the passenger coach he saw that there was no light or fire in it, and so he went into the caboose, which was just behind it. He was the only passenger on the train. The conductor collected his fare and when they had gotten a few miles from Harrodsburg, the train stopped. This they did because there were some cars in front of them. Towards morning they moved on further, and at seven o'clock, when they were in the yards at Burgin but before the train had been pulled up to the platform, Miller got off and walked home. He testified that he was then seven-eighths mile from the station. The conductor testified they were about two hundred yards from the station. He testified that during the night the caboose would get very hot and then would cool off; that the wind blew in upon him from under the door, it being a cold night, and he was very uncomfortable; that he got his feet wet in walking home; that he went home and went to bed; that at ten o'clock he had a high fever and continued sick for a long time. He had had Bright's disease in the fall, but his physician testified that he was discharged as cured in February. He also testified that the Bright's disease came back upon him in his sickness and that he was still suffering from it at the time of the trial. The defendant offered to show that the reason the train could not get to Burgin was that two flat cars loaded with long steel rails became uncoupled by one of the draw-heads coming out, thus dumping the rails across the track and completely blocking traffic; that there was apparently no defect in these couplers or draw-heads and that no amount of care could prevent the draw-head from pulling out; that by reason of the rails being upon the track there was a congestion of cars, so that the train could not get to Burgin sooner than it did; and that this was the sole cause of the delay: the defendant also showed that there was a good walk from where

Miller got off the train to the station, and it did not appear that he at any time complained during the night about the caboose being uncomfortable. The court refused to allow the evidence offered by the defendant as to the cause of the delay, and at the conclusion of the evidence instructed the jury as follows:

"You are instructed to return a verdict for the plaintiff for such a sum in damages as you believe from the evidence will be a fair compensation to him for any physical discomfort, trouble, inconvenience caused by him, if any, while in the defendant's caboose, by reason of the failure of the defendant to carry him within a reasonable time from its depot in Harrodsburg to its depot in Burgin, and if you believe from the evidence, that the plaintiff was caused to be and did become sick or injured in his physical health, because of the changing conditions of heat and cold prevailing in said caboose during the time he remained therein, or because of his having to walk from the place in the yards at Burgin where the train stopped, to the depot, then you will find for the plaintiff such further sum as you will believe from the evidence will be a fair compensation to him for any physical and mental suffering caused him by such sickness and ill health, and for any permanent reduction of his power to earn money, if any, by said illness, your whole finding not to exceed the sum of \$5,000.

"No. 2. You can find for the plaintiff for no injuries sustained by him, if any, that are not proximate to the failure to the defendant to make the trip in the ordinary time with its caboose in ordinary comfortable condition, and to deliver plaintiff at the accustomed place at Burgin where passengers alight from passenger trains."

The jury found for the plaintiff and fixed the damages at \$4,000. The court entered judgment on the verdict and the defendant appeals.

The court erred in excluding the evidence offered by the defendant to show the cause of the delay. A common carrier must use ordinary care to carry his passengers to their destination in a reasonable time, but is not responsible for delays which are caused by accidents that ordinary care may not guard against. If there was a wreck on the road, not due to the defendant's negligence, and this prevented the train from running into Burgin, the defendant is not responsible for such delay as ensued which could not be avoided by ordinary care on its part. (6 Cyc., 587, 5 Thompson on Negligence, secs. 6602-6; Hutchison on Carriers, sec. 654.)

The instructions of the court do not properly present the law of the case. In lieu of instruction 1, the court will tell the jury that if the defendant negligently failed to transport plaintiff from Harrodsburg to Burgin in a reasonable time, or negligently failed to keep its caboose in a reasonably comfortable condition under the circumstances, or negligently failed to deliver plaintiff at the regular place for the landing of passengers at Burgin, and as the proximate result of these things or any of them, the plaintiff suffered pain or was made sick, they should find for him a fair compensation for the time lost, for any physical or mental suffering he endured, and for any permanent reduction of his power to earn money, if such there was. In lieu of the second instruction, the court will tell the jury that the plaintiff can not recover for any suffering or sickness which he might have prevented, by the exercise of ordinary care, on his own part, or for anything which the carrier, by the exercise of ordinary care, could not reasonably have guarded against, and if when there was no negligence delaying the train, the plaintiff voluntarily left the train and walked to Burgin station, the defendant is not responsible for any sickness brought upon him by the walk. By another instruction, the court will tell the jury that if the delay in reaching Burgin was due to a wreck on the road and could not have been

avoided by ordinary care, and ordinary care was used to keep the caboose reasonably comfortable, they should find for the defendant.

It is not material who owned the track upon which the defendant ran its cars into Burgin station. It was incumbent upon the defendant to carry its passengers to Burgin and no order given by the Cincinnati Railroad Company can excuse it from its obligation. But the facts may be shown, and if by reason of the wreck the train could not, by ordinary care, have been run into Burgin any sooner than it was, the defendant is not liable; and if, rather than wait for the train to get down to the station, the plaintiff walked to it, when there was no negligence on the part of the railroad company causing the delay, the defendant would not be responsible for any sickness brought upon him by reason of the walk. The fact that Miller was infirm or in a condition which aggravated the injury will not excuse the defendant from liability. The rule is thus stated in 3 Hutchinson on Carriers, sec. 1432:

"If the passenger, at the time an injury is received, through the negligence of the carrier, is suffering from some disease or illness which tends to aggravate the injury, the passenger's previous infirmity will not excuse the carrier from answering in damages to the full extent of the injury as affected by such infirmity; and the fact that the carrier was not informed of the passenger's condition will make no difference. Where a female passenger fell and was injured through the carrier's negligence while alighting from a passenger car, it was held that the fact that she wore an artificial limb, which greatly aggravated the injury, would not relieve the carrier from making full compensation for the real injury suffered. So, where a female passenger, who was pregnant was injured in a collision of cars, it was held that the carrier was liable for the injury, notwithstanding the fact that, had she not been pregnant, she would not have been injured." (L. & N. R. R. Co. v. Dougherty, 108 S. W., 336.)

Judgment reversed and cause remanded for a new trial.

LOGAN, &c. v. VANARSDALL, &c.

(Filed May 19, 1908—Not to be reported.)

1. Inquests—Subsequent Inquest—Finding Party Insane—Proceedings—Conveyances—This action seeks to recover certain land conveyed by T. on the ground that he was of unsound mind when he conveyed it. The transaction complained of occurred thirty years ago and there is a failure of proof that, during all this time, either T. or his children complained or asked a rescission.

2. Same—The inquest complained of occurred more than thirty years ago and except a clerical error by the county judge in failing to turn the papers over to the circuit court, appears to have been regular. Nor did the failure of the party making the affidavit to sign the jurat invalidate it, the statute in that regard being merely directory.

Breckinridge & Breckinridge and Greene & VanWinkle for appellants.

J. F. Vanarsdall and J. Morgan Chinn for appellees.

Appeal from Mercer Circuit Court.

Opinion of the court by Judge Hobson, affirming.

At the April term, 1876, of the Mercer Circuit Court, James P. Terhune was found to be a person of unsound mind, by the verdict of the jury, and was committed to the lunatic asylum at Lexington. After he had been in the asylum about five weeks he was discharged as improved. On his return home another inquest was held in the Mercer County Court—the circuit court not being in session. At this inquest he was found of sound mind. In January, 1878, he and his wife sold and conveyed to C. S. Vanarsdall a tract of 147 acres of land in consideration of \$5,932. Vanarsdall sold the land to Thomas E. James. The widow of James conveyed it to Enoch F. Godfrey. James P. Terhune died in the year 1903. After his death this suit was brought by his children and heirs at law against Vanarsdall, Mrs. James and Enoch F. Godfrey, to recover the lands, on the ground that Terhune was of unsound mind at the time of the sale to Vanarsdall, and that he continued of unsound mind up to his death. The circuit court sustained a demurrer to the petition. On appeal to this court the judgment was reversed, the court holding that, under the allegations of the petition, a cause of action was stated. (Logan, &c. v. Vanarsdall, &c., 27 Ky. Law Rep., 822.) On the return of the case to the circuit court the defendants filed answer. A large amount of proof was taken, and, on final hearing, the circuit court again dismissed the petition; and from this judgment the plaintiffs again appeal.

It is insisted that the proceedings in the Mercer County Court, by which Terhune was found of sound mind, in May, 1876, were void. The county court did not, by its judgment, annul the judgment of the Mercer Circuit Court. The judgment of the Mercer Circuit Court determined that Terhune was of unsound mind in April, 1876. The question presented in the county court was whether he was of unsound mind something over a month later, when he demanded an inquest in the county court. The one judgment in nowise conflicts with the other. He may have been sane at the later date and insane at the first. The inquest merely determines the condition of the mind of the person charged at the time of the inquest. By section 14, chapter 53, of the General Statutes, which was then in force, the county judge was authorized to hold the inquest. The fact that the papers were not returned to the circuit court did not invalidate the proceedings. The validity of the proceedings depended upon the action taken at the time, and not upon the failure of the county judge to perform the clerical duty afterwards of returning the papers to the circuit court. By section 15, of the General Statutes, it was provided that, "whenever it shall be suggested to the court, by affidavit, that a person found of unsound mind has been restored to his proper senses," the court shall forthwith direct the facts to be inquired into by a jury. It is insisted that no affidavit was filed for the inquest in the county court. One of the sons of James P. Terhune, who came with him to the inquest, made oath to the necessary facts, and this statement, in writing, which was sworn to by him and is certified by the county judge, is in the record. By some oversight, the affiant failed to sign it above the jurat. But the statute is merely directory. When the facts were shown to the court by a witness under oath, the statute was substantially complied with, and the mere informality of the affidavit did not affect the validity of the proceedings.

As to the facts in regard to the condition of Terhune's mind after his return from the asylum, the proof is conflicting; but we can not say that the weight of the evidence does not sustain the conclusion of the chancellor. Vanarsdall was advised by his attorney that, as Terhune had been found of unsound mind by the verdict of a jury, it would be safer to have a writing from his children before accepting the deed and paying the money. The writing was prepared by the

attorney and was signed by all the children of Terhune. They were well acquainted with their father and his condition, and in this writing they guaranteed that he was of sound mind. He had three grown sons. One of the sons is shown to have been a man of unusual business capacity, and to have advocated the trade. The consideration was fairly adequate for the land at that time. The trade was canvassed for some time before it was consummated. The whole family of Terhune knew all about it. None of them at that time made any objection, but, on the contrary, acquiesced in it. Not only so, but, a year before, Terhune had sold and conveyed another tract of land. His children and friends had acquiesced in this sale, making no suggestion that he was incompetent to transact his business. After the sale to Vanarsdall, he sold and conveyed three or four other tracts of land, no complaint having ever been made of any of these transactions. While there is much evidence in the record that his mind was never right after he came back from the asylum, we are by no means satisfied from it that he was continuously of unsound mind. He was regarded by his neighbors as restored, and of the witnesses who are in nowise interested in the matter, personally, the weight numerically is perhaps with the appellees. But, however this may be, the transaction occurred something like thirty years ago. There is proof in the record that these children desired some action taken by their father during his life-time, when Vanarsdall wanted the lien on the land released, and Terhune said he had not released the lien and would not release it, and the matter might be settled after his death. The statements testified to as made by him, show that he understood very well what he had done, and there is an utter failure to show that, in all these thirty years, neither he nor his children ever complained to Vanarsdall or asked a rescission of the contract. When a transaction is so old and has stood without complaint so long, the presumption in its favor is strong and it will not be set aside except upon clear evidence.

Judgment affirmed.

BUTLER v. COMMONWEALTH.

(Filed May 20, 1908—Not to be reported.)

Homicide—Evidence—Statement of Wife—Appellant shot and killed deceased as a result of a whipping deceased gave his daughter, who was appellant's wife. If it was admissible for appellant to testify to all the circumstances, as detailed him by his wife of the beating deceased gave her, its exclusion was not prejudicial to appellant, who, instead of waiting for the law to take its course, went home and, preparing for a conflict, sought deceased and killed him.

John B. Grider and Nat A. Porter for appellant.

James Breathitt and Tom B. McGregor for appellee.

Appeal from Warren Circuit Court.

Opinion of the court by Wm. Rogers Clay, Commissioner, affirming.

Appellant, Frank Butler, was indicted for the offense of murder. The jury found him guilty of voluntary manslaughter and fixed his punishment at confinement in the penitentiary for twenty-one years. From an order overruling his motion and grounds for a new trial, he prosecutes this appeal.

On the night before the homicide, Joe James met his daughter, the wife of appellant, and severely beat and bruised her because she apprehended the deceased (Joseph James) in company with a lewd character who lived in the vicinity, and had communicated this fact to her mother, the wife of Joe James. Appellant's wife narrated to appellant the circumstances under which her father beat her, and appellant and she then went to police headquarters and secured a warrant for the arrest of deceased. There, in the presence of the police officers, appellant's wife again detailed the circumstances of the beating. On the day that Joe James was killed, he and his two sons, in company with other men, were engaged in repairing the interior of a negro Methodist church, on Kentucky street, in Bowling Green. On his way to dinner, just previous to the killing, appellant met the accused in the street. According to some of the witnesses, they did not speak or say anything to each other. Appellant contends, however, that deceased laughed at and mocked him, and asked him if he didn't like it, &c. At that time appellant asked one of the James boys, who was with his father, if the old man had been arrested yet, and the boy told him he had not. Appellant then proceeded on his way to dinner. After dinner he put his revolver in the bib of his overalls and then went to the church where he knew deceased was at work. Deceased was on the floor counting out a pile of shingles. James Grainger was at work on one of the windows near by, and the two James boys (sons of the deceased) and another boy were at work in different parts of the church, fixing the ceiling, moving scaffolding, &c. Appellant entered the church, and, after looking around and speaking a word or two to one or more of the persons present, walked over to where the deceased was at work on the floor, and asked him what about the trouble that he and Bertha had had the night before. The evidence is conflicting as to whether or not deceased made any reply. Appellant immediately drew his revolver and shot the deceased three times. As they grappled with each other and scuffled out into the vestibule and out the door of the church, another shot was fired. Grainger and one of the boys of the deceased reached them just about the time they got to the outside of the church, and pulled appellant off of the deceased. The latter then fell to the sidewalk and died immediately. Appellant left the scene, and, as he was departing, one of the sons of the deceased, who had gone to his father's tool-chest and secured a revolver, returned and fired three shots at appellant, who was then some distance away.

According to the testimony for the Commonwealth, the deceased made no demonstration towards appellant until after the latter had fired the first shot. According to the evidence of appellant, the deceased first grabbed his chisel and sprung at appellant before the latter attempted to do any shooting. Appellant claims that he did not go to the church with the intention of shooting deceased at all, but that he stopped there for the purpose of having an understanding with deceased as to why the latter beat appellant's wife and then laughed at him about it. While appellant was on the stand, the court permitted him to testify that his wife had told him that her father beat and bruised her, and that she exhibited her wounds to appellant, but declined to permit him to state to the jury all the circumstances of the beating as detailed to him by his wife. For this error, alone, appellant seeks a reversal.

Even assuming that such testimony was admissible, we do not think its exclusion in this case was prejudicial to the substantial rights of appellant. Instead of waiting for the law to take its course, he went home and prepared for a conflict; after which he sought the deceased, and, according to the decided weight of the evidence, attacked

him when he was bending over and had no weapons with which to defend himself. The court did permit appellant to testify that his wife had told him her father had beat her, and that she exhibited to him her wounds. Doubtless this testimony accounts for the fact that the jury did not impose a severer sentence on the appellant.

Upon the whole case, we are unable to say that the substantial rights of the defendant were prejudiced by the error complained of, and the judgment is, therefore, affirmed.

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5. If a fellow-servant is entirely competent to discharge the duties assigned him by his master, and he should, without authority from the master, undertake to do things beyond the scope of his employment, the master would not be responsible for his negligence in these matters, on the ground that he was not a suitable person for that service. *Idem* 423

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1. Description of Property—Identification—Validity—A mortgage on property which was sold and used in building a water plant is void for uncertainty which does not locate the property as to State, county or town, and which contains no reference which would supply the omission. A mortgage covering so many feet of "spiral pipe" is void for uncertainty in description where there is nothing in the mortgage by which it could be identified and distinguished from other pipe of like kind. *Miller Supply Co. v. Louisa Water Co.'s Ass'ee, &c.*..... 388
2. Water Plant—Enforced Sale—Liens on Connected Parts—Distribution of Proceeds—Where parties sold property to a water company by a contract, which was recorded, in which they retained the title to the property sold until the purchase price was paid, on the sale of the waterworks to pay its debts, under order of a court, where the property sold could not be attached without injuring the sale of the waterworks plant, the court should have ascertained the cost of each item that constituted the plant, and distributed the proceeds of the sale according to the cost of each of them on their respective claims, and if their whole claims are not then satisfied they should be permitted to present the balance as a general claim, to share with the other creditors pro rata, under section 74, Kentucky Statutes. *Idem* 388

MUNICIPALITIES—**Page.**

1. Public Common Nuisance—Omitting Legal Duty Required for Common Good—A common or public nuisance is one that affects the people at large, and is a violation of a public right, either by a direct encroachment upon public property, or by doing some act which tends to the common injury, or by omitting to do, in the discharge of a legal duty, that which the common good requires. *City of Owensboro v. Hope; City of Owensboro v. Lossie* 426
2. Street Improvement—Property Owners—Common Law Liability—Statutory Requirements—There is no common law liability on the part of abutting property owners to pay for street improvements. The only liability is that imposed by statute. The general rule is, that when a power is conferred upon a municipal corporation, and the manner in which it is to be exercised is prescribed, such mode must be pursued. *Idem* 426
3. Abatement—Jurisdiction of Courts—In addition to the ordinary remedies by indictment and abatement, a court of equity will often take jurisdiction of a public nuisance, such as the unlawful obstructing of a public highway, and restrain or enjoin acts prejudicial to the interests of the community. The jurisdiction of the court, in such cases, is founded upon the greater promptitude and efficiency of the remedy, as well as the desirability of preventing irreparable mischief and vexatious litigation. *Idem* 426
4. Abating Nuisance—Mandatory Injunction—Under section 3290, sub-section 7, Kentucky Statutes, relating to cities of the third class, authorizing the common council "to open, alter, abolish, widen, extend, establish, grade, pave, or otherwise improve and keep in repair, streets and sidewalks, or have the same done," the only liability created by these sections and by sections 3449 to 3452, inclusive, is the liability on the part of the abutting property owner to pay for the improvements, after they have been made, and a mandatory injunction will not lie to compel a property owner, in such city, to construct a sidewalk and abate a nuisance suffered by his failure to do so. *Idem* 426

OBSTRUCTION IN STREET—

1. Injury to Pedestrian—Joint Liability of City and Person Placing Obstruction—Liability as Between Wrongdoers—Although a person injured by an obstruction in a street may sue the city alone, or both the city and the person who placed the obstruction in the street, and recover damages against both and look to either for satisfaction of the judgment, yet as between the wrongdoers the city may, if it is required to satisfy the judgment, recover the amount thereof from the person who placed the obstruction in the street. *Blocker v. City of Owensboro, &c.*.... 478
2. Judgment Against City—Negligence of Another—Assignment of Judgment—Purchase by One Jointly Liable—Enforcement of Judgment—In an action by D. against Mr. B. and the city of O. for damages for an injury in falling over some brick negligently allowed to be in the street of the city in the building of a house on a lot owned by B., the plaintiff recovered a judgment for \$500 and costs. The wife of B. paid the judgment and took an assignment thereof and proceeded by mandamus to collect same from the city. It was shown by the evidence that

OBSTRUCTION IN STREET—Continued—

Page.

the house was built and owned by Mrs. B. who, though not a party to the record, was the real property in interest. It also appeared that Mr. B. owned property subject to execution. Held—That the court has the right to look beneath the surface to ascertain the truth and to adjudge the case as appears right, and it was properly adjudged that the purchase of the judgment was not made in good faith by Mrs. B., but was done by agreement with her husband, who was the real purchaser, and that no action could be maintained by her against the city. *Idem.* 478

OIL AND GAS WELLS—

Contract for Boring—Construction of Lease—Expiration of Lease—A gas company leased a farm on which to bore for oil and gas in February, 1903, for three years, and "as much longer as oil and gas are found, provided wells are completed during said term, and if gas is found in sufficient quantities to market it," and, if piped away, to pay \$100 a year for each well as long as the gas is marketed, and to sink a test well within one year. Held—That to entitle the lessee to a longer term than three years it was incumbent on it that other wells besides the test well should be completed during three years from the date of the lease, and failing to do so, the lease expired at the end of the three years. *Hazel Green Oil and Gas Co. v. Collier, &c..* 495

PRINCIPAL AND SURETY—See Replevin—

1. **Release of Surety on Note—Contract Between Principal and Creditor—**In order that a surety on a note be released, there must be an enforceable contract between the principal and the creditor, by which the creditor would be prevented from suing on the note when due, and, for that reason, the surety be prevented from paying off the debt that day, and thereupon subrogated to the creditors' rights, by suing or taking other steps to save himself from loss. *Davless County Bank & Trust Co. v. Wright, &c..* 457
2. **Indulgence by Principal—Assent of Creditor—Ignorance of Surety—**Mere indulgence of the principal in a note by his creditor does not operate to discharge the surety thereon, even though it be expressly assented to by the creditor, at the instance of the principal, of which the surety is ignorant, even if the principal has, during such indulgence, become a bankrupt. *Idem* 458
3. **Novation—Making New Contract—Definite Extension of Time to Principal—Consideration—**A novation is the making of a new contract. Its elements are essentially the same as in the first contract, which are (1) parties, (2) a meeting of their minds, and, (3) a consideration. Hence, the further indulgence by a principal in a note of the creditor, if the surety is to be released thereby, must be upon an agreement for an extension for a definite time, and this agreement must be based upon a new consideration. *Idem* 458
4. **Acts of Personal Representative—Authority of Court—**It is not competent for a personal representative of an estate, without the authority of a court of competent jurisdiction, to enter into a contract with a debtor to the estate, by which the jurisdiction of the court may be ousted, or the statutory rights of other litigants or claimants be charged or postponed. *Idem* 458

RAILROADS—**Page.**

1. Freight Trains—Carrying Passengers on Caboose—Separate Caboose for White and Colored Passengers—Under Kentucky Statutes, sections 772a and 801, the carrying of passengers by a railroad in a caboose attached to a freight train, does not change the freight train into a passenger train, and though a railroad company may allow both white and colored passengers to ride in such caboose, it is not subject to indictment under Kentucky Statutes, section 795, for failing to provide separate coaches on said trains for white and colored passengers. *Southern Ry. Co. in Ky. v. Commonwealth* 430
2. Crossings—Gates—Flagman—Signal—Invitation to Cross—Assumption of Traveler—A traveler, in approaching a railroad crossing that is protected by a flagman or safety gates, has the right to depend upon the invitation extended to cross the track by the open gates, or the signals of the flagman. When the safety gates are open, or the flagman signals the traveler that he may cross, it is an invitation to do so, and the traveler has the right to assume that he can pass in safety. *Cross v. I. C. R. R. Co.* 432
3. Implied Invitation—Care Required of Traveler—But the fact that the gates are open, or the flagman gives the signal to cross, does not relieve the traveler from exercising ordinary care for his own safety, as if, notwithstanding the invitation implied by the open gates, or the flagman's signal, the traveler, by the exercise of ordinary care, could know that a train was approaching, the invitation would not be an absolute protection against his negligence. *Idem* 432
4. Duty of Trainmen—Giving Statutory Signals—The fact that the crossings are protected by gates, or flagman, does not relieve those in charge of a train of the duty to exercise ordinary care, in approaching the crossings, to prevent accident to the persons at the crossings, or of the duty of giving statutory signals, or other warning, where the statutory signals are not required. *Idem* 433
5. Instruction of Court—While the travelers may not rely, to the exclusion of exercising ordinary care for his own safety, on the open gate, or the flagman's signal, it is not proper in the trial court to instruct the jury that the traveler has no right to rely entirely on the flagman, or the open gates, as the case may be, thus diminishing the weight and importance that the traveler has the right to attach to the invitation to cross, by the open gates or the flagman's signal. *Idem* 433
6. Trespassers on Track of—Infants—The deceased was a trespasser on appellee's track, and the fact that it was an infant two years old, added no duty or responsibility on the railroad's employes to anticipate its presence on the track, or to keep a lookout in advance of actually seeing its peril. *O'Bannion's Adm'r v. Southern Ry. in Ky.* 436
7. Instructions—There was no evidence to show that the child was killed by the negligent acts of those in charge of the train, and the peremptory instruction to find for appellee was properly given. *Idem* 436
8. Cattle Guards—Reasonable Construction—Sufficiency—Under Kentucky Statutes, section 1793, requiring "all corporations and persons owning or controlling and operating railroads, to erect and maintain cattle guards at all ter-

RAILROADS—Continued—

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- minal points of fences constructed along their lines," if a cattle guard is not reasonably sufficient to prevent cattle from going across it, then it is not such a guard as the statute contemplates, although it may be in general use by all railroads. *N., C. & St. L. Ry. Co. v. Russell* 447
9. Care Required of Railroads—Question for Jury—This does not mean that a cattle guard must be so constructed as that, under no condition, cattle can pass over it, or that it must afford absolute or perfect protection against trespassing or wandering stock, but railroad companies should at least exercise ordinary care to provide and maintain guards reasonably sufficient for the purpose intended, and no better test can be applied to determine the statutory sufficiency of a guard than to submit, under competent evidence, the question of its reasonable sufficiency to a jury. *Idem* 447
10. Crossings—Instructions—In this action to recover of appellant for the death of appellee's intestate which occurred at a crossing, so much of an instruction based on the idea that the crossing was unusually dangerous should not have been given. This instruction would have been proper, had the crossing been exceptionally dangerous, but it was only an ordinary country crossing. *L. & N. R. R. Co. v. O'Nan's Adm'r* 642
11. An instruction was also erroneous which told the jury that it was the duty of the railroad company to keep its crossings and approaches in "good repair" so as not to unreasonably interfere with travelers, &c., when the instruction should have directed that the crossing be kept in such repair as is reasonably safe for public travel. *Idem* 462
12. The proof showing that deceased was not seen until he came on the track about 100 yards ahead of the train, at which time it could not be stopped before it reached him, it was error to instruct the jury to find for plaintiff if the servants in charge of the train saw deceased, or could have seen him by the use of ordinary care in time to avoid injuring him. *Idem* 462
13. Passenger on Caboose—Delay of Train—Evidence Excluded—In an action by a passenger on a railroad train for damages for delay in being carried to his destination, and for being compelled to ride in a caboose without fire, and for being put off of the train a long distance from the depot. Held—That the court erred in excluding the evidence offered by the defendant to show the cause of the delay. *Southern Railway Co. in Ky. v. Miller*..... 505
14. Carriers of Passengers—Responsibility for Delay—Unavoidable Accidents—A common carrier must use ordinary care to carry its passengers to their destination in a reasonable time, but is not responsible for delays which are caused by accidents that ordinary care may not guard against. If there was a wreck on the road, not due to defendant's negligence, which prevented the train running to plaintiff's depot, the defendant is not responsible for the delay which could not be avoided by ordinary care. *Idem* 505
15. Negligence of Carrier—Instructions Applicable—Measure of Recovery—The court should have instructed the jury that if the defendant negligently failed to keep its caboose in a reasonably comfortable condition, under the circumstances, or negligently failed to deliver plaintiff at

RAILROADS—Continued—

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the regular place for the landing of passengers at B, and as the proximate result of these things, or any of them, plaintiff suffered pain or was made sick, they should find for him a fair compensation for the time lost, for any physical or mental suffering he endured and for any permanent reduction of his power to earn money, if such there was. *Idem*.....

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16. The plaintiff can not recover for any suffering or sickness which he might have prevented by the exercise of ordinary care on his part or for anything which the carrier, by the exercise of ordinary care, could not reasonably have guarded against, and if when there was no negligence delaying the train, the plaintiff voluntarily left it, and walked to the station, the defendant is not responsible for any sickness brought upon him by the walk. *Idem*

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REPLEVIN—

Action Against Sureties on Replevin Bond—Failure to Show Breach—Recovery Denied—In an action against the sureties on a replevin bond, where it appears that no restitution of the property in controversy was directed in the replevin suit, and no damages were sought or awarded, the plaintiff's right of recovery against the sureties being dependent upon the breach of the bond, they must fail in the absence of showing that there has been a breach of some of its provisions. *Vallandingham, &c. v. Ray, &c.*

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SECOND APPEAL—

Action of Lower Court—Compliance with Opinion—On a former appeal of this case (28 Ky. Law Rep., page 9) the trial court was directed to determine two questions: 1st. Were the 350 acres in controversy embraced in the 687-acre tract? 2d. Had appellants previously bought and paid for the 350 acres? Held—That the lower court, having found that the 350 acres were not embraced in the 687-acre tract, or in any other survey with which appellants were charged in the former judgment, therefore appellants were properly chargeable with the 350-acre tract in controversy. *Ewell & Smith v. Jackson's Adm'r., &c.*

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SCHOOLS—See Graded Common Schools, 1, 2.

SIDEWALKS—See Excessive Verdict, 1.

STREET IMPROVEMENT—See Municipalities, 1, 4.

1. Apportionment Warrants—Sale—Right of Redemption—Prior Judgment—Effect Thereon—Under section 2834, Kentucky Statutes, referring to apportionment warrants, a failure to provide in a judgment of sale thereunder, that the defendant in the warrant may redeem the land within two years from the report of the sale, does not affect a previous judgment in favor of the parties to the action, where the defendant did not offer to redeem the land within the two years. *Maypother v. Gast, &c.*

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2. Sale and Conveyance—Failure of Owner to Object—Legality of Sale—Under section 989, Kentucky Statutes, providing that the court may summarily determine the amount due on the assessment and provide for its payment in the judgment, where property was sold under an apportionment warrant and was conveyed to the pur-

STREET IMPROVEMENT—Continued—	Page
chaser without objection by the owner, who failed to ask that he should have two years time in which to redeem it, he can not thereafter raise the question as to the legality of the sale and conveyance. <i>Idem</i>	396

STREET CARS—

1. Collision With Wagon—Injury to Driver—Care Required—The only duty required by travelers or persons using streets that are occupied by street car tracks and cars thereon, is to exercise ordinary care for their own safety, and, in the exercise of such care, they have the right to change their course in any way they please, and to use any part of the street necessary for their purpose. While this is the rule, as applied to the individual, it is proper to define, with more particularity, the duty resting upon persons in charge of engines or cars, because of their dangerous character. *Louisville Ry. Co. v. Boutellier*. 484
2. Relative Care—Lookout Duty of Motorman—The duty of lookout and warning is included in the ordinary care required of persons operating engines or cars, and it is the duty of the motorman of street cars to keep a lookout for persons and vehicles on the track, and to give timely warning of the approach of the car, when he discovers, or, in the exercise of ordinary care by keeping a lookout, should have discovered, the presence of persons or vehicles on the track, in apparent peril, and to exercise ordinary care to avoid a collision. *Idem*. 484

SURETIES—See County Treasurer, 1, 2.

TELEPHONES—

1. Contract Between Two Companies—Pleading—The parties to this action entered into a five year contract providing for an interchange of business, and a controversy arising as to appellant's right under the contract, appellee cut off all connection before the termination of the contract. In this action against appellee for damages for the breach of the contract, appellee, in an amended answer, alleged that appellant had not obtained a franchise from Sonora, the place of its central station, as required by sections 163-164, of the Constitution. In its reply appellant admitted such failure, but averred that many of his subscribers were reached by lines that did not go over or upon any street in Sonora, and that most of his rural subscribers were of this class. It was error to sustain a demurrer to the reply. The contract was severable. There was an agreement to use such lines as the parties might from time to time set up. *Bland v. Cumb. Tel. & Telg. Co.*..... 399
2. Rule as to Construction of Contracts—The rule is elementary that contracts, though partly in violation of a statute, severable into parts, may be enforced as to the part that is good. *Idem* 399

VERDICT—See Excessive Verdict, 1.

TAXES—

1. Lien of City Therefor—Negligence of Officials—Effect—on Lien Notes—Whatever might be the rule between individuals, it can not be held that a city shall lose its right to collect its public dues by reason of the failure of its officers to present its claim in a suit of which they have no knowledge, the city not being a party to the suit. *Middlesboro Town & Lands Co. v. City of Middlesboro; City of Middlesboro v. Coal & Iron Bank, &c.* 469

TAXES—Continued—**Page.**

2. Execution Sale—Purchasers—Conveyance to Wife—Effect—Where in a proceeding to sell a lot in a city, under execution, and on which the city had a lien for taxes, and of which lien the purchaser had notice, the fact that the purchaser had the deed to the lot made to his wife did not make her a bona fide purchaser without notice—she being a lis pendens purchaser took the property subject to the lien of the city which it had asserted in the action. *Idem* 469

TEACHER, REPORT OF—See Graded Common Schools, 1, 2,
WILLS—

1. Devise of Fund to a Daughter—As a Home for Herself and Family—Sale or Re-Investment—Restrictions—Construction—A testator, by his will, devised to his daughter a house and lot of the estimated value of \$4,000, "as a home for herself and family, as long as she lives, free from the control of her husband, to have no power to encumber or sell same, except for re-investment, and, if sold, the proceeds to be re-invested in other property, suitable for a home for herself and family, and to be used for that purpose." She exchanged this home for a farm, which she subsequently sold for \$6,250, which the purchaser declined to pay, on the ground that she could not convey him a good title thereto. Held—That the word "family," in this will, includes children, and that the testator, in using the word "family," intended it to embrace not only his daughter, but her children, as well as her husband, and that the fund, when invested in a home, should be preserved in a home as long as his daughter lived. *Coleman v. Grimes*. 455
2. Exchange for Farm—Sale of Farm—Increased Price—Separation from Principal—Fund in Court—It does not follow, from the fact that, as only \$4,000 was set apart by the will for a home, that any increase in this fund might be used for other purposes. The increase can not be separated from the principal, and the entire fund, \$6,250, should be paid into the court by the purchaser of the farm, and retained until the devisee selects a home in which to invest it, subject to the approval of the chancellor. *Idem*..... 455

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No. 5

COURT OF APPEALS OF KENTUCKY.

LOUISVILLE & NASHVILLE R. R. CO. v. JOSH LIN.

(Filed May 19, 1908—Not to be reported.)

1. Railroads—Injury to Traveler at a Crossing—Action for Damages—Conflicting Evidence—Slight Evidence for Plaintiff—Refusal of Peremptory Instruction—In an action for damages by one injured at a railroad crossing by a collision with a train, in crossing the track in a buggy, where there is any evidence, however slight, that the usual signals of the approach of the train were not given as compared with the positive evidence of the railroad's witnesses that they were given, it was not error in the trial court to refuse to give a peremptory instruction to find for the defendant company.

2. Same—Proof of Admissions by Plaintiff—Denial—Question for Jury—In an action for damages by a woman for injuries received by being struck by a train in crossing a railroad track in a buggy, evidence was admitted that she said to the physician who treated her injuries, soon after the collision, that "she heard the train whistle and undertook to cross, and it ran into her, and that she was to blame," which she denied, the question of whether she made the admission or was in such a state of mind as to know that she was at the time saying, was for the jury.

3. Instructions on False Issue—Prejudicial Error—An instruction on a false issue in a case, and upon which no evidence was introduced, is misleading and prejudicial.

John T. Shelby, Lewis L. Walker and Benjamin D. Warfield for appellant.

Jas. I. Hamilton, W. I. Williams, R. H. Tomlinson and Greene & VanWinkle for appellee.

Appeal from Garrard Circuit Court.

Opinion of the court by Judge Settle, reversing.

The appellant complains that appellee was illegally permitted to recover in the court below a verdict and judgment against it for \$4,000 damages, for injuries to her person, and also for the destruction of her buggy; all resulting, as alleged, from the negligence of appellant's servants in charge of one of its trains, in failing to give the statutory and customary signals of its approach, and by running it

upon and against appellee, her buggy and horse, at Price's crossing, near the city of Lancaster. Appellant was refused a new trial and by this appeal seeks a reversal of the judgment complained of.

The appellant's answer specifically denied the acts of negligence alleged in the petition and averred contributory negligence on the part of appellee, but for which she would not have been injured, or her buggy destroyed. The contributory negligence thus charged was denied by reply.

According to appellee's evidence she and her daughter, eleven years of age, were, on the day of the accident, driving to their home from Paint Lick, in a buggy to which a single horse was attached. They reached Price's Crossing at a time when there was no regular train due to pass at that point. It turned out, however, that a passenger train which, when on time, arrived at Lancaster, two miles away, about 1:50 o'clock, p. m., was on that occasion between 30 and 40 minutes late. The time on which this train ran being known to appellee, she supposed it had passed the crossing as usual and reached Lancaster on its schedule time, and did not, therefore, know of its being late. Appellee had the curtains on her buggy and there was some wind blowing in the direction from which the train was coming and consequently against the train; the noise made by the wind and the running of the buggy doubtless prevented appellee and her daughter from hearing the noise made by the train. At any rate they drove upon the crossing and track in advance of the approaching train without seeing it and claimed not to have known of its presence until it struck the buggy, which was broken into pieces and appellee and her daughter thrown to the ground, but out of the way of the train. The horse, though knocked down in the collision, was not materially injured.

Appellee and her daughter both testified that they heard no signal from the train, whistle or bell as it approached, or before their buggy was driven upon the crossing, though both admitted that they did not stop or look for a train before going upon the crossing.

Appellee was rendered temporarily unconscious by the collision, sustained a serious scalp wound, broken rib and perhaps some injury to her back.

According to the testimony of Wallace, a surveyor who, at appellant's instance, furnished a map showing the crossing and adjacent ground, there was no obstruction in the way of appellee's seeing the train when she was yet far enough from the crossing to have avoided the collision. The engineer and fireman of the train testified that one approaching in a buggy from the east, as appellee was, could be seen from the engine when the buggy was 80 or 100 feet from the crossing, and the engine 250 feet away; that they kept a constant lookout ahead from the time it got in sight of the crossing, which was 250 feet off until the crossing was reached, and that they first saw appellee when they were in 250 of the crossing; that her buggy top was up and the curtains down and she was whipping the horse with the lines and driving rapidly toward the crossing as if to reach it and get over and beyond the track before it could be reached by the train, and that when they first saw appellee she was at a safe distance from the crossing and could, if she had looked for and seen the train, have stopped the horse and buggy before reaching the crossing and before it was reached by the train, and thereby prevented her injuries.

The engineer and fireman further testified that the train, upon arriving at the whistling board, a fourth of a mile from the crossing, sounded the customary whistle signal for the crossing and that from the whistling board to the crossing, the engine bell was continuously rung; that upon seeing appellee and that she was apparently going upon the crossing in front of the train, the alarm whistle was immediately sounded and the whistling continued until the crossing was

reached by the train; that upon the sounding of the alarm whistle the emergency air-brakes were applied and the train stopped at the earliest time possible; that when appellee could be seen, and was first seen from the engine, the train was running at a speed of 30 miles an hour and by the application of the air-brakes, its speed was reduced to 12 or 15 miles an hour by the time it struck appellee's buggy. Moreover, that in view of the speed at which it was going when appellee was first seen and the air-brakes were applied, and the fact that it was down grade from that point to the crossing, 500 feet was the shortest distance in which it was possible to stop the train, and it was actually stopped within 520 feet, which carried it to a point 270 feet beyond the crossing; and that it was impossible for those in charge of the train to have stopped it, after discovering appellee's peril, in time to have prevented the collision.

The engineer and fireman were corroborated as to the giving of the signal at the whistling board for the crossing and the alarm signals, by Price Floyd, James Smart Rice and Russell Floyd; the Floyds being near the railroad as the train passed, and Rice, baggage master, and Smith a passenger, on the train. Russell Floyd also said he thought he heard the bell ringing after the crossing signal was given, but was not positive about it.

The conductor and flagman of the train also testified as to the several whistle signals, and the quick stopping of the train, but neither of them was able to remember as to the ringing of the bell.

The evidence as a whole conduced to prove that for a short distance the public road traveled by appellee in going toward Price's crossing, runs nearly parallel with the railroad, consequently, just before reaching the crossing, appellee was driving with her back somewhat, if not altogether, toward the train as it approached the crossing. This fact together with that of the wind blowing against the coming train, may have served to prevent appellee's hearing the noise and signals, if any, of the train. Otherwise it is incredible that she would have ventured upon the crossing in the face of so great a danger.

The testimony of appellee and her daughter furnished some evidence that those in charge of the train failed to warn them of the coming of the train by giving the customary signals. It is true this testimony was mainly to the effect that appellee and her daughter did not hear such signals, but taking into consideration all they said on the subject, it must, however slight its weight, as compared to the positive statements of appellant's witnesses that the usual and customary signals were given, be accepted as amounting to a denial that such signals were given. Therefore, there was some evidence in support of the cause of action to go to the jury, and this being true the trial court did not err in refusing the peremptory instruction asked by appellant. Section 786, Kentucky Statutes, provides:

"Every company shall provide each locomotive engine passing upon its road with a bell of ordinary size, and steam whistle, and such bell shall be rung, or whistle sounded, outside of incorporated cities and towns, at a distance of at least 50 rods from the place where the road crosses upon the same level any highway or crossing, at which a signboard is required to be maintained, and such bell shall be rung or whistle sounded continuously or alternately until the engine has reached such highway crossing, and shall give such signals in cities and towns as the legislative authorities thereof may require."

If appellee's injuries were caused by the failure of those in charge of appellant's train to give the signals required by the section, supra, such failure was negligence for which she should recover, and the question of whether there was such negligence is one of fact to be determined by the jury under proper instructions from the court. The same

is also true as to the question of contributory negligence, which is not to be presumed any more than that negligence may be presumed. It was therefore left to the jury to say whether appellee would have been injured if she had looked or listened for the train, instead of driving on the crossing without taking such precaution.

The crossing at which appellee was injured is a public crossing and therefore one to which the requirements of the statute quoted fully apply.

In *L. & N. R. R. Co. v. Lucas' Adm'r.*, 30 Ky. Law Rep., 359, it is said:

"A peremptory instruction should be denied when the inference of negligence to be deduced from proved or admitted facts, is such as the jury might fairly differ about."

In *Cahill v. Cin., &c. Ry. Co.*, 92 Ky., 345, a more elaborate statement of the same principle is thus announced:

"But to decide that the failure of a person to look along a railroad before attempting to cross it is, under all circumstances and necessarily, negligence, would be arbitrary and without reason, for there may be evidence sufficient to satisfy a person of ordinary carefulness that the track is clear without taking that precaution, as when he knows it is not the usual time, and does not hear the signals he knows it is customary for the company to give or for him to hear. A person thus reasoning and acting it seems to us, can not, upon principle, be regarded as negligent, even if he does fall short of the measure of vigilance needed to prevent him being injured by a passenger train running behind time, at an extraordinary rate of speed, and without signal of its approach."

The steadfastness with which this court has adhered to the rule stated in the case, *supra*, will be made manifest by a reading of the opinions in the following cases: *L. & N. R. R. Co. v. Molloy's Adm'r.*, 28 Ky. Law Rep., 1113; *L. & St. L. Ry. Co. v. Davis*, 106 S. W., 305; *Hutchison v. R. R. Co.*, 52 S. W., 954; 21 Ky. Law Rep., 753; *C. & O. Ry. Co. v. Vaughn*, 97 S. W., 774; *L. & N. R. R. Co. v. Ueltsch's Adm'r.*, 97 S. W., 14, 31 Ky. Law Rep., 931; *L. & N. R. R. Co. v. O. Nan's Adm'r.*, 32 Ky. Law Rep., —.

We do not attach to appellee's admission made to Dr. Kinniard, "that she heard the train whistle and undertook to cross the track and it ran into her and that she was to blame herself," the importance given it by appellant's counsel. The statement was made in the office of physician immediately after she was injured and while under treatment, and if, as she testified, she was rendered unconscious by the collision, it is more than probable that she had not fully recovered her mental faculties at the time of making the admission; on the trial she claimed to have no recollection of making the admission and in effect denied it. However, the question of whether she made the admission or was in such a state of mind as to know what she was at the time saying, was one for the jury, in the light of the circumstances, to decide, and therefore, it was properly allowed to go to them. (*L. & N. R. R. Co. v. Molloy's Adm'r.*, 28 Ky. Law Rep., 1113.)

Consideration of the instructions leads us to the conclusion that all of them are substantially correct except number 3, which is as follows:

"Although you may believe from the evidence that the plaintiff was negligent in attempting to cross said railway at the time and place mentioned, yet if you further believe from the evidence that the defendant's servants and agents in charge of said train, after they discovered the plaintiff's danger, or with ordinary care could have discovered her danger, failed to use ordinary care for the protection of plaintiff, and but for said failure, if any, could have avoided the injury to plaintiff, if any, then you will find for the plaintiff in the

sum of not exceeding \$10,000, the criterion of damage being as set forth in instruction No. 1. By negligence is meant the failure to use ordinary care, and by ordinary care is meant such care and caution as a person of ordinary prudence might reasonably be expected to exercise under like circumstances."

There was no evidence upon which to base this instruction, therefore, it was misleading and necessarily prejudicial, because it authorized the jury to find a verdict for appellee upon a false issue or ground that did not exist. Appellee and her daughter did not undertake to state when their presence near the crossing was first discovered by appellant's engineer and fireman, for they claimed not to have themselves discovered the train until it was in the act of striking them. The only witnesses as to when she was first seen were the engineer and fireman and they testified that the train was at the time in 250 feet of her. All the testimony seems to be of a kind as to the fact that appellee could not be seen at or near the crossing by the engineer or fireman until the train emerged from a cut near the crossing. It is true the evidence is somewhat indefinite in regard to the distance of this cut from the crossing. There is an intimation in the brief of appellee's counsel that the distance is 500 feet. But the testimony of the engineer and fireman seems to place the distance between the crossing and cut at 250 feet; but whether 250 or 500 feet is the true distance, it is perfectly manifest that it was impossible on the occasion of the accident to stop the train by the application of the air-brakes under 520 feet. So, if it be assumed that 500 feet is the distance from the cut to the crossing and that appellee's peril was discovered by the engineer after the engine left the cut, according to the uncontradicted testimony, both of the engineer and fireman, it was not possible to stop the train in time to prevent it from striking appellee's buggy. The undisputed testimony of these two witnesses was that they kept a constant lookout in approaching the crossing and that appellee was not seen, and could not be seen by them, until the engine got in 250 feet of the crossing; that every effort possible was immediately made to stop the train to avoid running over her, but without avail, and that the train was not stopped under 520 feet.

On a re-trial, if the evidence is substantially the same, the instruction in question, except the last clause defining negligence and ordinary care, should be withdrawn and rejected.

As there must be a re-trial of the case and instruction No. 1, as to the measure of damages is not clearly stated, the court, in lieu of that part of it, should substitute the following:

"If you find for plaintiff you should allow her such a sum in damages as you may believe from the evidence will fairly compensate her for the physical and mental suffering, if any of either, and for the permanent impairment, if any, of her ability to earn money, that the evidence may show were caused by the negligence, if any, of appellant's servants complained of; also such further sum, if any, not exceeding \$35 as the evidence may show will fairly compensate her for the fair market value of her buggy, destroyed by appellant's train; but the damages altogether, if any are allowed her, should not exceed \$10,000."

As the case must be re-tried, we decline to express an opinion as to whether or not the verdict on the last trial was excessive.

We have discovered no prejudicial error in the admission or rejection of evidence on the former trial.

For the reasons indicated, the judgment is reversed and cause remanded, for a new trial consistent with the opinion.

SANDLIN v. LEXINGTON RAILWAY CO.

(Filed May 20, 1908—Not to be reported.)

1. Street Cars—Injury to Passengers in Alighting Therefrom—Action for Damages—Error in Instructions—In an action by a passenger injured in alighting from a street car, it was error in the trial court to instruct the jury to find for the defendant if they believe from the evidence that the plaintiff attempted to alight from the car before it was brought to a standstill and while it was in motion, and in so attempting to alight was thrown upon the ground.

2. Same—Per Se Negligence—Intention to Alight—Notice to Conductor—Sudden Increase of Speed—Actional Negligence—It is not per se negligence for a passenger in a street car to make preparations to alight therefrom before it comes to a standstill or to get off before it actually stops. When a car has slackened its speed to enable a passenger to alight therefrom, upon notice by him of his purpose to those in charge thereof, and it is then running at a rate of speed that a reasonably prudent person, in the exercise of ordinary care for his own safety, might attempt to alight, it is negligence to suddenly and violently increase the speed of the car until the passenger has had reasonable opportunity to alight.

C. J. Bronston and Wallace Muir for appellant.

Stoll & Bush and Morton, Webb & Wilson for appellee.

Appeal from Fayette Circuit Court.

Opinion of the court by Judge Carroll, reversing.

The petition, as amended, in this case states the cause of action of appellant, who was plaintiff below, in substance as follows: That he took passage upon one of defendant's cars at or near its central station, to be conveyed to a point on Jackson street, near the home of Curtis Kindred, and when he indicated to defendant's employes in charge of the car, his desire to leave the car at the point of destination, it was slackened in speed for the purpose of allowing him to alight therefrom. That the persons in charge of the car had knowledge of the fact that he was about to alight, but whilst he was still standing upon the rear platform of the car, and had moved towards the step for the purpose of, and with the intention of alighting, and before he could place his foot upon the step of said car, the employes of defendant in charge of said car, negligently caused the same to suddenly jerk forward and rapidly increase its speed, thereby throwing him with great violence from the car, upon the street.

The appellee company, in its answer, denied all the material averments of the petition, and in addition thereto pleaded contributory negligence.

Upon a trial before a jury, a verdict was returned in favor of appellee company.

On this appeal, prosecuted for the purpose of obtaining a reversal of the judgment upon the verdict, the only error complained of is that alleged to have been committed by the trial judge in giving instruction number three, which will be hereafter noticed.

The point on Jackson street, to which appellant desired to go is near the corner of Breckinridge street. The car upon which he was riding went out Breckinridge to Jackson street, thence down Jackson to Seventh street. Appellant testified that when he boarded the car, he informed the conductor that he wanted to get off near the corner of Breckinridge and Jackson streets. That as they approached the house of Kindred, he indicated to the conductor that he wished to get off,

and in response to his signal the conductor rang the bell one time, and the motorman slowed down the car. That, assuming that the car had been slowed down for the purpose of allowing him to alight, he took one step forward, holding with his right hand to the upright post on the rear platform, upon which he had been riding and as he was in the act of stepping from the platform to the car step, for the purpose of getting off, and when the car was moving at a rate of speed that would have enabled him to alight safely, the car, by signal from the conductor, suddenly lunged forward and threw him upon the back of his head on the macadamized street.

The evidence of appellee's witnesses tended to establish the following facts: That the speed of the car was slackened as it came around the curve from Breckinridge into Jackson street; but that no signal was given by any one to stop on Jackson street, and the speed of the car as it moved towards Seventh street, gradually increased after it came into Jackson street. That when the car reached a point on Jackson street, nearly half-way between Breckinridge and Seventh streets, a lady passenger indicated to the conductor to stop the car at Seventh street. That the conductor, in response to her signal, sounded one bell, which was the signal to the motorman to stop at Seventh street, and immediately after the signal was given, appellant hurriedly jumped or stepped off the car, receiving the injuries of which he complained.

From this summary, it will be seen that the issue between the parties is sharply defined. Briefly, it may be thus stated: The appellant's theory is that when the car had slackened its speed in obedience to a signal given by him to the conductor, to permit him to alight and he was in the act of getting off, or preparing to get off, the motorman suddenly and violently started the car, throwing the appellant to the street. The theory of appellee is that appellant, without giving any notice that he desired to get off, jumped from the car when the speed had not been reduced, receiving the injuries complained of.

With the evidence in this condition, the court gave to the jury the following instructions:

"1. If the jury believe from the evidence, that defendant's car, upon which plaintiff was riding, was being slowed down by defendant's employes in charge of the car, for the purpose of permitting plaintiff to alight therefrom; and if the jury further believe from the evidence, that the plaintiff, when said car was slowing down, was preparing to alight therefrom; and if the jury further believe from the evidence, that while plaintiff was so preparing to alight, said car was, without notice to plaintiff, and through the negligence of said employes, caused to suddenly start forward at an increased rate of speed, and that the plaintiff, by reason of said car being so suddenly caused to start forward, was thrown from said car, the jury should find for the plaintiff.

"2. The jury should find for the defendant, unless the jury believe from the evidence, that defendant's car, upon which plaintiff was riding, was slowed down for the purpose of permitting plaintiff to alight therefrom, and that after it was being so slowed down, and while plaintiff was preparing to alight therefrom, said car was without notice to plaintiff, and through the negligence of defendant's employes in charge of said car, caused to suddenly start forward, at an increased rate of speed, and that through said car being so suddenly started forward at such increased rate of speed, the plaintiff was thrown to the ground.

"3. The jury should find for the defendant, if the jury believe from the evidence, that the plaintiff attempted to alight from defendant's car before said car should be brought to a standstill, and while said

car was in motion, and in so attempting to alight he was thrown upon the ground.

"4. Before the jury can find for the plaintiff, they should believe from the evidence, that the plaintiff was thrown from defendant's car by reason of a sudden jerk or forward movement of said car at a time when the speed of the car was reduced to an extent or degree which would reasonably warrant an ordinarily prudent person in assuming he could alight therefrom with safety, and that such jerk or forward movement of this car occurred after the plaintiff had given notice to defendant's employees in charge of the car to stop the same for the purpose of enabling the plaintiff to alight therefrom, and after the speed of the car had been reduced by the motorman for the purpose of enabling the plaintiff to alight from the car, and unless the jury should so find, they should find for the defendant.

"5. If the jury find for the plaintiff, they should find for him in such sum, in damages, not exceeding ten thousand dollars, as will fairly compensate the plaintiff for any mental and physical suffering (if there was any) endured by him, by reason of the injury resulting to him from being thrown upon the street from defendant's car, and also, for any reduction of his power to earn money—if there is any—caused by any permanent injury—if there has been such permanent injury—resulting to the plaintiff through being thrown from defendant's car."

Instruction number three is the one complained of. Instructions one, two and four presented, as we understand it, the real issue the jury was called upon to try. Instruction number three was in effect a peremptory instruction to the jury to find for appellee, as all the evidence in the case tended to establish that appellant attempted to alight from the car before it stopped. Appellant so testified himself. As the jury were directed by this instruction to find for the appellee company if they believe from the evidence that the appellant attempted to alight from the car before it was brought to a standstill and while it was in motion, there was no reasonable way by which the jury could avoid returning a verdict for the company. Appellant's case was predicated entirely upon the proposition that he had a right to prepare to alight from and to get off of the car when the speed was reduced and the car was running at a rate that would permit him to alight in safety.

Under repeated decisions of this court, it is not per se negligence for a passenger in a street car to make preparations to alight from a car before it comes to a standstill, or to get off before the car actually stops. When a car has slackened its speed for the purpose of enabling a passenger to alight therefrom, in obedience to notice by him of his purpose to the persons in charge of the car, and the car is running at such a rate of speed that a reasonably prudent person, in the exercise of ordinary care for his own safety, might attempt to alight, it is negligence to suddenly and violently increase the speed of the car, until the passenger has had reasonable opportunity to alight from the car. This view is fully supported by the following cases:

In *Louisville & Nashville Railroad Co. v. Eakin*, 20 Ky. Law Rep., 736, which was an action by the administrator of Eakin to recover damages for his death caused by being run over by a train from which he was attempting to alight while it was in motion, it was contended for the company that the attempt of decedent to alight from the train while it was in motion was per se negligence, and that it could not be held responsible for the injury resulting therefrom. But the court rejected this view, and held—quoting with approval from other authorities. that:

"It can not be said, as a matter of law, that it would, under all circumstances, be an act of negligence for a passenger to attempt to

alight from a moving train. * * * Whether alighting from a moving train constitutes negligence or not is a fact to be determined by the jury trying the case, taking into consideration all the circumstances in connections with the alighting. * * * If the leap is made under such circumstances as that a person of ordinary caution and care would not have apprehended danger therefrom, then it was not such an act of carelessness as would relieve the company from the responsibility otherwise resting upon it."

In *Illinois Central Railroad Co. v. Whittaker*, 22 Ky. Law Rep., 395, it was said:

"The decided weight of modern authority is that it is not contributory negligence per se for a passenger to voluntarily alight from a moving train; and that ordinarily it is a question for the jury to determine, whether the passenger, under the circumstances, acted as a reasonably cautious and prudent man."

In *Central Passenger Railway Co. v. Rose*, 15 Ky. Law Rep., 209, the car, in obedience to a signal by Rose, slowed up for the purpose of permitting him to get on; and when he got hold of the rail and started to step upon the platform, the speed of the car was suddenly increased, throwing him to the ground. In response to the plea of the company that he was guilty of such contributory neglect as would defeat a recovery, the court said:

"We can not say, as a matter of law, that it was contributory negligence on the part of Rose to undertake to board a slowly moving electric car. The rate of speed at which it was going on the occasion referred to—the manner of attempting to board it by Rose, and the conduct of the persons in charge of the car after the peril was discovered, were matters put in proof before the jury. Their province was to determine from the proof what state of case actually existed, and what acts were or were not negligent acts, under all the proof and the instructions." To the same effect is *Belt Electric Line Co. v. Tomlin*, 19 Ky. Law Rep., 433; *Ford v. Paducah City Ry. Co.*, 29 Ky. Law Rep., 753; *Louisville Railway Co. v. Williams*, 30 Ky. Law Rep., 493; *Paducah City Railway Co. v. Walsh*, 22 Ky., Law Rep., 532; *L., H. & St. L. Ry. Co. v. Coons*, 25 Ky. Law Rep., 509; *Bishop v. Illinois Central R. R. Co.*, 25 Ky. Law Rep., 1363; *Illinois Central Railroad Co. v. Glover*, 24 Ky. Law Rep., 1447.

On a re-trial of the case, instruction number three should be omitted.

Wherefore, the judgment of the lower court is reversed, with directions for a new trial in conformity with this opinion.

McGOODWIN v. LUSTERINE MINING & POLISHING CO., &c.

(Filed May 29, 1908—Not to be reported.)

1. Contract—Action to Enforce—Striking Case from Docket—Agreed Order—Leave to Reinstate Without Notice—Effect of Order—In an action to enforce a contract for the development of certain minerals on a tract of land "of any kind except oil, gas and salt," to which an answer was filed controverting the allegations of the petition, an agreed order was entered that "the plaintiff hereby agreed to have the case dismissed at the March term of 1909 of said court, with leave to re-instate same at any time without notice to defendant and the defendant to pay all cost;" such agreement was not a final order that terminated the case, and the plaintiff had a right, at the following September term of the court, to have the case redocketed without notice.

2. Contract Leasing Mineral Rights—Transfer of Contract—Rights Acquired—Where a contract was made by W. with McG. leasing him the right to all minerals on his land "of any kind except oil, gas and salt, which McG. transferred to B. and B. transferred it to the L. M. & P. Co., the company took the place of B., and assumed the obligations that B. entered into which McG., and McG. had the right to proceed directly against the L. M. & P. Co., for a breach of the contract.

Hodge & Hodge for appellant.

Frank Rives for appellees.

Appeal from Caldwell Circuit Court.

Opinion of the court by Judge Carroll, reversing.

In December, 1903, D. B. Wigginton, in consideration of one dollar and certain royalties, leased to appellant, H. C. McGoodwin for the term of twenty years, "the right to all the minerals of any kind and rock or stone, except oil, gas and salt, which is on, in or under the following described tract of land situated, lying and being in Caldwell county, Kentucky, * * * containing 261 acres, more or less. Now, in consideration of the above lease, the second party hereby binds himself, his heirs and assigns, to pay to the first party hereto as royalties fifty cents per each ton of flour spar of two thousand pounds; one dollar per ton of two thousand pounds for lithite or polishing stone, and one dollar for each ton of two thousand pounds of lead and zinc and ten per cent. of all other minerals that may be mined on said land, and the second party is to have and shall have free ingress and egress, to, on, over and from said tract of land, and shall have free use and control over so much of the surface of said tract of land that may be necessary to erect suitable buildings thereon and to carry on the mining for said minerals successfully. Said second party binds himself to begin mining in good faith on said tract of land between the date hereof and 1st day of May, 1904, and that he will carry on and continue said mining operations vigorously and in good faith at least six months in each year so long as this lease may be in force, and he shall keep a weigher's book of all the weights of all the minerals and stone that may be mined and taken from said land, and he shall make monthly reports thereof to the first parties, and at the end of each month or within ten days thereafter to said first parties all royalties due them for minerals and stone mined and taken from said land during each month previous thereto. Said books shall be free and open to inspections of the first parties or their agents. Upon the termination of this lease the second party or his assigns shall have the right to remove all machinery, &c., that he or they may have placed upon said land. This lease to be void and of no effect upon the failure of the second party or his assigns to comply with the above stipulation to begin and carry on said mining operations vigorously and in good faith as above set forth. The first party further agrees, and do hereby give to the second party or his assigns, an option or privilege to purchase the rights to all said minerals herein above named, and the right to continue the mining for same on said tract of land by paying to said first parties the sum of \$40,000 on or before January, 1909, and upon the payment of said sum the first parties hereby bind themselves, their heirs and administrators, &c., to make the second party or his assigns a general warranty deed for all mineral stone, &c." * * *

On the 31st day of December, 1903, McGoodwin, in consideration of \$200 paid, and other considerations mentioned, sold and transferred to J. J. Boynton, the lease executed to him by Wigginton. Boynton accepted the lease subject to all the conditions and terms therein

specified, and "in addition thereto agrees and binds himself, his heirs and assigns, to pay to the first party monthly ten per cent. 'approximately' of the gross sales of all the stone or lithite mined on said tract of land. Said stone or lithite to be prepared suitably for all the uses for which it may be used before the sale thereof, and when sold the second party is to pay monthly as above stated, and shall pay monthly ten per cent. approximately of the gross sales of all other minerals mined and shipped from said tract of land under said lease. A full settlement of the ten per cent. shall be made at the end of each six months. Said second party, or his assigns, shall begin work under said lease in good faith on or before the first day of March, 1904, and upon their failure so to do, then and in that event this assignment or contract shall cease and be of no effect, and said lease shall revert back to the first party, this 31st day of December, 1903."

In January, 1904, Boynton, for a valuable consideration, sold and transferred to appellee, Lusterine Mining & Polishing Co., "the mineral and stone lease executed to him by H. C. McGoodwin and wife on December 31, 1903, and the same conveyed to H. C. McGoodwin, by writing, dated December 14, 1903, * * * upon the mineral and stone of every kind and description in, upon or under said land mentioned and described in each of said leases. Said second party takes and accepts said lease subject to all the conditions and terms therein specified, and subject to the conditions and terms specified in the lease from D. B. Wigginton and wife to H. C. McGoodwin."

In October, 1904, Wigginton and appellee company entered into a contract, which, after reciting the fact that Wigginton had theretofore executed a lease for twenty years to McGoodwin, which McGoodwin assigned to Boynton, and Boynton to the appellee company, set out that "in consideration of one dollar cash in hand paid, and the further consideration that the same royalties and considerations set forth in said original lease be continued with exception that the royalty on the lithite or polishing stone shall be two dollars per ton. The said parties of the first part hereby contract and agree to give to the said Lusterine Mining & Polishing Co. a new lease or an extension of said original, upon the same terms and conditions set forth therein, with exception that royalty on lithite or polishing stone shall be two dollars per ton instead of one dollar for the term or period of twenty years with option to extend another twenty years at the expiration thereof of said original lease either by lapse of time or failure to comply with the terms and conditions thereof or from any other cause, to have and to hold same unto the said Lusterine Mining & Polishing Co., or its assigns."

In 1905, McGoodwin filed his petition against the appellee company, in which, after reciting the leases before mentioned, averred that he recognized the company as the assignee of Boynton, and looked to it to perform all the conditions stipulated in the Boynton lease. That in February, 1904, it did a little work towards developing the lease, and again in May, 1904, worked about ten days, and in September following, worked a short time, and did nothing more until December, 1904, when it again worked a short time. And that it had not done anything since December. That it violated its contract, first, in not commencing to work the minerals in good faith before the first of March, 1904; second, that it has not at any time mined for lithite or polishing stone or any other mineral for as much as two months since the making of the contract; third, that it has not at any time worked the mines in good faith or vigorously, with a view of making them paying property; fourth, that it has not kept a weigher's book of any or all the weights of the minerals or stone that have been mined or taken from the land; nor has it made monthly reports, or any report whatever, to the plaintiff, McGoodwin, or Wigginton; fifth,

that it did not at any time report or pay to McGoodwin ten per cent., or any other sum, on the gross sales of all, or any, of the stone or lithite.

It is further averred that the company, instead of mining the land, and for the purpose of practicing a fraud upon him, procured from Wigginton and wife the contract before mentioned. That this contract from Wigginton was obtained for the purpose of forfeiting the lease made by Wigginton to McGoodwin. He prayed for a judgment cancelling the contract between himself and Boynton, and asked that the contract between Wigginton and the company be set aside, and for judgment against the company for five thousand dollars.

In June, 1905, the company filed its answer, in which, after traversing generally the averments of the petition, it averred that it had carried out to the best of its ability, the contract, and had worked the mines in good faith and vigorously, and had made every effort to create a market for the product mined on the land, and had gone to great expense, time and trouble to put said product on the market.

It further said that the chemical properties of the Lusterine product were practically unknown at the time its company acquired said lease; that the process of reducing the stone in its crude state to an impalpable powder had required time and money, but it says it has acquired formulas, receipts for the making of various articles of commerce out of Lusterine powder; it has installed a mill in Hopkinsville at great expense, and also established on the leased premises valuable machinery, and in all other respects made a diligent effort to find a market for the product, but that McGoodwin had maliciously and falsely circulated and published reports about the company that were calculated to, and did destroy its business credit, and drive from it the capital necessary for use in the development of its properties; and it had been damaged by this conduct of McGoodwin in the sum of five thousand dollars, which it pleaded as a set-off.

In February, 1906, the following agreement was entered into between McGoodwin and the company: "The plaintiff hereby agrees to have the above entitled cause dismissed at the March term, 1906, of said court, with leave to reinstate same at any time without notice to defendant; and defendant, the Lusterine Mining & Polishing Co., agrees and binds itself to pay all the costs of said suit, including the order of dismissal."

This agreement to dismiss was based upon a written agreement entered into between the parties, but it is not in the record. At the March term of the court, the following order was entered: "Ordered that this action be dismissed as per agreement filed. Wherefore, it is adjudged by the court that the plaintiff recover of defendant his costs herein expended, for which execution may issue.

Afterwards, on the 3d day of September, 1906, this order was made: "This day came plaintiff, H. C. McGoodwin, and on his motion it is ordered that the above entitled case be, and the same is hereby, reinstated upon the docket."

In October, 1906, a reply was filed, controverting the affirmative matter in the answer.

In November, 1906, April, 1907, and again in June, McGoodwin filed other amended petitions, in which he reiterated that the company had broken its contract, and set up the breaches thereof.

To these various pleadings demurrers were filed, but they do not appear to have been acted upon, and an answer was filed by the company.

Three separate depositions of McGoodwin appear in the record; as do also the depositions of J. H. Thompson, and D. B. Wigginton.

In November, 1907, the following judgment was entered: "This cause coming on for trial and having been submitted to the court

upon the pleadings, exhibits and depositions filed, and the court being advised, after reading the depositions and hearing the argument of counsel, upon consideration of the whole case, without regard to the rulings of the court upon demurrers or motions hitherto made, it is adjudged that the petition and amended petition, be, and they are hereby, dismissed and defendant will recover of plaintiff the costs herein expended for which execution may issue. To all of which plaintiff excepts and objects, and his objections being overruled, plaintiff excepts and prays an appeal to the Court of Appeals, which is granted.

We do not know the ground upon which the lower court rested its judgment, except from the statement contained in the brief for appellant, that the court was of the opinion that the agreement of February, 1906, and the order entered in pursuance thereof, was a final disposition of the case. This view is also insisted upon by counsel for appellee, who argues that the agreed order terminated the pending action and if the agreement entered into between the parties that resulted in the order dismissing the case was not performed, McGoodwin should bring a new action based upon the breaches of this agreement. We do not consider the agreement under which the action was dismissed as a final order or one that terminated the case. It expressly provides that the dismissal was with leave to reinstate the action at any time without notice. It was not contemplated by the parties that the order of dismissal was a settlement of the controversy; but, on the contrary, that it might be renewed at any time. And if the company failed to comply with the terms of the agreement, McGoodwin had the right to have the action placed on the docket and to set up, in an amended pleading, his complaint growing out of the company's breach of the agreement. This, we understand to be, the course he followed, and there is some evidence tending to support his contention.

Nor is the point well taken that McGoodwin would not maintain an action against the company for a breach of its contract with Boynton, because in its contract with Boynton it is expressly stipulated that "it takes and accepts said lease subject to all the conditions and terms specified in the lease from W. B. Wigginton to McGoodwin." In other words, the company took the place of Boynton, and assumed the obligations he entered into with McGoodwin, hence McGoodwin, for a breach of the stipulations of the contract, had the right to proceed directly against it.

Upon a return of the case, the appellant should be required to file an amended petition, setting out his entire cause of action and the appellee be permitted to file an answer thereto, setting up its entire defense; and such other pleadings may be filed as are necessary to complete the issue. The parties may then take such evidence in support of their respective contentions as they desire.

Wherefore, the judgment of the lower court is reversed, with directions for proceedings in conformity with this opinion.

MYERS, &c. v. BROWN, &c.

(Filed May 20, 1908—Not to be reported.)

1. Land—Oral Contract to Convey—Validity of Contract—An oral contract made by a father with his daughter to convey land to her is within the statute of frauds and not enforceable.

2. Sale of Land to Daughter—Deed Made but Not Delivered—Effect—Where a deed made by a father to his daughter was never delivered to the daughter, but remained in his possession until his death, no estate passed by virtue of such deed.

3. Services of Daughter—Nursing Father and Grandchildren—Allowances—Lien of Land not Conveyed—Where a married daughter went to her father's home and performed valuable services in nursing and caring for his two grandchildren, who had tuberculosis, she was entitled to compensation for such services, and an allowance by the lower court of \$1,250 was proper, and to secure this sum she has a lien on the 205 acres of land which her father put her in possession of under an oral promise to make her a deed.

W. S. Pryor, N. H. W. Aaron and J. Boyle Stone for appellants.

E. V. Puryear and Robert Harding for appellees.

Appeal from Casey Circuit Court.

Opinion of the court by Wm. Rogers Clay, Commissioner, reversing.

W. C. Myers died, intestate, in Casey county, Kentucky, in the year 1904, leaving surviving him as his only children and heirs at law appellant, W. M. Myers, and his three sisters, Julia Brown, Mary Brown and Cordelia Simpson. W. M. Myers thereafter qualified as administrator of his father, and filed this action in the Casey Circuit Court for a settlement of the estate. In his petition he claimed that he and his three sisters are the owners, as heirs of W. C. Myers, of two tracts of land, one of them containing 205 acres, and asked that these two tracts of land be sold and the proceeds divided among those entitled thereto, upon the ground that the lands could not be divided without materially impairing their value. He also averred that each of the four children received certain advancements with which they should be charged. In her answer, Julia Brown denied that certain sums for timber and rents, which plaintiff below claimed should be charged to her, were advanced to her by her father. She also claimed that her brother and sisters did not own any part of the 205 acres of land described and sought to be sold in the petition, but averred that she, alone, was the owner thereof. In her answer, Cordelia Simpson admits that her father advanced her certain lands, but denies that these lands were of the value of \$2,500, or of any value in excess of \$2,000, and avers that she should be charged only with the sum of \$2,000 for the lands advanced. Julia Brown and Cordelia Simpson, in their answers, denied that appellant correctly stated the advancements to himself. They averred that, in addition to the sums named, aggregating \$2,500.94, he should also be charged with \$1,000 given him by the decedent in 1887 or 1888; also a \$700-note, payable to W. C. Myers, and given to him by decedent; also the Myers and Lyons note of \$700, with interest, given him by decedent; also \$600 given him by W. C. Myers in 1899 or 1900, and a \$200-note, with its accrued interest, owing by him to his father. In his reply, Myers denied that he should be charged with any of these sums, except \$381.11 of the Myers and Lyons note.

The issues were made up and the case referred to the master commissioner, to hear proof and make report thereon to the court. Upon the filing of his report, exceptions were filed thereto. The case was heard upon these exceptions, and the court entered judgment charging the parties with the advancements set out below:

William Myers was charged as follows:

Myers and Lyons note	\$762 50
Horse and calf	120 00
Sheep	7 50
Note and interest	106 50
Note and interest	570 83
Note and interest	212 00
Note and interest	1,115 00

Total chargeable \$2,894 33

Julia Brown was charged as follows:

Horse and cash	\$250 00
Timber	500 00
Rents on her husband's land	600 00
205 acres of land	4,000 00

Total chargeable 5,350 00
Credited by board and care 1,250 00

Amount chargeable \$4,100 00

Cordelia Simpson was charged as follows:

Cash and personal property	\$377 50
Land	2,400 00

Total chargeable \$2,835 00

Mary Brown was charged as follows:

Personal property	\$335 00
Land	2,500 00

Total chargeable \$2,835 00

The court directed the commissioner to convey to Julia Brown the 205 acres of land charged to her at \$4,000. From this judgment W. M. Myers appeals. Julia Brown appeals from so much of the judgment as charges her with timber and rents amounting to \$1,100; Cordelia Simpson appeals from so much of the judgment as charges the land advanced to her at a value of \$2,400; and Mary Brown appeals from so much of the judgment as fixes the value of her land at \$2,500. Julia Brown, Cordelia Simpson and Mary Brown appeal from so much of the judgment as charges W. M. Myers with advancements amounting to only \$2,894.33.

Julia Brown claims the 205 acres of land, both by virtue of an oral promise made by her father to convey the land to her, and a deed which he executed, but never delivered to her. In pursuance to her father's promise, she and her husband moved to her father's home, and took care of him and two of his grandchildren, afflicted with consumption, for several months. Thereafter, on account of some misunderstanding with her father, she moved away from the home place. The oral contract on the part of her father, to convey the land in question, was within the statute of frauds, and on that account is not enforceable. (Usher's Ex'or v. Flood, 83 Ky., 553; Speers, &c. v. Sewell, &c., 4 Bush, 239; Glass v. Gaines, &c., 13 Ky. Law Rep., 277.) Furthermore, it appears that the deed, by which it is claimed the land was conveyed to Julia Brown remained in the possession of the intestate and was found among his papers, and, as said before, was never delivered to Julia Brown. That being the case, no estate passed by virtue of the deed in question. (Bell v. Farmers' Bank of Kentucky, &c., 11 Bush, 34; Jefferson County Building Association v. Heil, &c., 81 Ky., 513; Ward v. Small's Adm'r, 90 Ky., 198; Colyer v. Hyden, &c., 94 Ky., 180.) It was error then for the trial court

to direct a conveyance of the land in question to Julia Brown. Upon the return of the case, if the court is of opinion that the land can not be divided without materially impairing its value, it should direct that the land be sold. Inasmuch, however, as Julia Brown went to her father's home and performed valuable services in looking after his wants and in nursing and caring for his two grandchildren who were afflicted with tuberculosis, we are of the opinion that she is entitled, for such services, to the allowance of \$1,250, made by the trial court, and to secure this sum she has a lien on the 205 acres of land.

As to the charge for timber and rent, made against Julia Brown, it appears that her father made a conveyance of a certain tract of land, which he intended for his grandchildren, to her husband, which the latter purchased at the price of \$2,500, and executed his four notes therefor, each in the sum of \$625. For some reason or other, her husband failed to pay the notes as they fell due, and the matter was finally settled by a reconveyance of the land to her father and the cancellation of the notes. The trial court charged Julia Brown with the rent on this place at \$600, and with \$500 for timber which was removed therefrom. We are unable to see upon what theory these sums can be charged as advancements to Julia Brown. When her father elected to take back the land and cancel the notes, he thereby waived any claim he might have against her husband either for rents or for timber removed. The timber and rents were in no sense advancements to Julia Brown. Her father was willing to take the land back and cancel the notes, and in this way the whole transaction was closed. The fact that Julia Brown indirectly derived some benefit from the occupancy of the land, and from the timber taken therefrom during the time that it was in possession of her husband, does not alter the case. These benefits came to her indirectly, just as they would have come to the wife of any other purchaser of the land who failed to pay for the same and who settled the whole transaction by a reconveyance of the land to his vendor and the cancellation of the notes executed for the purchase price. We, therefore, conclude that the court erred in charging Julia Brown with the sums of \$600 and \$500, for rents and timber taken from the farm.

We shall next consider the question of the value of the land advanced to Cordelia Simpson. Her father fixed the value at \$2,000 in the deed by which the land was conveyed to her. Subsequently she put improvements upon the land, of the value of about \$1,000. Thereafter it appears that the land with the improvements on it sold, first, for \$2,475, then for \$2,800, and again for \$2,900. Mrs. Simpson's brother, W. M. Myers, testified that the land at the time her father deeded it to her was worth \$2,500. One other witness corroborates his testimony. C. P. Brown testifies that the property, at the time of the conveyance, was worth \$2,000. John Elliott places the same valuation upon the land. George King, who purchased the land with the improvements on it, valued the land and improvements, at the time he bought the same, at \$2,500. We are of opinion that the decided weight of the evidence is in favor of the view that the land, at the time of the conveyance to Mrs. Simpson, was worth only \$2,000. It subsequently sold for more, but only after the improvements had been placed upon the farm. The trial court, therefore, erred in charging Mrs. Simpson with an advancement of \$2,400, instead of \$2,000.

Of the advancements charged by the court in its judgments to W. M. Myers, both he and his sisters complain. As to the various items, a large amount of testimony was taken. Without attempting to detail the evidence, which we have carefully considered, we may say that it leaves the mind in such doubt that the judgment of the chancellor will not be disturbed.

The court charged the land advanced to Mary Brown, in 1896, at \$2,500. It appears that she received a few more acres than were given to her sister, Cordella Simpson; that being the case, we think a fair valuation of Mary Brown's land would be \$2,200.

For the reasons given, the judgment on the appeal of W. M. Myers, and also on the appeals of Julia Brown, Cordelia Simpson and Mary Brown, is reversed and cause remanded, with directions to the trial court to enter a judgment in conformity with this opinion.

DISTRICT OF CLIFTON v. PFIRMAN, &c.

(Filed May 20, 1908—Not to be reported.)

1. Pleadings—Failure to Answer—Admissions—Effect—Where plaintiff in a suit to subject land to the payment of taxes failed to reply to an answer alleging that certain infants, who owned an interest therein, were omitted as parties defendant and failed to reply to answer of the infants, the averments of such pleadings must be taken as true.

2. Judgment—Omission of Parties—A judgment to subject land to the payment of taxes does not affect persons claiming an interest thereon who were not parties to the suit.

3. Judgment—Sale—Reversal—Rights of Infant Defendants—Where a judgment against infants for the sale of land is reversed, the infants may elect to allow the sale to stand or have it vacated and take the property by paying the debt which was a lien upon it.

C. L. Raison, Jr., for appellant.

John S. Roebuck, Jr., for appellees.

Appeal from Campbell Circuit Court.

Opinion of the court by Judge Carroll, affirming.

In 1898 the appellant brought a suit in the Campbell Circuit Court against the widow and children of Casper Pfirman, alleging, in substance, that Casper Pfirman, who died in 1895, the owner of a lot of land in the district, left surviving him his only heirs at law, his widow and children, the defendants in said suit. That under his will his widow was given a life estate in the lot, with remainder in fee to his children. That Casper Pfirman, before his death, was indebted to the district for taxes due upon said lot, and that his heirs were also indebted for taxes upon it. The purpose of the action was to subject the lot to the payment of the taxes due by Pfirman and his widow and children.

In this action an answer was filed by the "defendants," in which they in effect controverted all the affirmative matter and prayed that the petition be dismissed. It does not appear that any evidence was taken in the case, but a decree was rendered, adjudging that the district had a lien upon the lot for the taxes sought to be recovered, and a sale of it was ordered for the purpose of satisfying the same. At a sale, under this judgment, the lot was purchased by the district for the amount of its taxes. Afterwards, the defendants in that action prayed an appeal to this court, and the judgment was reversed because of error in computing the interest due upon the taxes, and the case was remanded for proceedings in conformity with the opinion, which may be found in 29 Ky. Law Rep., 1004. Upon a return of the case to the lower court the defendants filed a supplemental answer, in which it was averred that Emma Shuckholz, a daughter of Casper Pfirman, and who was a defendant in the original action,

died in 1889, and before the action was instituted, leaving surviving her as her children Clara Shuckholz, an infant daughter, and Eliza Reutler, and Lillie Caldwell. They further averred that Charles Pfirman, a son of Casper Pfirman, and his wife, died in 1903, and before the judgment was rendered, leaving two infant children. That neither of the children of Emma Shuckholz or Charles Pfirman were parties to the action in which the judgment was rendered decreeing a sale of the land, although each of them owned, and now own, two-sixths of the entire lot. The infants, as well as the adult children, also filed an answer to the merits of the petition, in the action in which the lot was sold, and asked that the judgment and sale be set aside. To these pleadings no answer was filed, so that these averments must be taken as true. Upon motion the lower court set aside the judgment and sale, and awarded appellees a writ to place them in possession of the land sold under the decree. This appeal is facts hereinbefore mentioned, to be filed, and also in setting aside the ment and sale and awarding a writ of possession.

When the judgment was rendered, the children of Emma Shuckholz and Charles Pfirman were not parties to the action, although they owned a two-sixths interest in the lot, and it is of course apparent that the judgment did not affect them. We are also of the opinion that the lower court properly permitted the pleading, setting up the facts hereinbefore mentioned, to be filed, and also in setting aside the judgment and order of sale.

The point is made for appellant that the court erred in setting aside the sale, because some of the owners were parties to the suit and before the court, and further that, as the appeal in the original action was from the judgment and not the order confirming the sale, the reversal did not have the effect of disturbing the title or possession of the purchaser at the judicial sale.

It has been held by this court that when a judgment is reversed the reversal does not affect the title or possession of the purchaser at a sale made under the judgment before the reversal, although he may be the plaintiff or a party to the action. (*Yocum v. Foreman*, 14 Bush, 494; *Blake v. Wolfe*, 111 Ky., 840; *Talbott v. Campbell*, 23 Ky. Law Rep., 2198.) But there are exceptions to this rule, as may be seen from an examination of the cases of *Baker v. Baker*, 87 Ky., 461; *Spicer v. Seale*, 20 Ky. Law Rep., 1869. The principle announced in the *Yocum* case has been further modified in the cases of *Kavanaugh v. Wilson*, 22 Ky. Law Rep., 476; *Hess v. Deppen*, 31 Ky. Law Rep., 15. It is not, however, necessary here to do more than mention these cases as illustrating that the purchaser at a judicial sale who is the plaintiff or a party to the action in which the judgment is rendered, will not, in every instance, be permitted to hold the property purchased without in some way accounting to the judgment creditor when the judgment is reversed. And we have no hesitation in declaring that if a judgment against infants is reversed the purchaser, if he be the plaintiff or a party to the action, will not be permitted to hold against their interest real property bought under it at a judicial sale. In such case the infants may either elect to allow the sale to stand or they may have the sale set aside and take the property upon the payment of the debt, which is a lien upon it.

It is the especial duty of the chancellor to guard the interests of infants, and the law has carefully provided that their rights shall be protected. Under section 518 of the Civil Code the lower court is given the power, after the term at which a judgment has been rendered, to vacate it upon the application of infants; and when, upon their application, regularly and properly made, the judgment decreeing a sale of their land is set aside, the sale should also be set aside, to the end that no injustice may be done them. The relief would be very inadequate and oftentimes wholly insufficient if the judgment

alone should be set aside but the property sold under it be taken from the infants.

In answer to the argument of counsel for appellant that some of parties were adults, and although it might be proper to set aside the judgment and sale, so far as the infants were concerned, it was not proper to do so as to the adults. It may be said that the judgment was an entirety. The land sold was indivisible. The sale could not be set aside in part. The interests of the infants would be prejudiced by a partial vacation of the judgment and sale; and the court correctly set aside both. All of the parties in interest are now presumably before the court. If not, they can be brought in. The court has referred the matter to the commissioner to ascertain the amount due, and when it is determined, unless the defendants pay the same, the property may be sold to satisfy the debt.

The judgment of the lower court is affirmed.

BRADSHAW v. BUTLER.

(Filed May 29, 1908—Not to be reported.)

1. Wills—Devisee—Claiming For and Against the Will—One can not claim property under a will and also claim compensation for improvements against the will. Having elected to take under the will the devisee can not claim contrary to the will.

2. Same — Life Estate — What remains — Construction— Testator, by his will, devised (1) that his debts be paid; (2) that \$5,000 of his estate be divided equally to his ten brothers and sisters; and (3) all the remainder of his estate of every kind to his wife for and during her life, and at her death to his daughter Grace; but should Grace die without issue, then what remains of his estate shall go one-half to his brothers and sisters and one-half to the brothers and sisters of his wife; (4) "I authorize my wife to sell and convey any or all of my real estate, and to pass the fee-simple title to same." Held—That the expression "what remains on my estate" can not be held to amplify the estate given to his wife nor can the power of sale confer upon the wife the right to encroach upon the principal of the estate.

3. Same—"Dying Without Children"—Estate for Life—Restriction—Where an estate is devised to one for life with remainder to another, with the provision that if the remainderman should die without children, or issue, then to a third person, the rule is that the words "dying without children or issue," are restricted to the death of the remainderman before the determination of the particular estate.

N. H. W. Aaron for appellant Bradshaw.

Montgomery & Montgomery for Smith and others.

James Garnett and W. W. Jones for appellee Butler.

Appeal from Adair Circuit Court.

Opinion of the court by William Rogers Clay, Commissioner, reversing.

John W. Butler died, testate, a resident of Culumbia, Kentucky, in July, 1905. Prior to his death, he made a will in January, 1905, one in February, 1905, and one in March, 1905. The March will was probated by the Adair County Court. Appellant and an adopted

daughter, and the brothers and sisters of said Butler, prosecuted an appeal to the Adair Circuit Court from the order of the county court probating the March will. On the trial of this appeal the March will was rejected and the will made in February was probated, as the last will of John W. Butler. From that judgment an appeal was prosecuted to this court, and the judgment affirmed. The opinion may be found in 30 Ky. Law Rep., 1249.

This suit was brought by Bettie W. Butler, widow of John W. Butler, and devisee under his will, to obtain a construction of the will, and to recover the value of bonds and coupons amounting to about \$1,500, which she claims to have furnished her husband in the years 1896 and 1897, at his special instance and request, to put in a house and improvements he was then building on a lot in Columbia, Kentucky. She also seeks to recover interest on the same from the time it was furnished, the whole aggregating \$2,731.35, and to be adjudged a lien against the house and lot to secure the payment of the same. She occupied this property with the family until her husband's death, and has since occupied it as his devisee under the following will, which was probated as set out above:

"I, John W. Butler, of Adair county, make and publish this my last will and testament, hereby revoking all former wills made by me.

"1st. I direct that all my just debts and funeral expenses be paid.

"2d. I will and devise to my brothers and sisters, who are living, and to the heirs of those who are dead, the sum of five thousand dollars, to be divided between them, that is, one-tenth to my brothers and sisters who are living, and one-tenth to the heirs of each of my brothers and sisters who are dead. These sums are to be paid to them by my executor.

"3d. I will and devise to my beloved wife, Bettie W. Butler, for and during her life, all the remainder and residue of my estate of every kind, real and personal and mixed, including my farm of 192 acres, which was conveyed to me by W. E. Frazer, and at her death to our daughter, Grace Butler Bradshaw; but should our said daughter, Grace Butler Bradshaw, die without issue, then what remains of my estate shall be divided in two equal parts, and one-half thereof shall go to my brothers and sisters and their heirs, as directed in the second clause of this will, and the other half shall go to the brothers and sisters of my said wife, or to their heirs.

"4th. I authorize my wife to sell and convey any or all of my real estate and to pass the fee-simple title to same.

"5th. I appoint my wife, Bettie W. Butler, executrix of this my last will, and request that she be permitted to qualify without security.

"Executed as my last will and testament, this 20th day of February, 1905.

(Signed) "JOHN W. BUTLER.

Witnesses: "R. F. PAUL, W. A. COFFEY."

On submission of the case the chancellor adjudged (1) that appellee, Bettie W. Butler, recover of the estate of her husband the sum of \$1,500, with interest thereon from the 21st day of January, 1897; (2) That in addition to the income of the estate she was entitled to use the principal, if necessary for her reasonable comfort and support. (3) That the expression, "but should our said daughter, Grace Butler Bradshaw, die without issue," refers to her death without issue during the life-time of Mrs. Bettie W. Butler, and that Grace Butler Bradshaw took a fee-simple estate in the property devised. From so much of the judgment as gave to Mrs. Butler a recovery for the \$1,500 and interest, and adjudged that she was entitled to encroach upon the principal of the estate,

Grace Butler Bradshaw has prosecuted this appeal; from so much of the judgment as adjudged that Grace Butler Bradshaw takes an absolute estate in remainder of the property devised, the defendants, Sallie F. Smith and others—the brothers and sisters of John W. Butler—have also appealed.

It appears from the record in this case, that Mrs. Butler had some property which had been given to her by her father; that the sum which she had amounted to about \$1,500, and was used in constructing the house in question. It seems that J. W. Butler preferred to build on his farm; but his wife and adopted daughter insisted that he build on the lot in town. As an inducement to his building in town, Mrs. Butler agreed to furnish a portion of the money necessary for that purpose. Passing the question of the competency of her testimony, it appears from her own statement that her husband said: "I am building this house for you;" to which she responded: "Put my money in it; that is all right; I would as leave have it in a house as any where else." No where in the record does it appear that he promised to repay the money, or to convey the house and lot to Mrs. Butler. Indeed, the very basis of the latter's claim shows that she does not rely on an express contract. The account which she filed in this case says: "To money furnished to John W. Butler in the years 1896 and 1897, at his special instance and request, for the purpose and which said money was used by him to build a two-story brick house and improvements on his lot, * * * with the understanding and agreement between us that said house and lot, with the improvements, should be mine, but which was never conveyed to me by deed, and on which account, he became indebted to me in the full amount of the money so furnished and the interest," &c. Col. Butler, one of the witnesses, states that Judge Butler said the house was to be Grace Butler Bradshaw's after Mrs. Butler got through with it.

We think the facts of this case bring it within the rule laid down in *Nall, &c. v. Miller*, 95 Ky., 448, and that Mrs. Butler was to find her reimbursement for the money furnished by her for the construction of the house in the location which she preferred and in the future use and enjoyment of the house. Furthermore, it appears that Judge Butler, as a matter of fact, did actually devise the premises in question, to Mrs. Butler for life. This was, in effect, a compliance with his promise when he said, as claimed by Mrs. Butler, "I am building this house for you." But even if this be not true, Mrs. Butler could not claim the property under the will and also claim compensation for improvements against the will. The two claims are inconsistent, and having elected to take the property under the will, she can not claim contrary to the will. (*Gentry, &c. v. Gentry*, 77 S. W., 1115; *Morrison, &c. v. Fletcher*, 119 Ky., 488.) The trial court, therefore, erred in giving Mrs. Butler judgment for the \$1,500 and interest.

The next question is: Has Mrs. Butler the right to encroach upon the principal of the estate? The language of the will is certain and explicit. The estate is given to Mrs. Butler for and during her life. The fact that the testator afterwards used the expression "what remains," &c., can not be held to amplify the estate given to his wife. Nor do we think that the power of sale given in the fourth clause conferred any authority upon Mrs. Butler to encroach upon the principal of the estate. By the fifth clause she was appointed executrix. We think these two clauses should be construed together, and that the power given by the fourth clause was solely for the purpose of enabling Mrs. Butler to sell the property for the purpose of paying the debts and other charges against the estate. In no event could it be construed to enlarge the in-

terest she was to receive; that was definitely fixed by the expression "for and during her life." We, therefore, conclude that the judgment of the chancellor, in holding that she could encroach upon the principal of the estate, was erroneous.

The last question involved is the character of the estate devised to Grace Butler Bradshaw. While it is true, as contended by counsel for Sallie F. Smith and others, that the cardinal rule of construction of wills is to arrive at the intention of the testator, yet in seeking the intention of the testator we must construe the language of the will in the light of the uniform rules of interpretation adopted by this court. In a long line of decisions, this court has held that, where an estate is devised to one for life, with remainder to another, with the further provision that if the remainderman should die without children or issue, then to a third person, the rule is that the words "dying without children or issue" are restricted to the death of the remainderman before the termination of the particular estate. (*Merchante Bank of New York v. Ballard's Ass'ee*, 83 Ky., 481; *Ferguson, &c. v. Thomason, &c.*, 87 Ky., 519; *Pruitt, &c. v. Holland*, 92 Ky., 641; *Harvey, &c. v. Bell, &c.*, 118 Ky., 512.)

For the reasons given, the judgment on the appeal of Sallie F. Smith and others, is affirmed; and the judgment on the appeal of Grace Butler Bradshaw is reversed and cause remanded, with directions to enter a judgment in conformity with this opinion.

SOUTH COVINGTON & CINCINNATI STREET R'Y. CO. v. QUINN.

(Filed May 21, 1908—Not to be reported.)

Street Railways—Denying Passenger a Transfer Ticket—Compelled to Walk Home—Damages Recoverable—Where a little girl eleven years old, in traveling from Ludlow to Newport, a distance of several miles, had to change cars, and was entitled to a transfer in making the exchange, which she demanded, but was refused by the conductor, and by reason thereof she was compelled to walk alone to her home late in the evening for several miles through an unfrequented part of the way, she was entitled to recover damages for being refused a transfer ticket, and a verdict for \$425 was not excessive under the facts shown.

Ernst & Cassatt for appellant.

B. F. Graziani and H. D. Gregory for appellee.

Appeal from Kenton Circuit Court, Law and Equity Division.

Opinion of the court by Judge Hobson, affirming.

In October, 1903, Catherine Quinn, a little girl eleven years old, who lived at Ludlow, Ky., went to school in Newport, Ky. She took a street car in Ludlow which carried her to Fourth and Madison streets in Covington. There she was given a transfer and took the Newport car, which carried her to Newport. In the evening, when she went home, she took a car in Newport, and when she got to Fourth and Madison streets in Covington, was transferred to the other car for Ludlow. She paid her fare on the first car always and was given a transfer to the other car. She had gone to school in this way for some time when, as she was going home in October, one afternoon, after taking the car in Newport, she paid

her fare and asked the conductor for a transfer to Ludlow. He said, "All right, after a while." When the car got to the Licking River bridge, and he had not yet given her the transfer, she asked for it again. He then did not make any reply, just looked at her and went on. When the car reached Fourth and Madison streets when she went to get off, she said to the conductor, "Please give me a transfer." In a loud insulting tone he said to her, "Get off, I have't time to bother with you." At this she got off the car, and not having a transfer for the Ludlow car, did not get on it. She did not know what to do. It was a dark afternoon and she undertook to walk home, following the line of the street car track. It took her about an hour and a half to get home. For a part of the way there were no houses and the way was muddy. She became frightened and ran. When she reached home, she was in a bad, nervous condition, and a doctor was sent for. She was sick in bed for a week and was unable to go to school for half the time that winter. This suit was brought to recover for her injuries. The circuit court dismissed the petition, but on appeal to this court, the petition was held sufficient. (Quinn v. South Covington & Cincinnati Street Ry. Co., 30 Ky. Law Rep., 15.) On the trial of the case the plaintiff introduced witnesses showing the facts above stated. The defendant declined to introduce any evidence. The court instructed the jury, in substance, that if the defendant carried passengers from Newport to Covington and thence by transfer on its Ludlow line to Ludlow, Ky., the passenger paying the fare on the first car, and when the fare was paid receiving a transfer to Ludlow, and that the plaintiff paid her fare and requested the transfer to Ludlow to which she was entitled, and the conductor refused to give her the transfer, and by reason of his failure to do so she was compelled to walk from Fourth and Madison streets in the city of Covington to her home in Ludlow, Ky., and in doing so became frightened and was made sick and suffered physical or mental pain, they should find for her a fair compensation for such of these things as were the direct and proximate result of the defendant's refusal to give her the transfer. The jury found for her in the sum of \$425, and the defendant appeals.

It is insisted for the defendant that the proof does not show that the plaintiff was on one of its cars or paid the fare to one of its conductors. It is urged for the plaintiff that these matters are not put in issue by the answer. The circuit court seems to have taken the plaintiff's view of the pleadings, but aside from that we think the evidence is sufficient to show, *prima facie*, that the transaction occurred on one of defendant's cars. The plaintiff testifies that she was on one of the Covington and Newport cars; that these were the cars she always traveled on and on which she was always given a transfer. The answer of the defendant admits that it ran a line of cars between Newport and Covington and between Covington and Ludlow; and it not appearing that any other company ran cars between these points, the proof that the transaction occurred on the cars running between these points and on the line which the plaintiff traveled upon on other days, is sufficient, *prima facie*, evidence to show that she was on the defendant's line.

It is also insisted that no recovery should be allowed for the nervous injury to the child from her becoming frightened or for the sickness or suffering caused by her running home. From the fact that she got home about a quarter after five, it is evident that she need not have run to get home before night. But it was a dark evening and the child may not have known how long it would be before dark, and as the outskirts of any town about nightfall are

usually not a safe place for a girl, we can not say that it was unreasonable that she became frightened and did not walk home leisurely. If she had been a grown person, we would not, under ordinary circumstances, approve the recovery allowed by the circuit court; but here was a child, eleven years old, set down on the street corner of a city in which she did not live, several miles from home, without any means to get home and without protection. The conductor of the car was informed several times by the child that she wished a transfer to Ludlow. He could see by her looks that she was a school girl returning home, and could not but know that she was asking a transfer to go home. She was alone and carriers are under a peculiar obligation to children traveling alone in their vehicle.

In *C. & O. R. R. Co. v. Lynch*, 28 Ky. Law Rep., 467, the plaintiff was a girl, fifteen years old, living at Brighton, six miles from Lexington, and went to Lexington to school on the train every morning returning about six o'clock in the afternoon. On October 1st, she took the train for home; the conductor took her ticket, but, by mistake, took it to be a ticket for Chilesburg, which is nine miles from Lexington. He did not stop the train at Brighton, and when they were about one-half way between Brighton and Chilesburg, she called his attention to the fact that he had passed her station, asking him to take her back to Brighton. This he refused to do. When the train got to Chilesburg he had her to get off and left her standing on the platform without any acquaintance, in the dark. As she had no money, she set out and walked home. She became very much frightened and was sick for some time. She sued and recovered a verdict for \$250. On appeal the judgment was affirmed. The testimony of the conductor in that case was in conflict with the testimony of the passenger. He said that he told the agent, Mr. Warnock, to take care of the young lady. In affirming the judgment, the court said:

"The conductor could see that the girl, with her school books, was placed in a very embarrassing position. She did not know Warnock or know anything about him. He did not tell her at any time that he would have Warnock send her home, nor did he tell her who Warnock was, or put her in his care. If he went off and left the girl standing on the platform, where she knew nobody, without making any arrangement for her, his conduct was very reprehensible. The girl had no clothes with her for the night; she had no money; there was not, so far as appears, any hotel or boarding house there but there was a livery stable at which a vehicle could be hired though it does not appear that she knew this, and it was a question for the jury whether she acted as might be reasonably expected of one in her situation at her age."

That case is very similar to the one now before us. If the plaintiff was entitled to be carried to Ludlow for the fare which she paid the conductor, and it was the duty of the conductor to give her a transfer, the case would not be substantially different if she had had a ticket for Ludlow and the conductor, after taking up her ticket, had set her off at the corner of Fourth and Madison streets in Covington. She could not get upon the other car without any transfer as she had no money. Under the evidence, the plaintiff was entitled to be carried from Newport to Ludlow. The giving of a transfer did not change the essence of the transaction. Nor was it material that she was to be carried a part of the way on one car and a part of the way on another car. When she entered the car to go to Ludlow and paid the fare to take her to Ludlow, the defendant was under obligation to carry her to Ludlow, and when it refused to give her the transfer, this was a refusal to carry her

to Ludlow. There is, therefore, no substantial difference between this and the Lynch case.

The verdict here is for \$425; the verdict there was for \$250. The difference is not so much as to justify us in awarding a new trial on the ground that the verdict is excessive. If the plaintiff's testimony is true, and it is uncontradicted, she was in fact damaged and in fact suffered much more than the plaintiff there.

Judgment affirmed.

ILLINOIS CENTRAL R. R. CO. v. ELLIOTT.

(Filed May 21, 1908—To be reported.)

1. Railroads—Injury to Abutting Property—Smoke—Soot and Cinders—Liability for Damages—Where a railroad throws smoke, soot and cinders upon the property of another, it is a trespass upon the property for which, under sec. 242, of the Constitution, it must make just compensation for the injury, and it can not make any difference whether the railroad is upon a street in front of the property or elsewhere.

2. Same—Unusual Currents of Wind—A railroad company is responsible for such consequence as may ordinarily be anticipated, but it is not responsible for smoke, soot or cinders carried to adjoining property by unusual currents of wind.

3. Same—Damage for Noise—In an action by the owner of a dwelling abutting on a railroad for damages against a railroad company by reason of noise, smoke, cinders and dust, all the evidence as to the noise made should have been excluded, as the running of a railroad train is a lawful business and no amount of care can prevent the making of noise.

4. Same—Obstructing Street and Alley—Measure of Damages—Removing Obstruction—In an action by the owner of a dwelling abutting a railroad for damages in obstructing a street and alley adjacent to the property, the measure of damages is the diminution of the value of the property by reason thereof, but where the obstruction is removed by putting in a proper crossing, the measure of damages is for the time the obstruction was continued.

5. Changing Line of Railroad—Damages Caused Thereby—Where the line of a railroad track has been changed so as to bring it nearer to property than it was before the change, the measure of damages is the difference in the value of the property with the cinders, soot and smoke and obstruction of a street and alley, thereby, as they are, and what it would be without the increased cinders, soot or smoke or the obstruction of the street and alley, and unless such damage has thereby been increased there can be no recovery.

Trabue, Doolan & Cox, Robbins, Thomas & Corbett and J. M. Dickinson for appellant.

J. B. Wickliffe for appellee.

Appeal from Ballard Circuit Court.

Opinion of the court by Judge Hobson, reversing.

Mrs. A. O. Elliott is the owner of two lots in the town of Wickliffe, Kentucky, at the corner of Front and Court streets, on which she resides and conducts a hotel. Prior to the year, 1904,

the line of the railroad ran west of Mrs. Elliott's house, near the Mississippi River, which gradually encroached upon the railroad track; and to avoid this trouble, the railroad company built a new line further from the river and between Mrs. Elliott's house and the central part of the town of Wickliffe. The new line crosses both Front street and Court street and also crosses an alley back of her house, her land running back to the alley. This suit was brought by her to recover damages from the railroad company for the obstruction of Front street and the alley and the injury to her property from the smoke and cinders thrown upon it and the noise incidental to the running of the railroad trains. The proof on the trial showed that, in a straight line it was two hundred and thirty feet from Mrs. Elliott's house to the old line of the railroad, and that it was one hundred and eighty feet from her house to the new line. The situation is shown on the following plot:

There was proof introduced on the trial showing that by reason of the smoke and cinders and the noise of passing trains, Mrs. Elliott's house was unsuited for a hotel, and had been depreciated in value something like two or three thousand dollars by the change of the road. The court instructed the jury as follows:

"1. The court instructs the jury that if they believe from the evidence that defendant constructed a railroad in such proximity to the home of the plaintiff that the noise of defendant's trains and the smoke and dirt that passes from defendant's engines to plaintiff's property, renders her house less comfortable as a residence and less valuable by reason thereof; or if you believe from the evidence that defendant, in constructing its road, obstructed, stopped up or destroyed a portion of Front or First street and a portion of the alley in the rear of plaintiff's property, and that by reason of such obstruction, stoppage or destruction of said street or alley, plaintiff's property has been damaged; then you will find for plaintiff such damages as you may believe she has sustained by either or both of the above causes not exceeding the sum of \$4,000, and in measuring such damages, if any, you will consider the value of her house and lot immediately before the defendant constructed its road and began to operate over it, and the value of the same property immediately thereafter, caused, proximately, by the two causes mentioned, that is to say by any increase in dirt, noise or smoke or by diminution in value of the property through the destruction of portion of Front street and of the alley in rear of said property.

"2. The court instructs the jury to find for the defendant unless the jury believe from the evidence that, by the change of the defendant's railroad, it was placed nearer to the plaintiff's property, and that there was increased noise and smoke thrown upon and around her property from what it had formerly been subjected to and by reason of such increased noise and smoke, her property was diminished in value, the law is for the defendant and you should so find, unless you may further believe, from the evidence, that the destruction of First street or the alley in the rear of plaintiff's property was the proximate cause of the injury to plaintiff's property, in which latter event you should find for plaintiff the difference in value, if any, between said property immediately before said street and alley were obstructed or destroyed, and the value of same immediately afterward and unless you believe the latter proposition or the one presented above, the law is for defendant and you should so find.

"3. The court instructs the jury that the defendant had the right to move its track from the west side to the east side of the plaintiff's property, and the jury can not find any damages resulting to her property solely from the change of location of its railroad."

A great deal of evidence was admitted on the trial as to the annoyance caused by the noise from the trains; one witness said that "it seems like the train is running in at your window, if you happen to wake up at night upstairs, on the north side of the house." All the evidence as to the noise made by the trains should have been excluded and the instruction should not have allowed any recovery on account of noise. The running of a railroad train is a lawful business carried on upon the owner's own property. The noise is inseparable from the running of the trains; no amount of care can prevent it. Mrs. Elliott's property does not adjoin the right of way, and if she can maintain an action for this noise, every property owner in the town could maintain a like action, and so could all those along the right of way. That an abutting owner on a street can not recover for the noise made by the trains was held in *Cosby v. Owensboro R. R. Co.*, 10 Bush, 294; *C. & O. R. R. Co. v. Gross*, 43 S. W., 203; *L. & N. R. R. Co. v. Kleymeier*, 105 Ky., 609; and in a number of other cases, this court in defining what may be recovered for, has omitted noise from passing trains. (*Combs v. R. R. Co.*, 10 Bush, 392; *Henderson Belt Line v. Dechamp*, 95 Ky., 219; *Willis v. K. N. I. Bridge Co.*, 104 Ky., 186.)

There was proof on the trial that the railroad made a cut across Front street and across the alley in the rear of Mrs. Elliott's lot, thus entirely obstructing travel along Front street or along the alley. It is insisted that as this obstruction of the alley and of Front street is at a point not abutting the property of Mrs. Elliott, she can not recover for it. There are authorities sustaining this view, but the rule in Kentucky is otherwise. In *Transylvania University v. Lexington*, 3 Ben Mon., 27, the court said:

"Every owner of ground on any street in Lexington, has a right, as inviolable as it is indisputable, to the common and unobstructed use of the contiguous highway, so far as it may be necessary for affording him certain incidental easements and services, and a convenient outlet to other streets. And of this right, the Legislature can not deprive him, without his consent, or a just compensation in money. The extent of this appurtenant right, depending on circumstances, may not, in a particular case, be easily definable with mathematical precision. As far as it exists, however, it partakes of the character of private property, and is therefore protected by the fundamental law, as property. But it can not, as to each proprietor of ground, be co-extensive with all the streets and alleys of the city. As a private right, it must, like that of vicinage, be limited to its own nature and end; that is, chiefly by the necessity of convenient access to, and outlet from the ground of each proprietor."

This case was followed in *Gargan v. Louisville, &c., R. R. Co.*, 89 Ky., 212; *Bannon v. Bohmeiser*, 90 Ky., 52; *Wickliffe v. I. C. R. R. Co.*, 32 Ky. Law Rep., 1159. As far as appears from the evidence the obstructions in the street and the alley are permanent, and if the condition remains at the trial, the measure of damages for the obstruction will be the diminution in value of the property by reason of it. But the defendant has no right to obstruct the highway and if it shall remove the obstruction by putting in a proper crossing, the measure of damages will be the diminution in value of the use of Mrs. Elliott's property during the time the obstruction was continued. (*L. & N. R. R. Co. v. Carter*, 76 S. W., 364; 77 S. W., 718.)

It is also insisted that as the railroad does not run along the street adjoining the plaintiff's property she can not recover anything for the smoke and dirt thrown on her property by the trains. The contrary rule was laid down in *Willis v. K. N. I. Bridge Co.*, 104 Ky., 186, and in *L. & N. R. R. Co. v. Walton*, 24 Ky. Law Rep.,

9. Where a railroad throws smoke and cinders upon the property of another, it is a trespass upon the property and this is an injury to the property for which, by the express mandate of the Constitution, compensation must be made. Sec. 242 of the Constitution provides:

"Municipal or other corporations or individuals invested with the privilege of taking private property for public use shall make just compensation for the property taken, injured or destroyed by them."

Under this provision, where private property is injured by a railroad corporation, it must make just compensation for the injury, and it can not make any difference whether the railroad is upon a street in front of the property or elsewhere.

The defendant asked the court to instruct the jury that there could be no recovery for smoke or cinders carried upon the property by currents of wind; the instruction was refused and of this it complains. In *Elizabethtown, &c. R. Co. v. Combs*, 10 Bush, 392, the court said:

"And if his houses are damaged by having smoke, soot or fire from passing engines thrown or blown into or against them, he is entitled to recover for this also."

In *Henderson Belt Line v. Dechamp*, 95 Ky., 224, the circuit court instructed the jury that the railroad company was not responsible for smoke or cinders carried upon the property by currents of wind. There was a verdict for the plaintiff and the railroad company appealed. The judgment was affirmed, but the only question before the court was whether the instruction was prejudicial to the railroad company. In the subsequent case of *L. & N. R. R. Co. v. Kleymeler*, 105 Ky., 612, the judgment was reversed for other reasons and at the conclusion of the opinion it was held that the instruction should have been given. But what the court had in mind was unusual currents of wind. The air is hardly ever still. Cinders and smoke will usually float off to one side of the railroad. This may be ordinarily expected and the defendant should be responsible for such consequences as must be anticipated; but it is not responsible for the smoke, or cinders carried to adjoining property by unusual currents of wind; and on another trial the court will so instruct the jury.

The court erred in telling the jury that the measure of damages was the difference in value of the property just before and just after the road was constructed. By this measure of damages, the jury necessarily got into their minds that they should take into consideration the diminution in value of the plaintiff's property by reason of the change in the location of the railroad. On another trial the court will tell the jury that if the increased cinders, soot or smoke or the obstruction of the street or the obstruction of the alley diminishes the value of the plaintiff's property, then the measure of damages is the difference in value of the property with the cinders, soot and smoke and obstruction of the street and alley as they are and what it would be without the increased cinders, soot or smoke or the obstruction of the street or alley. The court will, in lieu of the second instruction, on another trial, tell the jury that unless the plaintiff's property has been diminished in value by reason of the increased cinders, soot and smoke thrown from the trains upon the property or by reason of the obstruction of Front street or the alley in the rear of the property, they should find for the defendant.

Judgment reversed and cause remanded, for a new trial and for further proceedings consistent herewith.

TALL v. COMMONWEALTH.

(Filed May 21, 1908—Not to be reported.)

1. Criminal Law—Malicious Shooting—Instructions—It was error, upon the trial of appellant, who was charged with willfully and maliciously shooting at one person with the intention of killing him and missing him and wounding another, to insert a phrase in an instruction on the offense defined in section 1242, of the statutes, which is a lower degree of the offense designated in 1166 of the statutes.

2. Former Conviction—Action of Commonwealth's Attorney in Matter of Former Conviction—Evidence of—Evidence of former conviction is limited to the verdict and judgment of conviction and the sentence, and proof showing defendant to be the same person that was formerly convicted. The Commonwealth has no right to show the facts with reference to previous convictions.

G. B. Saufley, T. H. Shanks and T. J. Hill, Jr., for appellant.

James Breathitt and Thos. B. McGregor for appellee.

Appeal from Lincoln Circuit Court.

Opinion of the court by Judge Nunn, reversing.

Appellant was tried, convicted and sentenced to serve his natural life in the penitentiary. He was charged with having willfully and maliciously shot at one person, with the intention of killing him, and missing him and wounding another. He was also charged with having been twice, previously, convicted of felonies.

It appears from the record that Stanford is a local option town, and, at the time the offense charged in the indictment was committed, there was a saloon in the town of Rowland authorized by law to sell whisky, which was situated about one mile from the town of Stanford. Appellant, a colored man, was invited by one George Smith, a white man, to go with him to Rowland to get some liquor. Another person present loaned Smith a quarter, and also furnished appellant with a quarter to get some whisky for him, and promised to give appellant some of it, when he returned, for his trouble. Smith and appellant went first to appellant's house to get some bottles to put it in, and while there Smith borrowed appellant's overcoat. They went along the railroad track, and when about one-half mile away Smith placed the overcoat on the ground near a telegraph pole. When they reached the saloon Smith gave appellant his quarter and requested him to buy the liquor, stating that they would divide it when they returned to Stanford. They entered the saloon; appellant purchased the whisky and stepped out in front of the building; Smith walked into the back room of the saloon and found Ed McCarty sitting in a chair drunk, they walked out into the saloon, took several drinks, left and started to Stanford along the railroad track. As they left, they addressed appellant saying: "nigger, come on." He started off walking behind the parties. When they reached a point about two hundred yards from the saloon they stopped and McCarty remarked to appellant: "nigger, come up and divide that whisky," and when appellant reached a point on the track opposite where they were standing near the track, McCarty said something which caused appellant to run. Smith and McCarty pursued him for about one hundred yards, when appellant left the track, ran up an embankment about eight feet high. McCarty followed him; there was a wire fence at the top of the bank that prevented appellant from going farther. We will quote

what each of the three said took place at this particular time. Smith testified that:

"We were then close on to him, and when he ran up on the bank he turned around and I saw a pistol in his hands. At this time McCarty was starting up the bank towards him. Jim told him three times to 'stop, go back,' and just as he said it the third time, McCarty turned to start back, as I thought. Instantly I heard a shot and saw the fire jump in the direction of McCarty. When McCarty turned to come down off of the bank, just before the shot was fired, I saw a knife in his hands. But I do not know when he drew it from his pocket."

McCarty testified as follows:

"I went up the track after him for about one hundred yards and overtook him. He then ran off the track, and up on an embankment, and had his pistol out. I went up after him, but just as I reached the top of the bank, he pointed the pistol at me, and I turned to come back down. When I saw him point his pistol I was afraid he would shoot me, and I pulled my knife from my pocket, as I turned he fired one shot at me and another down the track."

Appellant testified as follows:

"They walked on up the track to the cattle guard at the Goshen pike crossing, about one hundred and fifty yards from the saloon, and then stopped. I walked on and just as I got even with them I saw Mr. McCarty pull something out of his pocket, and heard it click. It was a moonlight night and I could see plain that it was a dirk knife, with a long blade. McCarty said: 'skidoo, you black s—— b——,' and I started running up the track towards Stanford. They ran after me for about one hundred yards, and I was getting tired. I ran off the track, and up on a bank on the side of the track and they were close on me when I did this. I tried to get out of the way, but ran into a barbed wire fence that is on the side of the track, and they were so close on me that I did not have time to get through it. I backed up against it as far as I could, and told Mr. McCarty, who had followed me up on the bank, wife his knife in his hand, to go back. I said this to him three times, but he kept coming on me and was cutting at me. * * * I shot once into the ground right by his side and near his feet to scare him into going back. He kept pressing me and I fired again at him. He then stopped, and turned back down off the bank, and went on up the track with Smith, and I followed behind them."

Appellant assigns many grounds for a reversal of the case; but we will only consider one or two of them. His counsel claims that the instructions given by the court are erroneous and prejudicial to defendant. Instruction number one is as follows:

"Gentlemen of the Jury: If you believe from the evidence beyond a reasonable doubt, that in this county, and before the finding of this indictment, namely March 6, 1907, the defendant, James Tall, willfully, feloniously, and with malice aforethought, shot and wounded George Smith with a pistol, with the intention of killing him or shot at Ed McCarty with the intention of killing him, and wounded said Smith, but of which wounding said Smith did not die, then you will find the defendant guilty, and fix his punishment at confinement in the penitentiary for not less than one year nor more than five years."

It is contended that this instruction submits two offenses for the consideration of the jury; one for shooting at George Smith with intent to kill him, and shooting at Ed McCarty with the intent to kill him, and missing him and wounding George Smith. We are of the opinion that this criticism of the instruction is not correct. George Smith received a slight wound in the conflict, but it is

doubtful whether appellant intentionally shot at him; but there is no doubt as to whether or not he shot at Ed McCarty. The instruction referred to the same act or offense committed by appellant, and if he shot at George Smith, maliciously and with the intention of killing him and not in self-defense, he is guilty. But if he did not shoot at George Smith, but shot at Ed McCarty, without legal excuse and with a like intent, and missed him and wounded Smith, he is guilty. The instruction referred to the same act of shooting and in our opinion it is proper.

Instruction number three is as follows:

"If you believe from the evidence, beyond a reasonable doubt, that in this county, with a pistol, and before the finding of the indictment, the defendant, in the sudden heat of passion, upon a provocation reasonably calculated to excite the passion of the defendant beyond the power of his control, and not with malice aforethought, willfully shot and wounded George Smith, with the intention of killing him, or shot at Ed McCarty, with the intention of killing him, and wounded said Smith, but of which wounding said Smith did not die, thence you will find the defendant guilty and fix his punishment at a fine of not less than fifty dollars, nor more than five hundred dollars, or confinement in the county jail for not less than six months nor more than one year, or both so fine and imprison him, and you may provide in your verdict that he work at hard labor until the fine or imprisonment is satisfied, or until both are satisfied."

This instruction is erroneous and was prejudicial to the substantial rights of appellant. The court improperly inserted in the instruction language properly applicable to an instruction in a case of voluntary manslaughter, to-wit: "Upon a provocation reasonably calculated to excite the passion of the defendant beyond the power of his control, and not with malice aforethought and intention to kill." This phrase should not have been inserted in an instruction on the offense defined in section 1242, of the statutes, which is a lower degree of the offense designated in section 1166, of the statutes, for malicious shooting at and wounding another with intent to kill. Section 1242, of the statutes, is in part, as follows:

"If any person shall, in a sudden affray, or in sudden heat and passion, without previous malice, and not in self-defense, shoot at without wounding, or shoot and wound another person, or wound a person other than the person shot at, with a gun or other instrument, loaded with ball or other hard substance, without killing such person."

The instruction given by the court omits the words, "in a sudden affray without previous malice and not in self-defense." This very question was under consideration in the case of *Violett v. Commonwealth*, 24 Ky. Law Rep., 1720. In that case the court said:

"It will be observed that the instruction of the court defining the offense does not follow the language of the statute. By the instruction of the court the offense consists in shooting in sudden heat and passion without previous malice. By the statute it consists in shooting 'in a sudden affray, or in sudden heat and passion, without previous malice and not in self-defense.' The words 'in sudden affray' are not synonymous with the words 'in sudden heat and passion.' The statutory offense is, therefore, different from that defined in the instruction, and, under the evidence in the case, the jury might well have concluded that the shooting was done in a sudden affray, and inasmuch as they were allowed by the statute to graduate the punishment according, as in their judgment, the defendant was in the wrong, the failure of the court to define the offense properly to the jury was prejudicial to the defendant,

and, in view of the severity of the verdict, under the evidence, we are of opinion that a new trial should be had."

In the case at bar, if this instruction had been properly given, the jury might have concluded that it covered the offense committed by appellant, instead of finding him guilty under the first instruction.

The instruction on self-defense was correct with this exception; it only allowed appellant to avert the impending danger by shooting at Smith, when it should have allowed the jury to acquit him if he shot at McCarty or Smith or both of them, if it was apparently necessary to save himself from the impending danger. We are confident that this error was caused by inadvertence by the court, or the clerk in making the copy for this court.

Appellant objected and excepted to the action of the court in allowing the indictments, on which the former convictions were secured, to be read in evidence to the jury, and in permitting the Commonwealth attorney to comment upon them in his argument. These indictments stated the particular acts which constituted the felonies in the previous convictions. It also introduced in evidence the judgments of convictions and the sentences of the court for the previous felonies. Section 1130, of the Kentucky Statutes, provides, that if a person be convicted three times of a felony, he shall be confined in the penitentiary during his natural life. Judgments in such cases shall not be given for the increase and penalty, unless the jury shall find from the record and other competent evidence the fact of former convictions for felonies committed by the prisoner in or out of the State. It will be seen from this language that it is the conviction of former felonies that authorizes the life penalty and the evidence of former convictions are limited, in our opinion, to the verdict and judgment of conviction and the sentence, and also proof showing that the defendant is the same person that was convicted of the previous felonies, which is the other competent evidence referred to in the statute. If the word "recorded" as used in the statutes was intended by the General Assembly to include more than the judgment of conviction and sentence, then it must include the whole record, which would include all motions made and objections entered and the orders of the court made during the trial. The statute did not mean to place this burden upon the Commonwealth, and besides this would be prejudicial to appellant; it would place before the jury all the facts and particular circumstances with reference to the charges for which he was previously convicted, which would tend to prejudice the minds of the jurors against him; and the jury might possibly not be able to give proper consideration and weight to the testimony with reference to the offense then under investigation. The Commonwealth has no right to show the facts with reference to the previous convictions; and it is not necessary for it to show that the judgment of conviction had never been vacated, set aside or reversed. If such was the case it devolved upon the defendant to prove these facts. (*Gragg v. Commonwealth*, 31 Ky. Law Rep., 873.)

For the errors in the instructions the judgment is reversed and remanded, for further proceedings consistent herewith.

MURRAY'S ADM'X. v. LOUISVILLE & NASHVILLE R. R. CO.

(Filed May 21, 1908—To be reported.)

1. Railroads—Negligently Killing Engineer—Action in this State—Killing in Tennessee—Jurisdiction of Action—A railroad engineer, who was a resident of this State, was killed while running his train in the State of Tennessee, by the negligence of the defendant railroad company. His administratrix brought suit for damages in this State. There was no averment in the pleadings and no proof as to what the law of Tennessee is. At the conclusion of the evidence the court peremptorily instructed the jury to find for defendant. Held—That this was proper.

2. Same—Law of Sister State—Absence of Allegation or Proof—Presumption—Until the contrary is alleged and proved, the courts of this State will presume that the common law is yet in force in a sister State. At common law a cause of action for injury to a person dies with the person, and no action can be maintained for his death.

3. Same—Judicial Presumption—While it is presumed that the common law prevails in a sister State, it is not presumed that the statutes of a sister State are the same as those of this State. Judicial presumption rests on the truth as shown by the usual course of things but they are not indulged as to matters which can not possibly be true.

B. F. Proctor, G. H. Herdman, J. G. Covington and Greene & VanWinkle for appellant.

Benjamin D. Warfield and Sims, DuBose & Rodes for appellee.

Appeal from Warren Circuit Court.

Opinion of the court by Judge Hobson, affirming.

John Murray was a locomotive engineer, in the service of the Louisville & Nashville Railroad Company, pulling a train southward from Bowling Green. While he was running under orders he came suddenly in the night upon some cars standing on the main track. A collision ensued in which he was killed instantly, in the State of Tennessee. This suit was brought in the Warren Circuit Court by his administratrix, to recover for his death. There was no averment in the pleadings of the plaintiff or of the defendant as to what the law of Tennessee is, and no proof was introduced on the trial by either party on the subject. At the conclusion of the evidence, the court instructed the jury peremptorily to find for the defendant. This was done, and the plaintiff's petition having been dismissed, she appeals.

The proof on the trial showed that the cars in question had been placed on a side track, but that the side track sloped toward the point where the cars were found and that in some way the cars had started and run out of the siding down on the main track, where they were when Murray's train ran into them. The fact that the cars were on the track is sufficient to make out for Murray a prima facie case of negligence on the part of the master, as he was running in obedience to his orders, and manifestly the master did not furnish him a safe place to work. The facts shown, therefore, were sufficient to take the case to the jury if it had not appeared that the accident took place in Tennessee.

In 6 Thompson on Negligence, sec. 6991, the rule is thus stated:

"The law of the place of the injury controls in an action for wrongful death; and the right to recover and the amount of the recovery are governed by the *lex loci* and not by the *lex fori*. These statutes have no extra-territorial effect. If the death of the deceased and the act which caused it occurred beyond the territorial limits of the State where the suit is brought, an action for wrongful death will not lie under the statute of that State, whether such act and death took place in another State or upon the high seas. It does not alter the case in this respect that both parties were citizens of the State where suit is brought; or that the wrong-doer was a corporation chartered by that State; or that the injury was occasioned by negligence which was a breach of a contract entered into in that State or that the corporation whose wrongful act inflicted the injury was chartered both in the State where the death occurred and in the State where the suit was brought; or that the person injured was brought into the State before his death, and there died."

(8 Am. & Eng. Cyc., 885, 13 Cyc., 314, Wharton on Conflict of Laws, sec. 480d.)

Murray was instantly killed. Here the whole matter occurred in Tennessee. Until the contrary is alleged and proved the courts of this State will presume that the common law is yet in force in a sister State. (Cope v. Daniel, 9 Dana, 415; Johnson v. Bank U. S., 2 B. Mon., 310; Miles v. Collins, 1 Met., 311; Honore v. Hutchins, 8 Bush, 692.)

At common law the cause of action for an injury to the person died with the person and no action could be maintained to recover for death. (Eden v. Lexington and Frankfort R. R. Co., 14 B. Mon., 165.) As it must be presumed that the common law is still in force in Tennessee, and as no right of action existed at common law to recover for the death of a person, and as Murray was killed in Tennessee, where under the record, it must be presumed that the common law is still in force, it follows that the circuit court properly held that no action could be maintained in Kentucky to recover for his death without proof of what the law in Tennessee is. It is true that since the passage of Lord Campbell's act in England, statutes have been passed in this country, in nearly all of the States, allowing a right of action in such cases. These statutes differ very much in their terms. As to who are fellow-servants, or to whom the recovery shall go, or by whom the action may be maintained or what is necessary to be shown to entitle the plaintiff to recover, the rules differ very much in the different States. The court, therefore, can not intelligently proceed in such a case as this, unless it knows the statute of the State regulating the matter.

It is insisted that it should be presumed, in the absence of proof to the contrary, that the statute of another State is the same as the statute of his State, and that as the plaintiff may recover under the laws of this State on the facts shown, it should be presumed that he might recover under the laws of Tennessee. It is said that this court so laid down the rule in Chesapeake, &c. R. R. Co. v. Venable, 111 Ky., 41, but in that case Venable was not killed. That was an action which might be maintained at common law, in this case the plaintiff has no right of action at common law and can only sue by virtue of a statute. The Kentucky Statutes have no extra-territorial effect and therefore do not apply to the case. While it is presumed that the common law prevails in a sister State, it is not presumed that the statutes of a sister State are the same as the statutes of this State. To so hold would be to require us to presume that the Legislature of other States meets at the same time as the Legis-

lature of Kentucky and changes the laws of those States simultaneously with the changes that are made in Kentucky. Judicial presumption rests on the truth as shown by the usual course of things but they are not indulged as to matters which can not possibly be true. (Moss v. Rowland, 3 Bush, 505; Klenke v. Noonan, 118 Ky., 436; Arnett v. Pinson, 108 S. W., 853; Wharton on Conflict of Laws, sec. 781c.)

Judgment affirmed.

AMERICAN-GERMAN NATIONAL BANK v. GRAY & DUDLEY
HARDWARE CO.

(Filed May 22, 1908—To be reported.)

1. Actions—Obtaining Goods by Fraud—Action for Recovery of Specific Property—Waiver of Contract—Where goods have been obtained by a party without any intention of paying for them, and with a design to cheat the vendor, the vendor, upon discovering the fraud, may elect to treat the contract of a sale as a nullity and bring his action for the recovery of the specific property or for its value.

2. Same—Innocent Purchase—Defense—In an action against one for goods alleged to have been obtained by fraud, the defendant having disposed of the goods for value, can only defend on the ground that he was an innocent purchaser for value without notice of any fraud in the party from whom he obtained them.

3. Same—Person Converting Goods—Liability to Owner—An owner of property may maintain an action for its value against a person converting it whether he be the original trespasser or not.

4. From an Action—Pleading—Claim and Delivery—Description of Goods—Forms of Action are Abolished by the Code—All that is now required in a pleading is to state the facts constituting a cause of action without reference to the form of the petition. An action for claim and delivery of property requires a particular description of the property and a statement of the separate value of each article claimed.

Bradshaw & Bradshaw, Flournoy & Reed and W. D. Greer for appellant.

Hendrick, Miller & Marble for appellees.

Appeal from McCracken Circuit Court.

Opinion of the court by Wm. Rogers Clay, Commissioner, affirming.

The Gray & Dudley Hardware Co., a Tennessee corporation, brought this suit of claim and delivery in the McCracken Circuit Court on the 24th day of September, 1906, for a lot of merchandise, consisting of whips and lashes, valued at \$348.45, claiming to be the owner of said property. The parties defendant to the original petition were E. Rehkopf Saddlery Co., R. J. Barber, assignee of E. Rehkopf Saddlery Co., American-German National Bank and the Cohankus Manufacturing Co. On September 25, 1906, an amended petition was filed, making W. S. O'Brien, O. B. Starks and the Starks-Ullman Saddlery Co. parties defendant, and claiming that said merchandise was detained by these defendants in conjunction with the other defendants in the original petition. To the original and amended petitions each of the defendants, except the E. Rehkopf Saddlery Co. and its assignees, filed a separate answer. The defendants, W. S. O'Brien, O. B. Starks, Cohankus Manufacturing Co. and the American-German National Bank, each denied that they had possession of, or set up any claim to, or had any control over said whips and lashes.

The Starks-Ullman Saddlery Co., in its answer, claimed that it had full possession and control over said merchandise and was the owner thereof; that it had acquired title to same in due course of trade by becoming an innocent purchaser thereof for a valuable consideration, without notice of any alleged prior rights of others thereto. Trial was had, and the jury brought in a verdict finding for plaintiff the goods sued for, and further finding them to be of the value of \$348.45. Thereafter the court rendered judgment against the American-German National Bank for the recovery of said goods, or their value—\$348.45. From an order overruling its motion and grounds for a new trial, the American-German National Bank prosecutes this appeal.

It appears from the record that, on August 23, 1906, the Gray & Dudley Hardware Co., which had a branch establishment at Eddyville, Ky., received by mail an order for a lot of whips and lashes from the E. Rehkopf Saddlery Co. On Monday, September 3, 1906, the Gray & Dudley Hardware Co. (appellee) shipped to the E. Rehkopf Saddlery Co. whips and lashes to the value of \$348.45. On September 20, 1906, the E. Rehkopf Saddlery Co. made a deed of assignment to R. J. Barber, for the benefit of its creditors. At the time of the assignment, the assets of the E. Rehkopf Saddlery Co. amounted to about \$25,000, while its liabilities amounted to over \$150,000. The goods were received by the E. Rehkopf Saddlery Co. on September 6, and were delivered to the Cohankus Manufacturing Co.

R. S. Mason testified that he was the general manager of the Gray & Dudley Hardware Co., at Eddyville. After detailing the facts connected with the purchase, he said that he came to Paducah on September 22, 1906. After supper he saw Mr. Rehkopf and asked him if he knew where the goods were. The latter replied that they were in the warehouse, but he did not know what warehouse. He then went and found the goods at the Cohankus Manufacturing Co.'s warehouse, which is located just across from the Starks-Ullman Saddlery Co. He met Mr. Starks in front of the postoffice, and Mr. Starks told him the goods were out at the warehouse, but he didn't want him to tell the old man that he (Starks) had told him. The conversation occurred about half past five or six o'clock Saturday evening. On Sunday morning Mason went and found the goods. On the following day suit was instituted. When he found the goods they were in the original packages, just as they had been shipped. There were other goods in the warehouse. The goods he saw were those ordered by the E. Rehkopf Saddlery Co. When he went with the sheriff to find the goods, they had been removed from where they were on Sunday, and they experienced some difficulty in finding them. Mr. Starks did not assist in the search. When the sheriff wrote on the box, Mr. Starks said they were his goods. He then told Mr. Starks that, if they were his goods, he had purchased them since Saturday night. Mr. Starks replied that he would show when they came to court that they were his goods. When looking over the papers of the E. Rehkopf Saddlery Co. he saw a note for \$6,000, signed by Oscar Harper, and payable to the American-German National Bank, or warehouse—he did not remember which. When he saw the note of Oscar Harper, Mr. Rehkopf said to him: "I made this note and put this leather in there to the bank. He wasn't satisfied with it, and put your whips in with it too, after he contended that he must have your stuff, and I put your whips in there too."

The president of the American-German National Bank testified that, on September 4, 1906, E. Rehkopf, president of the E. Rehkopf Saddlery Co., brought to the bank for discount a note of O. C. Harper, executed to the E. Rehkopf Saddlery Co. and endorsed by E. Rehkopf, and offered \$6,200 of warehouse receipts as collateral security for same. Not being satisfied with the security, he demanded more, and Rehkopf promised to deliver to him additional collateral

in a few days. With that understanding the note was accepted by the bank and the proceeds placed to the credit of the E. Rehkopf Saddlery Co. This was a new loan, and not a renewal of any old loan. Pursuant to his agreement, Rehkopf, on September 11, 1906, offered additional security in the shape of warehouse receipt No. 21, issued to the E. Rehkopf Saddlery Co. by W. S. O'Brien, a public warehouse of Paducah, Ky., covering a lot of whips and lashes valued at \$348.45. He accepted this additional collateral, not knowing from whom or when the whips had been bought. He believed, at the time of the transaction, from the reports of commercial agencies and other sources, that the E. Rehkopf Saddlery Co. was entirely solvent. The E. Rehkopf Saddlery Co. had for a long time been a customer of the bank and a large borrower, and had notes and bills maturing almost daily. Afterwards, on September 13, 1906, the president of the American-German National Bank notified E. Rehkopf that the bank was carrying too much of his paper, and that he must do something to reduce his loans. On September 17, 1906, the whips and lashes, covered by said warehouse receipt No. 21, together with a large lot of other merchandise, amounting to something like \$23,000, were sold by the bank, with the consent and pursuant to the instructions of E. Rehkopf, the president of the E. Rehkopf Saddlery Co., to the Starks-Ullman Saddlery Co., and the proceeds credited on the indebtedness of the E. Rehkopf Saddlery Co. Invoices of all the goods sold were delivered to the Starks-Ullman Saddlery Co. at the time of the sale.

O. B. Starks testified that he was the president of the Starks-Ullman Saddlery Co., and that on September 17, 1906, he, as president of said company, bought the merchandise in controversy, together with other merchandise from the American-German National Bank, which held the warehouse receipts for the same, and delivered to him an invoice for the goods that were stored in the public warehouse of W. S. O'Brien at the Cohankus factory. At the time, he did not know from whom the E. Rehkopf Saddlery Co. had bought the property.

W. S. O'Brien testified that he was the keeper of warehouses in Paducah, Ky. He leased warehouses, issued warehouse receipts, and kept records of goods received and receipts issued. He had leased the Cohankus house where the goods were stored. He received them on September 11, 1906, and issued warehouse receipt therefor on that day to the E. Rehkopf Saddlery Co.

Appellant contends for a reversal on the following grounds: (1) The verdict was against the evidence. (2) There was a fatal variance between appellee's pleading and proof. (3) The court erred in rendering judgment against the appellant, American-German National Bank, because there was no proof of detention or possession by it at the time of the institution of the action, but, on the contrary, the defendant, Starks-Ullman Saddlery Co. admitted the detention and possession by it at said time.

First. The law is now well settled, that where goods have been obtained by a party without any intention or reasonable expectation of paying for same, and with a design of cheating the vendor out of his goods, or to obtain them without consideration, the vendor may, upon discovering the fraud, elect to treat the contract of sale as a nullity and bring his action for the recovery of the specific property, or an action for its value. (Am. & Eng. Ency. of Law, volume 24, 1135; Dietz v. Sutcliffe, 80 Ky., 650; Brown v. Popham, 15 Ky. Law Rep., 543; Crozier's As'ee v. Cromie, 14 Ky. Law Rep., 858.)

In actions of this kind, it is difficult to prove the fraud of the purchaser except by his subsequent conduct. At the time the E. Rehkopf Saddlery Co. purchased the goods in question, its assets did not amount to over \$25,000, and its liabilities were over \$150,000. These liabilities consisted of small accounts due various parties in

all parts of the United States. When the goods were received by the E. Rehkopf Saddlery Co., they were not opened or taken out of the original packages. They were delivered to a warehouse, and the warehouse receipt was then delivered to appellant. The goods were not sold, nor was it sought to sell them in due course of trade. A warehouse receipt was delivered to the bank, and the goods subsequently sold, along with other merchandise, to the Starks-Ullman Saddlery Co. The entire proceeds of this sale, including the proceeds from the whips and lashes, sold by appellee to the E. Rehkopf Saddlery Co., were applied to the payment of the latter's indebtedness to the bank. At the time the goods were purchased the E. Rehkopf Saddlery Co. could not have paid to its creditors over sixteen and two-thirds cents on the dollar. The turning over of the proceeds of the sale in question to the bank shows that it did not even intend to pay this much to its general creditors, including appellee, but proposed to apply the whole proceeds to the payment of its indebtedness to the bank. From this evidence, we think the jury were authorized to conclude that the goods were obtained by fraud. The goods being obtained by fraud, and appellant having received the value of the goods, it could defend only on the ground that it was an innocent purchaser for value without notice. Counsel for appellant contend that, under the rule laid down in *Union Trust Co. v. Bulkeley*, 150 Fed. Rep., 510, the discounting of the note for \$6,000, and the placing of the proceeds to E. Rehkopf Saddlery Co.'s credit with the understanding at the time that additional collateral was to be furnished, made it an innocent purchaser for value, and, as the president of the bank testified that he believed the E. Rehkopf Saddlery Co. was solvent, and did not know when or from whom it purchased the property in question, the bank certainly had no notice that the goods had been obtained by fraud. Even conceding the law to be as stated, the statements of the president of the bank are not conclusive of the character of the transaction in a case like this. It does not conclusively appear that the saddlery company really received the benefit of the proceeds of the note discounted by the bank. The president only claims that the saddlery company got the benefit of it; that it was placed to its credit. The mere deposit of that amount of money to the credit of the saddlery company does not show that the latter received the benefit of it. From all that may be gathered from the statements of the president of the bank, it may, as a matter of fact, have been used to pay an overdraft or other indebtedness on the part of the saddlery company to the bank. If, as a matter of fact, the proceeds were used to liquidate other indebtedness due the bank by the saddlery company, the money advanced by the bank on the note was, in effect, a mere payment of pre-existing indebtedness, and did not constitute the bank an innocent purchaser for value. The acts of the president in demanding more collateral, as well as in disposing of the goods for which the bank held warehouse receipts, show that the bank was, to say the least, very uneasy about the saddlery company's indebtedness to it. That the saddlery company was largely indebted to the bank, and had done its business at the bank for a number of years; that the bank demanded additional collateral and afterwards disposed of all the goods for which it held warehouse receipts for the purpose of reducing the indebtedness of the saddlery company to it; coupled with the further fact that, within a few days thereafter, the saddlery company made an assignment, show a condition of affairs from which the jury might have reasonably inferred that the officers of the bank knew of the saddlery company's insolvency, and that it was unable to pay for goods it was purchasing at that time. Owing to the many peculiar and suspicious circumstances connected with the case, we think the question, whether or not the bank was an innocent purchaser for value without notice,

was one for the jury, who heard all the witnesses and knew many of them personally, and could best tell what credence to give their to statements.

The court instructed the jury as follows:

"No. 1. If you shall believe from the evidence in this case, that at the time the defendant, E. Rehkopf Saddlery Co., ordered and obtained from the plaintiff the goods in controversy in this action, that said defendant's officers or agents, offering or obtaining said goods, knew that said E. Rehkopf Saddlery Co. was insolvent and had no reasonable expectation of being able to pay plaintiff for said goods, and made the order for said goods without any intention of paying for same, or without any reasonable expectation of paying therefor, and with the design of cheating the plaintiff out of said goods, or to obtain them without consideration, and that said officers or agents concealed said designs from the plaintiff, then in law the plaintiff is the owner of the goods sued for, and entitled to recover possession thereof, and if you shall so believe then you will find for the plaintiff the goods sued for, and in your verdict fix the value thereof, at not exceeding three hundred and forty-eight dollars and forty-five cents (\$348.45), the value alleged in the petition, unless you shall believe, as stated in instruction No. 3 herein, and this instruction is given you subject to said instruction No. 3.

"No. 2. But unless you shall believe from the evidence in this case, that the goods in controversy were obtained from plaintiff by defendant, E. Rehkopf Saddlery Co., under the facts and circumstances stated to you in instruction No. 1, therein, then the law is for the defendant, and you will so find.

"No. 3. Although you may believe from the evidence, that the goods in controversy were obtained from the plaintiff by defendant, E. Rehkopf Saddlery Co., under the facts and circumstances stated to you in instruction No. 1 herein, yet if you shall further believe from the evidence in this case, that after the delivery of said goods by plaintiff to defendant, E. Rehkopf Saddlery Co., that said saddlery company placed same in a public warehouse in the city of Paducah, Kentucky, and caused the warehouse receipt exhibited to you in evidence to be issued covering said goods, and shall further believe that said warehouse receipt was delivered and pledged by said E. Rehkopf Saddlery Co. to the defendant, American-German National Bank, for money loaned to said saddlery company, or for a note or notes discounted at the instance or request of said E. Rehkopf Saddlery Co., or its officers or agents by reason of the delivery to it, and upon the faith of said warehouse receipt, and without any knowledge or notice that said E. Rehkopf Saddlery Co. had obtained said goods from the plaintiff, under the facts and circumstances stated to you in instruction No. 1 herein, if you shall believe that said goods had been so obtained, then the law is for the defendant, and you will so find. But unless you shall so believe from the evidence, then the law is for the plaintiff as defined to you by instruction No. 1 herein."

Instruction No. 1 properly presents the law as to whether or not the goods were obtained by fraud. Instruction No. 3 presents appellant's defense in language as favorable to it as it could reasonably contend for. In this instruction the jury were told to find for the defendant if they believed that the warehouse receipt was delivered and pledged by the E. Rehkopf Saddlery Co. to the American-German National Bank for money loaned to said saddlery company, or for a note or notes discounted by it at the instance or request of the E. Rehkopf Saddlery Co., or its officers or agents, by reason of the delivery to it, and upon the faith of said warehouse receipt, and without any knowledge or notice that the E. Rehkopf Saddlery Co. had obtained the goods from the plaintiff under the facts and circumstances stated in instruc-

tion No. 1. In finding for the appellee the jury must have believed either that the bank did not buy the note in question for a valuable consideration, or that it had notice of the fact that the goods were fraudulently detained. While the bank may not have had notice of the latter fact, the circumstances surrounding the \$6,000 transaction and the subsequent delivery of collateral security, are such as to lead us to the conclusion that the verdict of the jury was not flagrantly against the weight of the evidence.

Second. It is contended by counsel for appellant, that, as appellee's petition did not charge that it had been deprived of possession of, or title to, the goods by fraud, but simply sought to recover the property as its own, it could not do so under the proof in this case, appellee showing by its own witnesses, that it sold and delivered the goods in the regular course of trade to the E. Rehkopf Saddlery Co., and had, as vendor, placed said vendee in possession of, and invested it with title to said goods. In this view of the law, however, counsel are mistaken. Appellee had the right to treat the goods as its own, and sue for their recovery or their value in case of their conversion. This rule is well settled by a long line of authorities. (Dietz's Ass'ee v. Sutcliffe, 80 Ky., 650; Longdale Iron Co. v. Swift's Iron & Steel Works, 91 Ky., 191; Reager, v. Kendall, 19 Ky. Law Rep., 27.)

Third. Counsel for appellant further contend that, as the American-German National Bank did not have possession of the goods in question at the time of the institution of the suit, and, as the Starks-Ullman Saddlery Co. answered admitting that it had possession of the goods, judgment could not properly go against appellant.

In the early case of Pool v. Adkisson, &c., 1 Dana, 110, which was an action of detinue for the recovery of two slaves who, the proof showed, were at that time in the State of Missouri, the court, speaking through Chief Justice Robertson, said:

"But is detinue maintainable? We think it is. Since the case of Burnley v. Lambert (2 Wash., 308), it has been considered that proof of possession by the defendant at the date of the writ, is not necessary in an action of detinue. In Southcote's case (4 Co. Rep., 83), detinue was maintained against a bailee (to keep safely) after he had been robbed of the thing bailed.

"In many cases it would be difficult to ascertain the motive which induced a defendant to part with the property prior to the institution of the suit for it. And surely the right to maintain detinue, can not depend on grounds so precarious and delusive as the fact that the defendant was in the possession at the date of the writ, or at the time of its service, or the fact that, in parting with the possession prior thereto, he had acted wantonly or in bad faith. Such a metaphysical inquiry as the latter seems not to be required by principle or authority, and would, were it required, tend to the subversion of the action of detinue."

Furthermore, it has been held that the owner of property may maintain an action for its value against a person converting it, whether he be the original trespasser or not. (Ballentine, Jr. v. Joplin, &c., 105 Ky., 70; Justice v. Mendall & McLanahan, 14 B. Mon., 10; Newcomb-Buchanan Co. v. Baskett, 14 Bush, 658.)

Forms of action were abolished by the Code. All that is now required is to state the facts constituting a cause of action, without reference to the form of the petition. The present action of claim and delivery requires a particular description of the property claimed, and also the separate value of each article to be stated. The very purpose of stating the separate value of each article is to enable the court to render judgment in case the defendant fails to deliver the property. Indeed, the action of claim and delivery takes the place, and has in it all the elements of detinue, replevin and trover. If

the party in possession has converted the property, and no longer has it in his possession, he is liable for the value thereof.

But counsel for appellant contend that appellee's petition was defective, and that he could only recover the value of the property in case he asked for that specific relief. Appellee's petition, however, complied with all the provisions of the statute with reference to an action for claim and delivery. It set forth the separate value of each article, and not only prayed for a recovery of the property, but for all proper relief. Assuming, as was found by the jury, that appellant was not a bona fide purchaser for value without notice, it necessarily, then, converted the proceeds of appellee's property to its own use. It, alone, received the proceeds of the property, when it was not entitled to receive any portion thereof. The court did not err in giving judgment against appellant.

The fact that judgment was not given against the Starks-Ullman Saddlery Co. is not assigned as ground for a new trial, and it can not, therefore, be considered. However, it may be said that judgment should not have gone against the latter company merely because it admitted possession of the property, if the evidence showed that that company bought and paid for the goods without notice of the fraud by which they had been obtained.

Perceiving no substantial error in the record, the judgment is affirmed.

COSTEN v. PRICE.

(Filed May 22, 1908—Not to be reported.)

1. Partnership—Settlement of—Race Mare—This suit grows out of a partnership in a race mare. The evidence examined and held that the contract of settlement was voluntarily entered into by appellant and he is bound by it.

2. Expense of Training Mare—Absence of Contract or Agreement—In the absence of any contract or agreement as to the payment of the training of the mare, one-half of it should be paid for by each of the two partners, the ownership of the mare being joint.

John T. Shelby and B. T. Southgate for appellant.

Allen & Duncan for appellee.

Appeal from Fayette Circuit Court.

Opinion of the court by Judge Lassing, reversing.

This suit involves the settlement of the partnership between appellant and appellee in the race mare "Avana." The appellant, plaintiff below, sued to recover possession of the mare, alleging that he was the owner thereof; later, by a supplemental pleading, he admitted that the defendant was claiming an interest in the mare and he asked that she be sold, the questions in dispute between himself and defendant adjudicated, and the proceeds arising from the sale disposed of according to their rights. By agreement of parties the mare was sold. The defendant answered, alleging that he and plaintiff were the joint owners of the mare, each owning a one-half interest in her; that he had cared for, boarded and trained her from the spring of 1895 to June 25, 1898, and that there was due him for moneys expended by him in the care, keep and training of said mare, over and above the moneys which had been paid to him by the plaintiff on account, and the moneys which she had won in purses, the sum of \$287.20. The reply admitted the existence of an arrangement by

which defendant had been entrusted with the care and training of said mare, denied the terms of the contract, and pleaded an entirely different contract, under which defendant is shown to have been indebted to plaintiff in a larger sum. The allegations of the reply were traversed and issue was finally joined, the main questions in dispute being the terms of the contract under which defendant had the care, possession and training of the mare.

It appears from the pleadings that the defendant also trained the race horse, "Peter Pan," during a part of the time covered by this account for plaintiff, but, upon motion, all items charged for the account of this horse were stricken from the pleadings of the defendant, as were all sums set up in the plaintiff's pleadings as having been paid on account of this horse, so that the case was tried out on the questions in dispute relative to the keeping, care and training of the mare "Avena" alone.

Much proof was taken in support of the respective claims and contentions of the litigants, and, upon final hearing, the trial judge found that there did exist a partnership between the plaintiff and the defendant in the mare "Avena," and he adjudged that each was entitled to one-half of the proceeds arising from the sale of said mare, and dismissed the suit, with the directions that each party pay his own costs. From this judgment the plaintiff appeals, the defendant prosecutes a cross-appeal, and we are asked by each to reverse the finding and judgment of the chancellor on the sole ground that the decided weight of the evidence is against the judgment.

In April, 1895, appellant became the owner of the race mare "Avena," and under some sort of an arrangement, about the terms of which the record is not clear, he placed her in the hands of appellee to train. Appellee kept her from this time until in the early part of May, 1896, at which time appellant alleges that appellee was claiming something over \$2,000 from him for having trained and boarded the mare "Avena" from April, 1895, to May 5, 1896, and the race horse, "Peter Pan," during the greater portion of said time. That appellant considered the charges made against him for this service extortionate there can be no question, and it was only after a prolonged and heated argument that an agreement or understanding was reached in regard thereto, according to the statement of appellee, while appellant insists that the so-called settlement into which he entered at that time was forced from him on an imperfect and partial showing, and under such circumstances that it should not be upheld, but that he is entitled to an accounting, a settlement and adjustment of all business transactions between himself and appellee from April, 1895, to the beginning of this litigation.

In this meeting of May 5, 1896, as claimed by appellee, appellant, in settlement and adjustment of the claims between them, gave to appellee a bill of sale for one-half interest in the mare "Avena," and \$100 in cash, and that this bill of sale and the \$100 settled all matters in dispute between them relative to the mare "Avena," save and except her keep for the winter months, for which he is entitled to compensation at the rate of \$10 per month. Appellee admits that, during the time between April, 1895, and May 5, 1896, appellant paid him, on account, \$674 in money, and it is conceded that he was chargeable with purses won by "Avena," which would increase appellant's credit to something more than \$800. So that, according to his own admission, he received from appellant for the keep of the race mare, "Avena," during this time, and the race horse, "Peter Pan," during the greater portion of this time, \$674, paid during the time, \$100 paid May 5, 1896, and a one-half interest in the race mare, "Avena," which he estimated to be worth \$700, and purses won by the mare during the season of 1895, amounting to something over \$100. Appellee testifies that, on that occasion, he gave to appellant a full

statement of his claim and account, this appellant denies, and it is left a question between the two. The statement of the accounts between them is not at all satisfactory. Appellee lost, or misplaced, and could not produce the books in which the original entries of the items of expense were made. Appellant asked to be relieved from the terms of the contract which he there made. He is shown, by the record, to be a man of affairs and much business experience, and, although we are of the opinion that even though the circumstances were such that he felt impelled to make a settlement on appellee's terms, which were very oppressive, rather than be subjected to the vexations and annoyances of a, perhaps, tedious litigation, still they were voluntarily accepted, made and entered into by him, and he is bound by whatever trade they made on that date. They certainly did not make a partial settlement, it was either in full or none at all. We are of opinion that it must be regarded as a full settlement of all matters relative to the keep of the mare to that date. It is agreed by the parties that on this date a new arrangement was made and entered into, by which they were to be governed and controlled thereafter, but they differ very materially as to the construction to be placed upon the terms of the contract by which appellee was to continue to keep the mare. Under the arrangement which they made on that date, whether it was as stated by appellee or appellant, appellee kept the mare from that date, May 5, 1896, to the institution of this litigation in June, 1898. During this time, according to appellee's own statement, he received from appellant \$111 in money, and in purses won by said mare, \$2,602.30, and when in June, 1898, he was called upon to settle his accounts with appellant, he presented a claim for services and expenses incurred in training and caring for said mare during this time, amounting to nearly \$3,400, and, after giving to appellant credit for \$1,301.15, one-half of the purses won and \$110, which was paid to him it still leaves appellant indebted to him in the sum of \$287.20.

Appellant disputes the correctness of appellee's claim for services, expenses, &c., and claims that after May 5, 1896, he paid to appellee the sum of \$130 on account, and that giving to appellee every claim to which he is justly entitled, there is due him on a settlement of their accounts, \$1,399. Appellant insists that after May 5, 1896, he was to pay to appellee \$1 per day for caring for and driving the mare "Avana," and he was to be at no other expense excepting the cost of shipping, shoeing, doctor's bills, &c., while appellee states that appellant said he would pay no feed bills, but would allow appellee, by the month, for training his mare, that he was willing to pay \$5 per month while she was not in training, in the winter, and 50 cents per day, as his share of the cost of training, and one-half of all necessary expenses, such as shoeing, doctor's bills, freight, medicine, &c. Appellee insists that it was customary and understood that this necessary expense included railroad fare and hotel charges for himself and his helper a boy whom he had with him, and it is more than likely that these items had been included in the bill which he presented for the previous year, but appellee also admits that in this conversation with appellant, appellant plainly told him that "from this time on I will know what I am doing." It is not claimed that in the conversation of May 5, 1896, appellee stated he was to be paid his railroad fare, board, &c., and like charges for his helper, as part of the necessary expenses to be charged up to their joint account and, it is quite certain from appellant's testimony, that he did not so intend or understand.

There is no material difference between appellant and appellee as to what the contract was, so far as it was stated on that occasion. The difference between them comes from appellee's construction as to what is covered by the terms "expenses," it being his contention

that this term includes his railroad fare, hotel bills, helper's hire and railroad fare and hotel bills. Whereas, appellant insists that the term "expenses" should properly cover shoeing, doctor's bills, costs of shipping the mare, &c.

Much confusion seems to have occurred in the account between these litigants because of the fact that the mare in question was a partnership mare and being handled by one of the partners. There is no occasion, however, for any confusion on this account. Appellant and appellee, being the joint owners of the mare, contracted with appellee, a horse trainer by profession, to train and care for her. In the absence of any contract or agreement as to what the charges for this service should be, it being admitted that it was to be paid for, appellee would be entitled to have the fair and customary and usual charge for this character of service allowed to him, and no more, and this amount, when determined, should be paid one-half by appellant and one-half by appellee.

Appellee testifies that during a portion of the time he trained horses of his own, as well as horses belonging to other parties, and, while traveling around the circuit, he frequently drove horses for other people in races. So that, it will be seen that, in the absence of an express contract, it would be both inequitable and unjust to permit appellee to charge his railroad fare and his board bills, as well as those of his helper, to the account of this one mare, and in fact, if this be done and if the joint account, which he holds against this mare, is to be made responsible for the cost of his assistant and his traveling expenses and hotel bills, we are at a loss to understand why it should also be charged with \$2 per day while around the circuit, and this is what we find it charged with, for, in the itemized account which appellee has presented, there is a charge for \$2 per day for every day during the season when the mare was away from home, and \$1 per day for her training while she was at home. Surely the \$60 per month was intended, as appellants insist it was, to cover all expenses save the actual cost of shipping the mare, and her bills for shoeing, doctoring, medicine, &c. It is admitted that, at the time this arrangement was entered into, appellant and appellee had just been engaged in a heated discussion, and they did not enter into or discuss in detail, or at any great length, the terms under which the mare was to be continued in the possession, and under the care and control of appellee, and, from the record, it is certain that their minds did not agree on the contract as appellee understands it, and if their minds did not meet then no agreement was reached as to the charges to be made, and appellee is only entitled to receive a fair compensation from the partnership for the services which he rendered. While the record evidence on this point is quite meagre, the witness, Gus Macey, testifies that he is in the habit of handling horses for others, and that while there is no absolute and fixed price, still his custom was to charge \$1 a day and necessary expenses for training, and that this necessary expense did not include either the cost of the hire of his assistants, the or his board, or their or his traveling expenses, but only the necessary expenses for transporting the horse. Such a charge, it seems to us, is ample and adequate, and when there is added to this, for appellee, the additional charge of a \$1 a day for every day that the mare is on the circuit away from home, we are of opinion that appellee is well compensated for the services which he rendered. A mere statement of the account between these litigants from the time they entered into this business transaction to its termination, will show that the advantage is all on the side of appellee.

Appellee had charge of the mare "Avana" for a little over three years, and of the horse "Peter Pan" about one year. During that time he received in purses more than \$2,700; in cash from appellant, according to his own admission, \$885, and according to appellant's

contention, about \$1,000, and a one-half interest in the mare, for which he agreed to pay \$700, and which he has sold for \$1,000, making a total which he has received for the care and training of one horse during thirty-eight months and another horse about twelve months, making a total of fifty months for the two, of more than \$4,200, and he still claims that appellant is indebted to him in the sum of \$287.20. Whereas, appellant bought the horse, for which he alleges he paid \$1,800; he has paid to appellee about \$1,000 in money, making his outlay about \$2,800, and he has left but a one-half interest in the horse with a claim against him for \$287.20.

Appellee presents no book of original entry for the reason, as he testifies, that they were lost after he had his wife draw off the account on a sheet of paper, while appellant lost his memorandum for moneys paid in an earthquake. None of the claims for expenses incurred are vouched for by receipted bills or other evidence showing their correctness. Appellee denies the receipt of any moneys at the hands of appellant after May 5, 1896, save the sum of \$111, paid as follows: One hundred dollars, ten dollars and one dollar, so that the correctness of the claims of each litigant rests at last upon his own statement in regard thereto.

The litigants sought to have their differences settled and their accounts adjusted, and neither is satisfied with the judgment of the chancellor. We are of the opinion that the nearest to a correct solution of this litigation is found by allowing to appellant credit for the various items of cash which he alleges he paid to appellee subsequent to the date of the settlement on May 5, 1906, and by allowing to appellee all items of expense which he has charged to their joint account save those for hire and helper, and board and railroad fare for himself and helper, witch hazel, and the items of expense charged for services rendered prior to May 5, 1896. With these items deducted from his account, there remains the sum of \$1,247.15, properly charged to the account of appellant. This sum, when credited with \$130, the amount which it is found appellant paid to him on account leaves appellant indebted to him for services in the sum of \$1,117.15. Appellee admits that since May 5, 1896, he has collected in purses won by "Avana" the net sum of \$2,602.30, and appellant is entitled to one-half of this sum, or \$1,301.15; deducting from this the amount which appellant owes to appellee, as above indicated, there is a balance due appellant of \$184. The mare was sold for \$2,000, and this sum, less such an amount as is due for taxes thereon, is in the hands of the commissioner.

Upon a return of this case the court will enter a judgment in favor of appellant for \$184, with interest from the 8th day of June, 1898, until paid, and costs, and he will direct one-half of the net proceeds of the sale paid over to appellant, and out of the remaining one-half he will direct the judgment of appellant to be paid, and the balance of said one-half, after the judgment and costs are satisfied, to be paid to appellee.

For the reasons indicated this case is reversed and remanded, for further proceedings consistent with this opinion.

LAWSON, &c. v. TODD, &c.

(Filed May 22, 1908—To be reported.)

1. Deeds—Use of Words "Heirs of His Body"—"Bodily Heirs"—Title Conveyed—In view of the uncertainty in arriving at the intention of the maker of a deed or will in the use of the words, "heirs of his body," "bodily heirs," or the like, when the mind is left in doubt as to the true meaning, it is safer to conclude that the convey-

ance was designed to pass the fee and not a life estate or a joint interest.

2. Same—Deed by Father to Married Daughter—Conveyance to Her and Her Bodily Heirs—Fee Vested in Daughter—A deed to land was made by a father to his married daughter, Mary L., "and her bodily heirs after her" in consideration of one dollar and natural love and affection, in which he covenants to and with the parties of the second part to forever warrant and defend the same against all claims of all persons whatever, Held—That the only grantee named in the deed is Mary L.; there is no remainder over nor are the words "children" or "child" used, and under the rules of the common law the words "and her bodily heirs after her," would have created an estate tail which, by our statute, is converted into the fee.

Wm. J. Steinert for appellants.

Barker & Woods for appellees.

Appeal from Jefferson Circuit Court, Chancery Branch, First Division.

Opinion of the court by Judge Carroll, reversing.

The question in this case is, whether or not Mary E. G. Lawson took a life estate or the fee under the following deed: "This deed made this 9th day of March, 1871, between E. D. Polk, of the first part, and my daughter, Mary E. G. Lawson, wife of Alexander Lawson, and her bodily heirs after her, parties of the second part, both of the county of Jefferson and State of Kentucky, to-wit: For and in consideration of one dollar cash in hand paid and the natural love and affection I have for my daughter, Mary E. G. Lawson, and her bodily heirs after her, do give, grant, alien, convey and confirm unto the parties of the second part forever, all of a certain tract or parcel of land in the county of Jefferson, described as follows: * * * To have and to hold to the said parties of the second part, forever, and singularly, the tracts thereunto belonging. * * * The said party of the first part covenants to and with the parties of the second part that it is free from all encumbrances whatever, and warrants and forever defends the same against all claims of all persons whatsoever."

Questions very similar to the one here involved have been before this court in a number of cases, and an examination of them discloses the fact that there is seeming conflict in the opinions; but this conflict is more apparent than real, and usually resulted from an effort upon the part of the court to arrive at the intention of the grantor gathered from the relation of the parties as well as from expressions indicating his intention that might be found in the instrument under consideration. It is a rare thing that two deeds or wills containing the expression "bodily heirs" are in other particulars precisely alike. The tendency, however, of the court is to construe deeds like the one before us as vesting the fee rather than a life estate. In favoring this construction we have followed the legislative intent, as expressed in section 2342, of the Kentucky Statutes, declaring that "unless a different purpose appear by express words, or necessary influence, every estate in land created by deed or will without words of inheritance, shall be deemed a fee-simple or such other estate as the grantor or testator had the right to dispose of," and section 2343, providing that "all estates heretofore or hereafter created, which in former times would have been deemed estates entailed, shall henceforth be held to be estates in fee-simple." As illustrating the purpose of the court and the trend of its decisions, as well as the difficulty in formulating any rule that may safely be depended upon

in the construction of deeds similar to this one, we call attention to the following cases:

In *Johnson v. Johnson*, 2 Met., 331, the court said: "It is the settled rule, established by numerous adjudications of this court, and recognized and acted upon in several cases, that the words 'heirs of the body,' 'heirs lawfully begotten of the body,' and other similar expressions, are appropriate words of limitation, and must be construed as creating an estate tail, which, by our statute, is converted into a fee-simple, unless there be something else in the deed or will from which a reasonable inference can be drawn that the words were used in a sense different from their legal and technical signification."

This principle has been recognized and applied in the following cases. *Prewitt v. Holland*, 92 Ky., 641; *Hall v. Moore*, 32 Ky. Law Rep., 56; *Handy v. Harris*, 32 Ky. Law Rep., 225; *Jones v. Mason*, 21 Ky. Law Rep., 842; *Davis v. Davis*, 23 Ky. Law Rep., 1132; *McGennis v. McGennis*, 16 Ky. Law Rep., 598; *Lanham v. Wilson*, 15 Ky. Law Rep., 109; *Ruby v. Ruby*, 12 Ky. Law Rep., 879; *Short v. Terry*, 15 Ky. Law Rep., 241; *True v. Nichols*, 2 Duv., 547.

On the other hand, there is a line of cases holding that, under a conveyance to the grantee "and the heirs of his body," or, "his bodily heirs," the grantee takes a life estate only, with remainder to his children. Among these may be noticed *Prescott v. Prescott*, 10 B. Mon., 56; *Brann v. Elzey*, 83 Ky., 440; *Righter v. Forrester*, 1 Bush, 278; *Mitchell v. Simpson*, 88 Ky., 125; *Louisville Trust Co. v. Erdman*, 22 Ky. Law Rep., 729, in which it was held that "bodily heirs," or "heirs of his body," were words of purchase and not of limitation, and that they were intended to be synonymous with "children."

Again, in *Combs v. Eversole*, 23 Ky. Law Rep., 932, where the conveyance was "to Catherine D. Bolin and the heirs of her body" * * * "to have and to hold unto the said Catherine D. Bolin and the heirs of her body, their heirs and assigns forever," with covenant of warranty unto "the parties of the second part, their heirs and assigns forever;" it was held that Catherine D. Bolin and her children took a joint estate in the land.

In view of the uncertainty in arriving at the intention of the maker of an instrument like a deed or a will, in the use of the words "heirs of his body," "bodily heirs," or the like, and when the mind is left in doubt as to the true meaning, we regard it as safer to conclude that the conveyance was designed to pass the fee and not a life estate or a joint interest. And this construction should prevail, in the absence of language indicating a purpose, to invest the person named as grantee with only a life estate or a joint interest. It is more in harmony with the legislative intent as expressed in the statute than would be a construction that only gave to the named grantee a life estate or an interest less than the fee. Where the word "children" is used, as when the estate is given to "A and his children," the uniform ruling has been that "A" will not take the fee; but, whether he will take a life estate or a joint estate with the children is to be determined from a consideration of the relationship of the parties and the language of the instrument. (*McFarland v. Hatchett*, 26 Ky. Law Rep., 276; *Hall v. Wright*, 27 Ky. Law Rep., 1187.)

And so when the intention, as manifested in the language, is to convey a life estate, with remainder over, there has been no disposition to defeat, by construction, the purpose of the grantor. But in the deed before us, the only grantee named is Mary Lawson. There is nothing in the instrument to indicate that the grantor only intended that she should take a life estate. There is no remainder over, nor are the words "children" or "child" used. On the other hand, it is manifest that, under the rules of the common law, the words "and her bodily heirs after her," would have created an estate tail, which, by our statute, is converted into the fee. (*Johnson v. Johnson*, 2

Met., 331; *Pruitt v. Holland*, 92 Ky., 641.) We do not attach serious importance to the fact that the words 'parties of the second part' are used. The words "party" or "parties" are commonly employed interchangeably in deeds, and we often find the expression "party of the first part" when there are several grantors, and the words "parties of the second part" when there is only one grantee. This deed appears to have been written by an experienced person; and if the intention had been to give to Mary Lawson only a life estate, or to give the property to her and her children jointly, it would have been so written. In our opinion she took the fee.

Wherefore, the judgment is reversed, for proceedings in conformity with this opinion.

DAY v. COMMONWEALTH.

(Filed May 22, 1908—Not to be reported.)

False Pretenses—Money Obtained Thereby—Forging Name of Surety on Note—Errors in Instructions Corrected—This is a prosecution against Walter R. Day for obtaining money under false pretenses, by signing the name of Floyd Day to a note, without authority, which he discounted in bank, and is reversed on erroneous instructions given to the jury, the correct instructions being set out in the opinion.

Hazelrigg, Chenault & Hazelrigg, E. E. Hogg, John C. Eversole and Eversole & Eversole for appellant.

James Breathitt and Chas. H. Morris for appellee.

Appeal from Perry Circuit Court.

Opinion of the court by Judge Lassing, reversing.

The appellant, Walter R. Day, was indicted for obtaining money under false pretense; upon a plea of "not guilty," he was tried, convicted and his punishment fixed at confinement in the penitentiary for one year. Conceiving that the punishment is not merited, and that there has been a miscarriage of justice in his case, he prosecutes this appeal, and, as grounds for reversal, relies upon the following: First, that there was not sufficient evidence to authorize the court to instruct on the question of the ownership of timber in Perry county; second, that the indictment not having alleged the inability of the plaintiff to produce the note, and the note itself not having been satisfactorily accounted for, it was error to admit secondary evidence of its contents, and no instruction should have been submitted on that charge in the indictment; third, the plaintiff failed to prove that the Hazard Bank was incorporated, no proof whatever was submitted on that point.

The facts, as developed in this case, are, briefly stated as follows: Sometime in the early part of March, 1904, the Hazard Deposit Bank, of Hazard, Ky., received, in the regular course of mail, the following letter:

"Frozen Creek, Ky., March 1, 1904.

"Cashier Hazard Deposit Bank,

"Hazard, Ky.

"Dear Sir—We have bought some timber in your county and want to begin operations about May 1, and we want to borrow \$3,000 from you for six months, and want to keep our account with you while

operating. Will give as security Floyd Day, and any one else you desire, and will pay you 8 per cent. on said loan.

"Please let us hear from you at once, and oblige

"Yours truly,

"N. B. DAY & CO."

This letter was written upon a letterhead upon which there appeared the following:

"All agreements are contingent upon strikes, accidents or other causes beyond our control.

"Floyd Day.

Walter R. Day.

Carl Day.

"General Store.

"office of

"N. B. Day & Co.

"White Oak, Cross Ties, Crossing Plank, Switch Ties, Street Rail-road Ties.

"Full Dressed Staves for Ale and Beer."

Upon receipt of this letter the cashier of the bank forwarded to Day & Co. a blank note. A few days thereafter the note was returned to the bank filled out and signed as follows:

"Hazard, Ky., March 15, 1904.

"\$3,120.

"Six months after date we promise to pay to the order of the Hazard Bank, Hazard, Ky., three thousand one hundred and twenty dollars, value received, negotiable and payable at the office of the Hazard Bank, Hazard, Ky. And we hereby pledge first as security therefor and second as security for any other debt or liability we may now or hereafter owe or be under to said bank.

"The parties hereto agree to pay 7 per cent. from maturity of this note until paid, and they hereby authorize said bank to sell and transfer for cash any securities pledged and mentioned herein, without notice, should this note not be paid at maturity, and apply proceeds to its payment, with interest and all costs, and hereby severally waive notice of non-payment, protest and notice of protest, and sureties consent that time of payment may be extended without notice thereof.

"N. B. DAY & CO.,

CARL DAY,

"WALTER R. DAY,

FLOYD DAY."

This note was accepted by the bank, discounted and the proceeds, amounting to \$3,000, placed to the credit of N. B. Day & Co., and was drawn out of the bank on five checks, four of which were signed, "N. B. Day & Co., by Walter R. Day," and the other was signed, "N. B. Day & Co." Floyd Day denied that he signed the note or authorized any one to sign it for him, and denied that he was a member of the firm of N. B. Day & Co.

The officers of the bank testified that they relied upon the representation that was made to them by appellant in the letter above set out that Floyd Day would sign the note as surety, and when the note was returned to the bank with the name "Floyd Day" signed thereto, they accepted it as his genuine signature. They also relied upon the statement in the letter that N. B. Day & Co. had bought timber in Perry county and were going to begin operations about May 1; they further stated that they were lead to believe by the letterhead on which the letter was written, that Floyd Day was a member of the firm of N. B. Day & Co.; that they had made investigation, and had failed to find that N. B. Day & Co., or Walter R. Day, had bought or owned any timber in said county; that Floyd Day was known to be a man of considerable wealth for that com-

munity. For the defendant, it was testified that Floyd Day had either signed the note in person, or had authorized Walter R. Day, to sign for him, and, as evidence tending to support this latter proposition, they introduced the following letter:

"Frozen Creek, Ky., March 21, 1902.

"To Whom it May Concern:

"This is to certify that I have this day given to W. R. and Carl Day, the right to use and sign my name in any way they may see fit in connection with any transaction connected with the business of the firm of N. B. Day & Co.

"Given under my hand this 21st day of March, 1902.

"FLOYD DAY."

The defense also introduced evidence tending to show that Floyd Day was a member of the firm of N. B. Day & Co.

Appellant testified that he was a member of the firm of N. B. Day & Co. Floyd Day is his uncle. That for years the firm of N. B. Day & Co. used the name of Floyd Day as a business partner, and that Floyd Day had, on several occasions, endorsed for the firm; that Floyd Day lived about eight miles from him; that he was elected State Treasurer on the Republican ticket in 1889, and after he lost his office was sued in Franklin Circuit Court for some \$30,000; that to evade the payment of this debt he placed all of his property in the hands of his uncle, Floyd Day, and left the State; that the firm of N. B. Day & Co. had originally been composed of Nathan B. Day and his two sons, Walter R. and Carl Day. Nathan died in 1899, and Floyd Day qualified as his administrator. After the death of their father, Walter R. and Carl Day carried on the business of N. B. Day & Co. for about two years, at which time Floyd Day, who had then practically settled up the business affairs of Nathan B. Day, permitted the use of his name in the firm of N. B. Day & Co., and executed the writing of date March 21, 1902, as above set out. Floyd Day denied signing the power of attorney bearing date of March 21, 1902, although several witnesses were introduced who testified that they were familiar with his handwriting, and that in their opinion, he did sign it. A letter purporting to have been written by Floyd Day on August 31, to Walter R. Day, which is as follows:

"You will please send me a list of the staves unsold. You must get rid of them this month. Have you received any orders lately? Let me know just what you have, and I will try and get rid of them from this end of the line. Has the Clay City Lumber and Stave Co. sent you any orders?

"P. S.—Enclosed find a letter which explains itself.

"FLOYD DAY."

was introduced for the purpose of showing that Floyd Day was a member of the firm of N. B. Day & Co.

Appellant also testified that in a letter bearing date of October, 1903, his company entered into a contract with the Continental Realty Co., by which it had sold to the said company certain lands for \$57,500, and that after this contract had been entered into, he had a conversation with his uncle, Floyd Day, in which his uncle said to him that his firms were hard up for money, and that he wanted him and Carl to take sufficient interest in the contract to take care of the paper of N. B. Day & Co., and let him have the balance to use in his private business; that the lands which he had contracted to the realty company were surveyed at a considerable expense and thereafter the said company declined to take the lands, and their failure to so do resulted in a law suit.

It is shown that Floyd Day undertook the settlement of his nephews' business and agreed to buy the business of N. B. Day & Co., and Walter R. Day and Carl Day, and settle the indebtedness of the company, and turn over any surplus to appellant's wife. This agree-

ment was entered into in the spring of 1905. It appears that many of the debts upon which Floyd Day was surety were settled and compromised by him, though he denied having signed same. When so settled he had them assigned to him without recourse. The note, which is the basis of this prosecution, was likewise taken up by him, and was not introduced in evidence on the trial, it being alleged by Floyd Day that, after he had taken it up, he filed it with the commissioner in a case in the Breathitt Circuit Court, and the clerk of the Breathitt Circuit Court testified that the report of the commissioner of the court showed that the Hazard Bank had presented a claim for \$3,213, being composed of two items, \$3,120 and \$93, interest, but, the note was not with the report, and it is not shown what had become of it.

Appellant had no personal interview with the bank. Any misrepresentation which he made by which the bank was deceived to its prejudice was made through the correspondence above set out. For the Commonwealth, it is urged that the bank was deceived by the printed letterhead, and led to believe that Floyd Day was a member of the firm of N. B. Day & Co. We fail to see how this was possible, for it was wholly immaterial to the bank whether Floyd Day was a member of the firm of N. B. Day & Co. or not, for, if a member of the firm of N. B. Day & Co. then, he was bound to the bank by the signature of the firm, and if not a member of the firm, he was bound on the note by his individual endorsement as surety, so that in any event he was bound for the payment of this money, whether a member of the firm or not, if he in fact signed the note or authorized his nephew, the appellant, to sign it for him. It will not do to say that the bank was deceived to its prejudice by the letterhead and thereby induced to part with its money, for such was not the case, nor could it have been the case. It loaned the money on the strength of the representation that Floyd Day would sign the note and had he been a member of the firm of N. B. Day & Co. he could not have been more firmly bound for the payment thereof than he would have been by his signing the note as surety, nor would the security of the bank have been in the least enhanced by his having been a member of said firm, for the reason that the note, being signed by the firm, all of its assets were liable to secure its payment and being signed by Floyd Day, individually, all of his property subject to execution was likewise liable for its payment. It was immaterial to the bank whether Floyd Day was a member of the firm of N. B. Day & Co. or not, so far as this transaction was concerned.

This being true, it was error for the court to instruct the jury upon this point, for no principle is better settled than that the deception must be upon a material point, its falsity known to the maker, made for the purpose of deceiving, and must, in fact, be relied upon by, and deceive the party to whom it is made, to his prejudice.

Appellant stated in the letter in which he sought this loan, that his company had purchased timber in "your county," meaning Perry county, and expected to begin operations shortly thereafter. The officials of the bank testified that they were unable to learn of any timber which he, or his company, had bought in their county, while appellant testified that at the time this letter was written, his company had made an arrangement to close quite an extensive contract, which called for the purchase and sale of a large amount of timber land covering a portion of several counties, including Perry, but that this deal, when apparently almost completed, fell through. That at the time he wrote this letter he was expecting this deal to be completed, and had it been his company would have had the timber contract about which he wrote. The evidence upon this point, for appellant, is not quite clear, from the record, but he very positively testified that his company did own timber in Perry county, and there is

no evidence whatever offered on the part of the Commonwealth which contradicts the testimony of appellant in regard to the timber, and, as it was incumbent upon the Commonwealth to make out her case, it was her duty to show that appellant did not have timber in Perry county, and the failure of the bank officials to find any timber owned by him, or his company, is not by any means conclusive of the fact that he, or they, did not own it. There being a failure of proof on this point on the part of the Commonwealth, no instruction should have been given thereon.

The appellant wrote the bank that he would give Floyd Day, his uncle, as surety on the note, and later he presented to the bank a note with the signature of Floyd Day signed to it. If, as a matter of fact, this name was not signed to the note by Floyd Day in person, or by some one who had been authorized to sign it for him, then, in procuring the money from the bank on said note which contained the forged signature of Floyd Day, appellant practiced a fraud upon the bank, but if, on the other hand, it was the genuine signature of Floyd Day, signed by himself in person, or by some one authorized to sign for him, then no fraud has been perpetrated, and this is the question in this case which should have been submitted to the jury by an appropriate instruction.

For appellant it is also insisted the Commonwealth should have been required to produce the note in order that appellant might see it and have it exhibited to the jury for their inspection. The witness, Floyd Day, testified that he filed the note with the commissioner of the Breathitt Circuit Court, and upon another trial of the case a subpoena duces tecum should be issued for said official, and he should be required to produce said note or satisfactorily account for its absence. If, upon another trial, the evidence is the same or practically the same as upon this trial, the court will instruct the jury as follows:

"1. If you believe from the evidence in this case, beyond a reasonable doubt, that the defendant, Walter R. Day, in Perry county, at any time before the finding of the indictment herein, presented to the Hazard Bank a note for \$3,120, dated March 15, 1904, and due six months thereafter, for discount, intending the bank to discount it as having on it the genuine signature of Floyd Day, when in fact he knew that Floyd Day had not signed said note and had not authorized any one to sign his name for him to said note, and that he did this for the purpose of obtaining money from said bank, and that he received from said bank the sum of \$3,120, or any other sum of money on said note, then you will find the defendant guilty, as charged in the indictment, and fix his punishment at confinement in the State penitentiary for any length of time, not less than one year nor more than five years, in your discretion.

"2. Although you may believe from the evidence, beyond a reasonable doubt, that the defendant, Walter R. Day, signed the name of Floyd Day to the note in question, yet, if you shall further believe from the evidence that the defendant, Walter R. Day, was authorized by Floyd Day to sign and use his name in connection with the business of N. B. Day & Co., then you will find the defendant 'not guilty.'

"3. If you believe from the evidence before you that Floyd Day himself signed the note in question, then you should find the defendant 'not guilty.'

"4. If, upon the whole case, you entertain a reasonable doubt of the defendant's having been proven guilty you will find him 'not guilty.'"

For the reasons indicated the judgment is reversed and remanded, for further proceedings consistent with this opinion.

ROBARDS v. ROBARDS.

(Filed May 22, 1908—Not to be reported.)

1. Pleadings—Amendments—Divorce Cases—In the matter of amendments to pleadings there is no difference between divorce causes and other actions. In this case, however, the amendment came too late—long after the parties had pleaded to an issue, and the court properly refused it to be filed.

2. Adulterous Acts—May be Shown After Date of Acts Alleged in Petition—It was error for the chancellor to sustain exceptions to depositions which tended to establish adulterous acts on the part of appellant after the dates of the acts alleged in the original petition.

3. Witnesses—Credibility of—Where evidence is introduced that a witness is a creditable person, the statutory requirements are complied with regarding the certification of depositions by the officer taking them.

4. Alimony—Wife not Entitled to When Lewd Conduct Established—It has been repeatedly held by this court that where the husband is granted a divorce because of the lewd conduct of the wife, she is not entitled to alimony.

James C. Klein for appellant.

Greene & Tilford and O'Neal & O'Neal for appellee.

Appeal from Jefferson Circuit Court.

Opinion of the court by Judge Lassing, affirming.

This litigation deals with the sad story of the domestic infelicities of a young couple who for ten years had apparently enjoyed each others confidence and esteem. During this time three children, all boys, were born to them. The husband was a traveling salesman, and his business necessarily took him away from home a great part of the time. By thrift and economy he had saved money to purchase a small home in the city of Louisville, where his wife and their infant children resided. The title to this home was taken in the name of the wife. Sometime during the year 1905 the husband conceived the idea that his wife was not conducting herself as she should. He caused an investigation to be set on foot, which apparently verified his suspicion that all was not right, and the disclosure thereby made resulted in his filing a suit for divorce on the ground of lewd and lascivious conduct. On motion of his wife, he was required to make his pleading more specific and set out with particularity the places and dates where, and upon which the acts complained of, were committed and done.

In compliance with the ruling of the court that the pleading be made more specific in this particular, he charged that on the 25th of March, and on April 8 following, she had entered a notorious assignation house in the city of Louisville, and remained there for some hours on each occasion in company with a man, whose name was unknown to plaintiff, and that on two other occasions, set out with particularity in the pleading, his wife, during his absence, had entertained in their home unmarried men, and had been guilty of conduct unbecoming a married woman on these occasions, by drinking, smoking cigarettes and being guilty of loud, hilarious and bolsterous talk and conduct in their presence. To these charges the defendant entered a complete denial, and in a cross-petition, sought a divorce from bed and board from her husband on the ground of cruel and inhuman treatment, habitual drunkenness and adultery. Issue was joined upon each of these grounds for divorce set up in the cross-petition.

The plaintiff offered to file an amended pleading, setting up with particularity other acts of lewd and lascivious conduct on the part of his wife, occurring something like a year after the date of the charges upon which the original petition was based, objection was made by the wife to the filing of this amendment, the objection was sustained and the amendment was not permitted to be filed. Shortly after the suit was filed, the defendant moved for an allowance pending the litigation for the support of herself and children.

The parties agreed, and the order was so entered, that the plaintiff should pay to the wife \$65 per month during the litigation. Much proof was taken by the plaintiff in support of the allegations of the original petition as amended, and of the charges preferred in the amendment which the court refused to permit to be filed.

The defendant directed her proof toward establishing an alibi, as defense to the suit of her husband, and in her own behalf proof was directed toward establishing the charges that her husband was an habitual drunkard, of an insanely jealous disposition and extremely cruel toward her.

The chancellor, on exceptions to depositions, sustained the exceptions filed by the defendant to all of the proof taken by plaintiff which tended to show and establish the particular acts of misconduct set out in the amended pleading which the court refused to permit to be filed, and also sustained exceptions to the deposition of the witness, Laura Butler, on the ground that her good character was not certified to by the officer taking the deposition, not personally known to the judge, and her general reputation was not proven. Of this ruling the plaintiff complains. However, with this evidence excluded from his consideration, the chancellor found that the proof remaining in the case supported the allegations of the petition, as originally amended, and warranted and justified him in granting to plaintiff a divorce on the ground of lewd and lascivious conduct on the part of his wife. This was done and the cross-petition of the wife was dismissed. The title to the house and lot was taken from the defendant, and ordered restored to the plaintiff, from whom it was acquired. The custody of the children, about three, six and nine years of age respectively, was left with the wife, and she was permitted to remain in the home so long as the children were left in her care and custody, and the plaintiff was required to pay to the wife, for the support of the children, until further order of the court, the sum of \$65 per month; the wife was denied any alimony whatever.

From so much of this judgment as denied to the wife alimony, she has appealed. She asked that an allowance be made her pending the appeal for her own support and maintenance.

This the chancellor denied, and from his ruling upon this point, she has likewise prosecuted an appeal, and, in addition to prosecuting an appeal from his ruling, has asked that this court make an allowance for her support and maintenance pending the appeal. All of these questions are now before us and will be considered and disposed of together.

The first question for consideration is the ruling of the chancellor, in refusing to permit the amended petition to be filed. Section 134, of the Code, provides that the court may, at any time, in furtherance of justice, and on such terms as may be proper, cause or permit a pleading or proceeding to be amended, and, in passing upon the action of the trial court in permitting or refusing amendments, this court has held that the only limitation placed upon the discretion of the trial judge in allowing amended pleadings to be filed is, that it must be done in furtherance of justice, so that, if in the opinion of the trial judge the amendment offered would tend to secure to the party offering it a just and fair determination of his case, then the court should permit it to be filed, even though in so doing he should

find it necessary to continue the case at the cost and expense of the party offering the amendment. If, on the other hand, in the exercise of his sound discretion, he should determine that the filing of the amendment would not be in furtherance of justice, then he should not permit it to be filed, and, in either event, unless it clearly appeared that his rulings had caused a miscarriage of justice, the action of the trial court would be upheld. An attempt has been made to draw a distinction in the rules of practice between divorce cases and other equity actions. There is no good reason for any difference, nor does there, in fact, any such difference exist, but in divorce as in other equity suits, where the ends of justice require it, the party should be, and is, permitted to amend his pleadings. The amendment offered in this case came long after the parties had pleaded to an issue, and we are of opinion that the court did not err in refusing to permit the proposed amendment to be filed.

We come next to a consideration of the ruling of the trial court in sustaining exceptions to certain depositions and particularly those depositions which were taken for the purpose of establishing the particular acts of lewd and lascivious conduct, set up in the amended petition which plaintiff was not permitted to file. The chancellor found that plaintiff was entitled to the relief sought without taking into consideration the evidence of any other misconduct on the part of defendant than that specifically set up and charged in the original petition, hence a determination of this question, so far as this case is concerned, is altogether unnecessary, but we are urged to pass upon this point as it is one which frequently arises, and its determination will be of benefit to the profession.

In 2 Bishop on Marriage and Divorce, section 1376, the rule is thus stated: "Any conduct of a wife indicative of a disposition tending to adultery is a proper item of evidence in a case against her, when duly connected with other evidence. Thus, in the ecclesiastical practice, a husband was permitted to plead in his libel, that during his absence she had behaved so indecorously as to induce a lady, with whom she resided, to recommend her removal to her mother. In another case, where the evidence did not fully establish adultery, but her conduct had raised distinct suspicions of it, proof that, during the progress of the suit, the alleged particeps criminis had frequently visited her alone, and remained late at night, was received as sufficiently strengthening the former evidence to justify the sentence of divorce."

In the case at bar, the wife was charged with having been seen to enter an assignation house, on two distinct occasions, and remaining there on each occasion for some time, and with having entertained strange men in the home of her husband late at night, during his absence, and with having behaved in an improper manner on said occasions. These allegations, if true, tended to establish an adulterous disposition on the part of the wife, and this disposition having been established, it was entirely competent for the husband to show any act on the part of the wife, either before or after the date upon which the particular act charged in the pleading was committed, which tended to confirm and strengthen the evidence already introduced. This idea is supported by the decided weight of authority; courts of last resort and text-writers uniting in the view that acts prior to, and also subsequent to the particular acts charged, are admissible in evidence, for the purpose of showing an adulterous disposition on the part of the party charged. (Bishop on Marriage and Divorce, vol. 2, section 1376; Wigmore on Evidence, vol. 1, sections 398, 399 and 400; State v. Moore, 115 Ia., 178; Sherwood v. Tiltman, 85 Pa., 77; Rose v. Mitchell, 21 Ia., 270; Schufeldt v. Schufeldt, 86 Md., 519; Brooks v. Brooks, 145 Mass., 574; and Thayer v. Thayer, 101 Mass., 111.) The authorities above enumerated agree that the ad-

mission of this character of evidence is not merely for the purpose of showing the adulterous disposition between appellant and a named co-respondent, but also for the purpose of showing that the restraints, "and safe-guards of common deportment and conventionality and of the natural modesty, that is presumed to exist, have been broken through and displaced by an adulterous disposition and the habits of adulterous intercourse."

And, while as a matter of fact, in each of the cases which we have cited a co-respondent was named, yet, we are of opinion that the admission of such proof is not confined to that class of cases alone, where the adultery is charged to have been committed with a specifically named co-respondent, but may be considered in any case for the purpose of establishing an adulterous disposition on the part of the one charged.

If appellant visited an assignation house in the spring of 1906, and permitted men, other than her husband, to spend the night with her in her own house about the same time, these acts tend to establish, on the part of appellant, a sexual desire for men other than her husband, and tend to show the probability of her having committed the acts charged in the petition to have been committed in the preceding year. The chancellor erred in sustaining exceptions to those depositions which tended to establish in the appellant an adulterous disposition after the dates of the acts alleged in the original petition. Appellee was entitled to the benefit of this evidence. It strengthened his case and the chancellor erred in excluding it from his consideration.

The chancellor likewise sustained exceptions to the entire deposition of the witness, Laura Butler, because her general reputation for truth and veracity was not proven, although two witnesses testified that she had lived in their home for more than a year and that during this time they had ample opportunity to judge of her character, and that from their observation of her and acquaintance with her they believed her to be both truthful and trustworthy. This is not a new question, for in the case of *McC Campbell v. McC Campbell*, 103 Ky., 745, the identical question was before this court, and it was there held that where evidence is introduced to the effect that the witness is a creditable person or entitled to credit on oath or is of good character, that the statutory requirements are complied with, and a prima facie case of good character or reputation for truth and veracity is established, and that if the adverse party desires to attack the reputation of any witness whose character is thus established, he must do so in the manner provided by law.

The exceptions to the deposition of Laura Butler should have been overruled and her deposition should have been considered in determining the rights of the parties, for she not only is shown by the record to be an honest and trustworthy servant but to be of a good family of negroes, and her acceptance of employment in an assignation house was due, no doubt, to the fact that she received better wages there than she could elsewhere, and it does not militate against her credibility as a witness.

When the depositions, which were excluded by the chancellor from his consideration in determining the case, are taken into account a most damaging record of misconduct and wrong-doing on the part of appellant is made out, and the conclusion reached by the chancellor that appellee was entitled to an absolute divorce, is more than justified. It has been so repeatedly held by this court that where the husband is granted a divorce on such grounds the wife is not entitled to alimony, that a further consideration of this question is unnecessary.

Appellant's claim to alimony was based upon the idea that the divorce was improperly granted to her husband. If we had found

this to be true, she would be entitled, not only to alimony, but to an allowance pending the litigation, but inasmuch as we have decided the case adversely to her contention, her claim to alimony and an allowance, as well, must fail. In permitting her to remain in the care and custody of their children, in the home of her husband, we are of opinion that the chancellor dealt more generously with appellant than the strict demands of justice required. We doubt his wisdom in so doing. However, these matters address themselves to his sound discretion, and we have no doubt but that he will, from time to time, make such orders in the case as will protect the moral interests and welfare of the children and properly regulate the burden that should be placed upon their father for their support.

The motion for an allowance is overruled, and the judgments of the lower court in denying to appellant any alimony whatever, or any allowance, pending this appeal, are affirmed.

THOMAS, &c., v. DAVIS, &c.

(Filed May 22, 1908—Not to be reported.)

1. Writ of Prohibition—Jurisdiction—If an inferior court has jurisdiction, the circuit court has no power to grant the writ of prohibition for the purpose of denying the inferior court the right to hear and determine a case, although it is of opinion that the inferior court will decide improperly.

2. Same—Work Upon Public Roads—Therefore, the lower court properly dismissed appellant's motion for a writ of prohibition to restrain the inferior from trying him for failure to work the public road.

R. C. Burns for appellants.

H. R. Dysard for appellees.

Appeal from Carter Circuit Court.

Opinion of the court by Judge Lassing, affirming.

Appellants brought suit in the Carter Circuit Court, wherein they allege they were citizens and taxpayers of Carter county, Kentucky, and that they had paid all taxes assessed against them for State, county and road purposes for the current year, and that notwithstanding that fact, one Jack Jones, overseer in Road District No. 25, in Carter county, was trying to make them work and labor upon the public roads in said district, and that appellee, the county judge of Carter county, on complaint made by the overseer, had issued a warrant for their arrest and, unless enjoined and restrained from so doing, would fine them for their failure to work upon said roads and would commit them to jail until said fine and costs were satisfied. That the said overseer had no right or authority in law to cause them to work upon said road, and his efforts to require them to do so were wholly illegal and they asked that a writ of prohibition be issued enjoining and restraining the county judge from trying them under said warrant charging them with a refusal and failure to work upon the public roads of said county. The county judge demurred to the petition, and pending the demurrer filed an answer traversing the allegations of the petition. The circuit judge, before whom the motion was made, refused to issue the writ and dismissed the petition, from which ruling and judgment the plaintiffs have prosecuted this appeal.

The sole question for determination is, did the county judge of

Carter county have jurisdiction to try appellants for their refusal or failure to work upon the county roads of Carter county?

Section 4308, of the Kentucky Statutes, provides that: "The fiscal court of any county may require all able-bodied male citizens of the county, over eighteen and under fifty years of age, except licensed ministers of the gospel, and citizens of incorporated towns and cities to provide themselves with necessary tools and implements, and to work on the public roads of the county not exceeding two days in a week, and six days in each year. * * *

"Any one assigned to work on a public road who shall, without good cause, fail to appear with proper implements, and do good work thereon, after having been notified for two days by the officer having supervision of the road, or by some one authorized, in writing, by him, to give said notice, shall, on trial and conviction before a justice of the peace, or the county judge, be fined for each day he so fails to work."

The statute empowers the fiscal court to appoint an overseer for each road district in the county, and it is made the duty of such overseer to notify the able-bodied hands in his district, between the ages of eighteen and fifty years, saving only those which the statute expressly exempts, to work upon the roads in their district a designated number of days.

The pleadings show that appellants were notified to do so, and, upon complaint being made to the county judge by the overseer, he caused the warrant of arrest to be issued for each of them. It will be observed that by express provision of the statute cited it is made the especial duty of the county judge to cause such delinquents to be arrested and brought before him for trial. A writ of prohibition is an order which is issued by the circuit court to an inferior court of limited jurisdiction, prohibiting it from proceeding in a matter out of its jurisdiction. (Civil Code, section 479.) If an inferior court has jurisdiction, the circuit court has no power to grant the writ of prohibition for the purpose of denying to the inferior court the right to hear, pass upon and determine a case, although the judge of the circuit court may be of the opinion that the judge of the inferior court will decide the case improperly. (Hughes v. Holbrook, 108 S. W., 225, and Scott v. Tully, 20 Ky. Law Rep., 1734.)

Under section 4308, above referred to, it was the duty of the county judge to try appellants on the charge of their failure to work the roads when directed to do so by the overseer. If they had any good reason for their refusal to so work, when notified by the overseer, they should make this defense before the county judge, when called upon to answer the writ. The circuit court had no right, authority or power to deny to the county judge the right to try these cases, any more than it would have had the right to direct him how he should determine them.

The chancellor having so held, the judgment is affirmed.

LANE, &c. v. LLOYD, &c.

(Filed May 22, 1908—Not to be reported.)

Liens—Mortgages—Executions—Priorities Determined—L. gave a mortgage on his land to Mrs. B. for \$2,100 in 1903, later he gave a note to a bank for \$1,200, with his brother as surety, to whom he gave a mortgage on the land as indemnity. In May, 1906, executions were levied on the land by judgment creditors of L. for \$300, subject to the aforesaid debts. In August, 1906, L. borrowed from G. \$4,064.80, for which he gave his note with his brother as surety,

and gave mortgage on the land as additional security, and with this money paid off the debts to Mrs. B. and the bank, leaving the execution debts outstanding. In an action by the execution creditors to enforce their lien, Held—That G. is not entitled to be subrogated to the rights of Mrs. B. or the bank, and the lien of the execution creditors is superior to that of G.

J. J. Nesbitt for appellants.

Chas. D. Grubbs and W. B. White for appellees.

Appeal from Bath Circuit Court.

Opinion of the court by Judge Barker, affirming.

The appellant, R. H. Lane, is the owner of a tract of about one hundred and twenty acres of land, situated in Bath county, Kentucky, on which there was a mortgage lien to secure a debt in favor of Ruth Beall for two thousand one hundred dollars. This mortgage was executed in August, 1903. Later in the year, 1903, he became indebted to the Farmers' Bank of Owingsville, in the sum of one thousand two hundred dollars, for borrowed money, for which he executed his promissory note with his brother, appellant, J. W. Lane, as surety, at the same time executing a second mortgage on the land in question to his brother, to indemnify him as such surety against loss. On May 30th, 1906, the appellees, W. S. Lloyd, and Hazelrigg & Son, judgment creditors of R. H. Lane, to the extent of about three hundred dollars, caused executions to be levied upon his land, subject to the Ruth Beall debt of two thousand one hundred dollars and the Farmers' Bank debt of one thousand two hundred dollars. On August 31st, 1906, for the purpose of paying off the above mentioned mortgage liens, R. H. Lane borrowed from one, C. W. Goodpaster, the sum of four thousand and sixty-four dollars and eighty-two cents, executing his note therefor, with his brother, J. W. Lane as surety thereon, at the same time executing to Goodpaster a mortgage on the land in question as additional security.

Thereupon R. H. Lane paid off and discharged the Ruth Beall mortgage debt, which at that time amounted to two thousand two hundred and thirty-one dollars and five cents, and the Farmers' Bank note, amounting to one thousand two hundred and forty-one dollars and ninety-one cents, thus leaving the Lloyd and Hazelrigg & Son execution debts outstanding, as unpaid and unreleased liens upon the land.

Subsequently, this action was instituted for the purpose of enforcing the Lloyd and Hazelrigg & Son execution liens. The mortgagee, C. W. Goodpaster, who was made a co-defendant with R. H. Lane and J. W. Lane, filed his answer and cross-petition, setting up his mortgage for four thousand and sixty-four dollars and eighty-two cents, and asked for a sale of the land and the payment of his mortgage debt out of the proceeds of same. The defendants, R. H. Lane and J. W. Lane, filed answers, in which J. W. Lane sought to have Goodpaster subrogated to the liens of Ruth Beall and the Farmers' Bank, which R. H. Lane had discharged with the money borrowed on August 31, 1906; and R. H. Lane asserted a claim of homestead exemption as against the execution creditors.

The issues being made up, the evidence in, and the case submitted for final judgment, the chancellor ordered a sale of the land and determined that there was a first lien upon the proceeds to the extent of one thousand two hundred and forty-one dollars and ninety-one cents, the amount of the Farmers' Bank debt on which J. W. Lane was personally bound as surety; that the W. S. Lloyd and Hazelrigg

& Son execution lien debts came next in point of dignity, and that the balance of the proceeds of the sale should go to the discharge of the remainder of the Goodpaster mortgage.

As the appellees, the execution creditors, are not complaining of the decree, which gives precedence over their liens of so much of the Goodpaster debt as was used to pay off the Farmer's Bank debt, the only question presented on this appeal is, whether or not the chancellor erred in giving the liens of the execution creditors priority over the balance of the Goodpaster debt, being that part which was used in paying off the mortgage of Ruth Beall; and thereby depriving R. H. Lane of his homestead in the land. It is not questioned, that the Beall debt, the Farmers' Bank debt, and the claim of R. H. Lane to homestead, were all superior to the liens of the execution creditors, and if the liens, as they originally stood, had been enforced, the Beall debt and the Farmers' Bank debt would have been paid first out of the proceeds, and then one thousand dollars set apart to R. H. Lane for a homestead, and any balance remaining paid over to the execution creditors. But when the common debtor borrowed money from Goodpaster and with it paid off and extinguished the Beall and the Farmers' Bank debts, the legal aspect of the rights of the parties was materially changed. The lien of the execution creditors is superior to that of Goodpaster, and they are entitled to payment out of the proceeds of the sale of the property before he receives anything, and the common debtor is not entitled to a homestead against the Goodpaster debt, because he has waived it by the execution of the mortgage. Goodpaster is not entitled to be subrogated to the rights of Miss Beall or the Farmers' Bank. He simply loaned the debtor, Lane, money to pay off those debts, and took a mortgage to secure him for what he has advanced. It is not claimed that he bought the Beall or the Farmers' Bank debts, or that there was any attempt to assign them to him. He, therefore, received by the mortgage all that he had bargained for in the way of security, so far as R. H. Lane was concerned, and has no claim against the execution creditors to be substituted to the rights of the original mortgagees, Beall and the Farmers' Bank. (Payne, &c. v. Johnson's Ex'ors, 95 Ky., 175; Griffin v. Proctor's Adm'r, 14 Bush, 571; Brougner, &c. v. Laughlin's Ex'tx, &c., 23 Ky. Law Rep., 1166.)

The cases cited by appellant are not opposite to the question at issue. In the case of Ogden v. Totten, 17 Ky. Law Rep., 1390, Ogden really purchased the debt of the prior lienholder, and took the subsequent mortgage as additional security. The note of the prior lienholder was assigned to him, and it was very properly held that, as he had purchased the prior debt, he was entitled to enforce it. That principle has no application to the case in hand. In Bradley v. Curtis, 79 Ky., 327, and Harrod v. Johnson, 5 Ky. Law Rep., 247, the questions were solely between the owners of the land and the parties advancing money to pay off prior liens. There were no intervening equities as in the case at bar.

Assuming that the property is worth more than one thousand dollars, the execution creditors have a first lien on the overplus, and the debtor could not, by giving Goodpaster a subsequent mortgage, divest them of their legal rights in this overplus. The rights of these execution creditors in the overplus became vested when the superior mortgage liens were paid off and discharged, and no action of the debtor could divest them of their fixed legal rights. Of course, this principle will not apply if there be no overplus above the one thousand dollars, for unless the sale of the property produces more than one thousand dollars, the execution creditors have no lien; but if there is an overplus, then they have a lien on it, and the debtor can not deprive them of it by mortgaging his homestead right to Goodpaster, the subsequent mortgagee, and then claiming the homestead right against the execution creditors in the overplus.

Conceding the truth of the testimony of J. W. Lane, that his brother, R. H. Lane, told him if he would get the money from Goodpaster, for the purpose of paying off the Beall and Farmers' Bank liens, he should be substituted to the liens paid off, this would not avail Goodpaster or J. W. Lane in this case. In the first place, the debtor could not give away the rights of the execution lienholders, and, in the second, a lien upon the real property could not be acquired by this verbal arrangement. In the case of Reid, &c. v. Jackson, 6 Ky. Law Rep., 743, it was held that "one who loans to another money with which to pay off a vendor's lien is not thereby substituted to the rights of the vendor, and does not acquire a lien; therefore, the sureties of the vendee in the note executed for the money borrowed for this purpose do not acquire a lien by substitution to the rights of the obligee, he having none himself. Nor is a mere parol promise by the vendee that they shall have a lien sufficient to create a lien." This principle is conclusive of the question of subrogation.

Judgment affirmed.

LOWRY & GOEBEL v. HITCH'S ASSIGNEE, &c.

(Filed May 26, 1908—Not to be reported.)

1. Claim and Delivery—Action For—Insolvency—In this action by the wholesale merchants for the delivery of the goods they sold the assigned merchant, under the proof of his insolvency at the time of the purchase and of his representations as to his solvency, it was error for the court to direct the jury to find against appellants.

2. Title of Goods—If the assigned merchant knew he was insolvent and fraudulently purchased the goods without intending to pay for them, the title remained in appellants and did not pass under the deed of assignment.

Worthington & Cochran for appellants.

Appeal from Mason Circuit Court.

Opinion of the court by Judge Barker, reversing.

The appellants, Lowry & Goebel, are wholesale merchants in Cincinnati, Ohio. In September, October and November, of 1906, the appellee, C. H. Hitch, purchased certain goods from them which amounted in the aggregate to \$360.68. In November, 1906, Hitch made a general assignment of all his property, for the benefit of his creditors, to J. D. Dye. Thereupon, the appellants instituted this action in the Mason Circuit Court, claiming that Hitch knew he was insolvent at the time he purchased the goods, and had no intention of paying for them, but that the purchase was fraudulently made for the purpose of cheating the appellants of their property. Without going into the details of the petition, it may be stated that it contains all of the necessary allegations to constitute a petition for claim and delivery of personal property under the provisions of the Code regulating this matter. The assignee, J. D. Dye, was made a party defendant. He answered, denying all the allegations of the petition as to the fraud, and claimed the right to hold the property under the deed of assignment to him. In a second paragraph he denied that all of the goods came into his hands under the assignment, but admitted that two hundred and fifty-two dollars and sixty-seven cents worth came into his hands, and that he held them as assignee. Afterwards the creditors of C. H. Hitch took such procedure in the Federal Court as was necessary to have him

adjudged an involuntary bankrupt, and J. D. Dye, his assignee, under the deed of assignment, was appointed assignee in bankruptcy. Thereupon, J. D. Dye, as assignee in bankruptcy, tendered an amended answer, setting up the bankruptcy proceedings in bar of the jurisdiction of the State court to proceed further with this action. The motion to file this amended answer, on the objection of the plaintiffs, was overruled by the court. Afterwards the case came on regularly for trial on the issues joined, and a jury being impaneled, the evidence was heard. At the close of all the testimony, the court sustained the defendant's (appellees') motion for a peremptory instruction to the jury to find for them, which was done; and of this ruling the plaintiffs (appellants) now complain.

We feel constrained by our views of the merits of this case to disagree with the circuit judge in his conclusion on the facts arising from the evidence adduced. C. H. Hitch had purchased the stock of goods belonging to one C. A. Hainline, in Maysville, Kentucky, in August, 1906. Afterwards, he visited Cincinnati and called on Lowry & Goebel, from whom Hainline had purchased goods. It is claimed, by appellants, that he made certain representations to them as to his solvency which induced them to extend to him the necessary credit, thus enabling him to purchase the goods involved here, without prepayment of the price. Three witnesses testify that he stated to the credit clerk of appellants, that he had inherited three thousand dollars; that he paid one thousand five hundred dollars of it cash for Hainline's stock of goods, and had a thousand of it remaining intact with which to do business, and that he was not indebted to any one. We do not understand that Hitch contends that these statements were true. He simply denies that he made them. As a matter of fact, the record shows indubitably that he was insolvent at the time he bought the goods. It is true, he says he was solvent, but was unable to state the details of his financial condition at that time. In three months after he opened up business, he made an assignment; he could have had no capital at the time he commenced. He says that he was solvent at the time he commenced, but broke afterwards, and attributes his failure to the expense of conducting his business. Taking his own figures for it—the clerk hire, store rent and advertising—he could not have laid out more than four hundred and fifty dollars during the three months intervening, between his beginning as a merchant, and his bankruptcy. He denies that he made any representations as to his credit to Lowry & Goebel at all, and states that they did not ask his financial standing. Of course, it is possible that these wholesale merchants might open up an account with an unknown man without making any inquiry as to his financial standing; but such procedure on their part, would be so unusual that it requires little testimony to convince us that it was not true. Hitch's statements as to these dubious facts, are unsupported by any other testimony, and they are overwhelmingly disproved by three witnesses. If Hitch knew he was insolvent, and fraudulently purchased the goods without an intention of paying for them, the title remained in appellants, and, therefore, it did not pass under the deed of assignment, or to the assignee in bankruptcy. (*Bradberry v. Keas*, 5 J. J. Mar., 446; *Dietz v. Sutcliffe*, 80 Ky., 650; *Bridgeford v. Barbour*, Id., 529; *Bank of Commerce v. Payne & Viley*, 86 Ky., 446; *Longdale Iron Co. v. Swift's Iron & Steel Works*, 91 Ky., 191; *Linstroth Wagon Co. v. Ballew*, 149 Fed. Rep., 960.)

It results from this conclusion as to the value of the evidence adduced, that the trial court erred in awarding a peremptory instruction to the jury to find for the defendants, and the judgment is, therefore, reversed for a new trial consistent with the views herein expressed.

KEY v. USHER.

(Filed May 27, 1908—Not to be reported.)

Former Appeal—Instructions—Argument of Counsel—(30 Ky. Law Rep., 667)—The instructions upon the trial of this case were as directed by this court, except in a particular which did not prejudice appellant's substantial rights.

The statement of counsel in argument, did not go beyond the pale of legitimate argument. The jury are the triers of fact and counsel must be allowed some latitude in illustrating the matter before them.

Speight & Dean for appellant.

W. J. Webb, Robbins & Thomas and R. G. Robbins for appellee.

Appeal from Graves Circuit Court.

Opinion of the court by Judge Hobson, affirming.

On the first trial of this case, the plaintiff recovered a judgment; the defendant appealed to this court, and the judgment was reversed for certain errors in the instruction of the court to the jury. (Key v. Usher, 30 Ky. Law Rep., 667.) On the return of the case to the circuit court, it was tried again with the same result, and the defendant again appeals. The facts of the case are stated in the former opinion. It is insisted for the defendant that the judgment should be reversed because the court improperly instructed the jury and allowed improper argument by the plaintiff's counsel to the jury, and that the verdict is against the evidence. The instructions of the court to the jury on the last trial are as follows:

"1. The court instructs the jury that if they believe from the evidence, the plaintiff sold his stock in the Beaumont Soap Company to L. W. Key or P. Burnett, on the condition that they, together with T. J. Murphey, were to execute their note for the purchase of the price thereof, and that they failed or refused to execute and deliver it to the plaintiff, and if the jury further believe, from the evidence, that the said Murphey was ready and willing and offered to execute said note and to consummate the trade, and that he was prevented from doing so, by the wrongful act or acts, of the defendant, L. W. Key, the law is for the plaintiff, and the jury should find for him the sum of twenty-one hundred dollars, with interest thereon, at 6 per cent. per annum, from the thirteenth day of September, 1904.

"2. The court further instructs the jury that if they believe from the evidence that the alleged sale of stock in said company was made with the plaintiff, upon the condition that said sale was not to be consummated, until P. Burnett should have procured a majority of all the stock in said company, and if the jury further believe from the evidence, that said Burnett failed to procure a majority of said stock, after he had, in good faith, made efforts to procure it, and if the jury further believe from the evidence, the conditions named above were known to the plaintiff, W. A. Usher, at the time he contracted to sell his stock to the defendant, Key, or to Burnett, then the law is for the defendant, and the jury should so find.

"3. The court further instructs the jury that there was to be no sale of the stock to defendant, Key and P. Burnett, unless and until the note executed therefor was signed by T. J. Murphey; and unless the jury believe from the evidence, said Murphey failed or refused to sign it, through some wrongful act on the part of the

defendant, Key, then the law is for the defendant, and the jury will so find."

Instructions 1 and 3 are literally in compliance with the directions given by this court on the former appeal. It is insisted for the appellant that the following words in instruction 2 were condemned as erroneous on the former appeal: "At the time he contracted to sell his stock to defendant, Key or to Burnett." It is true that this court on the former appeal, held in effect that instead of these words, the following words should be used, "At the time the note in controversy was signed." But when instruction 2 is read in connection with instructions 1 and 3, it is manifest that the jury could not have misunderstood it; for by instruction 1, there could be no recovery unless Murphey was ready and willing to consummate the trade; and by instruction 3 the jury were told peremptorily, that there was to be no sale of the stock until the note was signed by Murphey. There could have been no finding for the defendant under instruction 2, if it had been worded as insisted by the defendant, unless a good faith effort was made to procure a majority of the stock. The evidence shows conclusively that they made no effort at all to procure a majority of the stock after signing the note in controversy, and that when Burnett, Key and Murphey disagreed among themselves, they abandoned the whole thing without making any effort to get the other stock. As under the evidence there could have been no finding for the defendant under this instruction, if worded as insisted by the defendant, the omission of the court to make the change indicated by this court on the former appeal, was not prejudicial to his substantial rights on the whole case.

During the argument of the plaintiff's counsel, he used this language: "Any condition imposed by defendant, Key, that did not previously exist, by which Murphey was prevented from signing the note, was in law a wrongful act." The defendant objected to the argument and moved the court to exclude it from the jury. The court overruled the motion and of this he complains. We are not favored with the argument of the defendant's counsel, but as the court had peremptorily told the jury that they should find for the defendant unless Murphey failed to sign the note through some wrongful act on the part of the defendant, Key, the question before the jury was whether the conduct of Key in preventing Murphey from signing the note, was rightful or wrongful, and the counsel on each side had a right to present the facts to the jury to maintain his view of the question. The jury are the triers of fact in matters of this sort and counsel must be allowed some latitude in illustrating the matter before the jury. The statement of counsel did not go beyond the pale of legitimate argument. The court did not err in refusing the two instructions asked by the defendant on the trial as this court had, on the former appeal, indicated what instructions should be given, and the instructions asked by the defendant, so far as they were proper, were included in those given.

The verdict of the jury is not palpably against the evidence. There have been two convicts for the plaintiff on the same evidence. The jury evidently came to the conclusion, from the evidence, that the reason the note was not signed by Murphey, was that Key locked it up in the drawer, and would not let him sign it; and that Key did this because he wanted Murphey and Burnett to furnish him certain security before the transaction was consummated, a matter which was entirely outside of the contract with Usher.

Judgment affirmed.

SUTTON v. WESTERN UNION TELEGRAPH CO.

(Filed May 27, 1908—To be reported.)

Telegram—Funeral Notice—Delay in Delivery—Action for Damages—Accident to Train—Negligence—Presumptions—A telegram announcing his mother's death, was sent to plaintiff in time for him to have attended her funeral, but by failure to deliver the telegram he was delayed a day. The train he took the next day was delayed by earth sliding on the track so that he failed to see her before her burial. In an action for damages against the telegraph company, Held—The presumption is, that the plaintiff would have taken the first train on receiving the telegram, and the company can not be excused for its negligence in failing to deliver it, thereby causing plaintiff to miss two trains, on the ground that he would have been able to attend the funeral if the accident had not happened to the railroad track on the following day.

Roscoe Vanover for appellant.

Richards & Ronald, Geo. H. Fearons and York & Johnson for appellee.

Appeal from Pike Circuit Court.

Opinion of the court by Judge Nunn, reversing.

Appellant resided in Pikeville, Kentucky, and his parents in East Radford, Virginia. Appellant's mother died in her home on December 27, 1906, and on that day his father directed to him the following telegram:

"East Radford, Vr., December 27, '06.

"To W. D. SUTTON,

"Pikeville, Kentucky.

"Mother dead, come at once.

(Signed) "G. W. SUTTON."

It appears from the evidence, that this telegram reached Pikeville, Friday morning, December 28th. It was not delivered to appellant until Saturday morning, after ten o'clock; and he boarded the first train leaving for East Radford, which was a few minutes after twelve o'clock that day, and would have reached his destination about the same hour on Sunday, but for an accident, the slip of earth onto the track in a cut, but he did not reach his destination until about eight o'clock Sunday evening. His mother was buried about two o'clock in the afternoon.

During the trial it developed that this message was not received in Pikeville, by appellee, until 10:10 o'clock Friday morning, December 28th. Appellant, in his petition, had only charged negligence in failing to deliver it promptly after it was received at that office; but offered an amended petition in which he alleged that the defendant was also guilty of negligence in transmitting the message to Pikeville. The court refused to allow him to file this amended petition, to which he excepted. When the telegram was received at appellee's office in Pikeville, appellant was about eleven miles from home at one of his lumber mills, and did not return to his home until ten o'clock on Saturday, the 29th of December. Appellant does not contend that the telegraph company was under any duty to deliver the message to him while he was in the country; but claims that it should have delivered it at his home or his office in the city, which were near to appellee's place of business. Ap-

appellee concedes that the law required it to so deliver the telegram. But it proved by its agent that it made repeated efforts to do this; that its agent went in person to the residence of appellant and also to his office, and made an effort to call up both places by telephone for the purpose of giving him information of the contents of the telegram. Appellant introduced testimony contradicting this—that is that the agent made no call for the residence or place of business of appellant. Persons who were at appellant's office and residence during the day, testified that the agent did not make a visit to either of the places during the day. Appellee concedes that the evidence upon this point was sufficient to have warranted the submission of the case to the jury.

The testimony shows that on Saturday morning, the 29th, a friend of appellant's, J. L. Morgan, was in the telegraph office and accidentally saw this telegram, and upon his request the same was given to him and he delivered it to the wife of appellant, who immediately started a person to deliver it to her husband at the mill. Her husband left the mill, however, before the messenger arrived, and received the information of his mother's death from his wife, when he reached Pikeville. Appellee's counsel claims that there was no competent evidence that the wife started this messenger to her husband in the country. This is true. However, appellant gave testimony to this effect, and it was not objected to. We have no doubt, if there had been an objection, that the court would have excluded it, but there being none, the testimony was properly before the jury for its consideration. If there had been objection appellant would, most probably, have introduced the messenger or some other person who knew the fact. The evidence also shows, without contradiction, that a train passed Pikeville, going to East Radford, in the evening of Friday, December 28th, that reached East Radford about ten o'clock Saturday morning, and also another left Pikeville at 6:20 a. m. on Saturday, the 29th, that reached East Radford at ten o'clock that night. Both of these trains passed through the cut before the slip of earth onto the track. Appellee says that there is no positive proof that appellant would have taken either of these trains if he had received the telegram in time. It is true that there was no direct statement made that he would have taken the first train after receiving the message; but the whole case was conducted upon that idea. Both appellant's and appellee's counsel seem to have assumed, by their manner of conducting the case, and the answers of appellant to questions, that he would have responded to the telegram and have gone at the first opportunity to see his dead mother; and from the evidence the reasonable presumption is that he would have gone on the first train after receiving the telegram. This court in the case of *Western Union Telegraph Co. v. Caldwell*, 31 Ky. Law Rep., 497, said:

"But what appellee would have done upon the receipt of this message, when measured by the ordinary rule of human experience, and judged by the standards that regulate the conduct of people generally, is not of doubtful or uncertain import. * * * In a case like this, appellant, confessedly guilty of negligence, will not be permitted to escape responsibility for its acts upon the theory that what appellee might have done, was too remote to entitle her to compensation."

The real question to be determined in the case, is whether the negligence of appellee in the failure to deliver the message within a reasonable time, was the proximate cause of appellant's injury and suffering, or whether the slip in the earth ahead of the train, upon which he took passage, was the proximate cause. It appears that the lower court took the latter view of it and gave a peremptory instruction to the jury to find in behalf of appellee. There are

some few authorities in other States that tend to coincide with this view, but this court has invariably held to the contrary. It will not do to say that a public service corporation may be guilty of negligence, as in this case, withholding a telegram for a very unreasonable length of time, which caused appellant to miss two trains, either of which he would have gone on and which reached East Radford before the slip in the cut, and by its negligence, force him to take the last chance, and by reason of the slip was deprived of seeing his mother, and be exonerated from its negligence by reason of the accidental slip which prevented the train, on which he was forced to start by reason of the negligence of appellee, from reaching East Radford in time for the burial.

The case of *Cassilay, &c. v. Young, &c.*, 4 B. Mon., 265, was one where Cassilay, &c., agreed to deliver a cargo of goods in Vicksburg without delay. But for some reason, satisfactory to themselves, they stopped the cargo and tied it up to the bank at Paducah for a few days. A storm arose which caused the cargo to sink, and the action was brought to recover the value of it. They were compelled to pay the value of the cargo by reason of their negligence in tying it up to the bank at Paducah. The court said: "By reason of the disregard of their duty and of their conduct, we are of the opinion that they are liable for the loss." The storm in that case, was as much the proximate cause of the loss of the cargo as the slip in the earth, which covered the track, was in the case at bar.

The case of *Louisville & Nashville Railroad Co. v. Brownlee, &c.*, 14 Bush, 590, was one in which appellee delivered several hogsheads of tobacco at appellant's depot in Rowlett's Station, to be carried as freight by appellant to market. This tobacco was destroyed by fire, together with the station house in which it was placed. The proof showed that if appellant's agent had exercised ordinary care he could have shipped several of the hogsheads before the fire. Appellant in that case claimed that the destruction of the tobacco by fire was the proximate cause of the loss.

The court said:

"We think the appellant was only bound to use ordinary care and prudence in providing a depository for appellees' tobacco, and also such care and prudence in shipping it;" and continued by saying that certain instructions were proper, and said:

"If the appellant could, by the use of ordinary diligence, and in the regular course of its freight business, have shipped the tobacco before its consumption by the fire, it is responsible for its failure to do so."

In the case of *Hersheim Bros. & Co. v. Newport News & Mississippi Valley Co.*, 18 Ky. Law Rep., 227, appellants delivered to appellee, the railroad company, thirty-five hogsheads of tobacco for shipment. In the petition it was alleged that the railroad company carelessly and negligently failed to ship the thirty-five hogsheads of tobacco within a reasonable time; that by the use of ordinary diligence, defendant could have shipped all of said tobacco before its destruction by the fire, on October 8, 1891. The court said:

"It seems to us that the allegations of the petition clearly show that the loss was the direct result of the negligence and carelessness of appellee. If appellee had shipped the tobacco immediately as it agreed to do, the loss by the fire could not have occurred, and as they had taken it into custody and agreed to immediately ship the same and could have done so, it seems to us that appellee is liable for the damages sustained by the appellants."

And referred to the case of *L. & N. R. R. Co. v. Brownlee*, *supra*, with approval. There was no claim in that case that the fire which destroyed the tobacco was started by the negligence of appellee or its servants. The question turned upon the negligence of

appellee in failing to ship the tobacco as it had agreed to do. If it had lived up to its agreement, the tobacco would not have been in the depot and have been destroyed when the depot was burned. According to appellee's contention, the loss of the tobacco by fire was the proximate cause of the loss to appellant, and not the railroad's negligence in failing to ship it.

Appellee's counsel cites the case of *Western Union Telegraph Co. v. Briscoe*, 18 Ind. App., 22, in support of his contention. The facts of that case were, in substance, as follows: A message was sent from Morganfield, Kentucky to Bloomington, Indiana, where it arrived at eight o'clock a. m., and was delivered to appellee about one o'clock in the afternoon. Appellee boarded the first train going the most direct route to Morganfield. His train was delayed in Vincennes, Indiana, which caused the train he was on to miss connections at other points, and appellee was delayed ten or twelve hours, and did not arrive in Morganfield until after his mother was buried. The proof showed that if the telegram had been delivered to him before ten o'clock of the day on which it reached Bloomington, he could have taken a train on another road and have gone to Goshen and there taken another train and made several other changes and have reached Morganfield in time for the burial; but the proof showed that he had never traveled this route, but had always gone over the one he did take. The proof also showed that this Goshen route was from twelve to fourteen hours longer than the one he did take, and on the one he did take, if he had not been delayed, he would have reached Morganfield several hours in advance of the other. The court said:

"Is it not reasonable to suppose that appellee, knowing this, would most certainly prefer that route which would take him to his destination the soonest, and the route over which he was accustomed to travel?"

The case was turned upon the fact that appellee, under the facts and circumstances proven, would have gone on the same train that he did go on; that he would not have gone by Goshen, even if the telegram had been delivered to him within a few minutes after it was received in Bloomington. It does not decide that if, by the negligence of appellant in delivering the message to appellee, he had missed a train in the morning going to Morganfield on the route which he afterwards took, he would have been barred from recovering, but the intimation is otherwise.

For these reasons, the judgment of the lower court is reversed, and on the return of the case, if appellant so desires, he should be allowed to file his amended petition.

Whole court sitting.

STAMPER v. COMMONWEALTH.

(Filed May 22, 1908--Not to be reported.)

1. Continuances—Affidavit For—Instruction of Court—Failure to Except—It was the duty of appellant to ask the court to instruct the jury that the statements in the affidavit for a continuance, as to what the witnesses would testify, were to be taken as true, and if the court failed to instruct them, then it was the duty of appellant to except to the ruling. His failure to so except was a waiver of the error, and he can not now be heard to complain of it.

2. Instruction Omitted from Record—Presumption—It was appellant's duty to bring up the whole record, and in the absence of the instruction mentioned, it will be presumed that it was given.

Hazelrigg, Chenault & Hazelrigg, R. A. Hurst, W. H. Blanton and Wm. Kash for appellant.

James Breathitt for appellee.

Appeal from Breathitt Circuit Court.

Opinion of the court by Judge Barker, affirming.

The appellant, Siduel Stamper, was indicted by the grand jury of Breathitt county, Kentucky, charged with the murder of Curt Smith, and, having been tried by a jury, was found guilty as charged, and his punishment fixed at confinement in the penitentiary for the term of his natural life. From the judgment based upon this verdict this appeal is prosecuted.

It is not questioned that there was sufficient evidence in behalf of the Commonwealth to authorize a submission of the guilt or innocence of the accused to the jury, and the only complaint of the appellant is based upon the ruling of the trial court in regard to an affidavit which he filed for a continuance, and which the Commonwealth agreed should be read to the jury as true. The complaint as to this is two-fold: First, it is said that, while the Commonwealth's attorney agreed that the statements in the affidavit, as to what the absent witnesses would state, if present, were to be taken as true, the court did not formally so instruct the jury; second, that the court erred in refusing to allow all the statements of the affidavit to which an absent witness, Susan Fugate, would depose if present, to be read to the jury.

Before entering into a discussion of these mooted questions, it is necessary to state that the quarrel out of which the tragedy involved here arose, originated over a game of cards between the defendant and decedent. The evidence of the Commonwealth tended to show that the defendant murdered the decedent in cold blood, and then robbed him; whereas the evidence of the defendant was to the effect that he won the decedent's money fairly, and that having refused to refund it, the decedent, Curt Smith, drew his revolver and fired upon appellant at such close range as to set his shirt on fire, the ball going through his shirt and barely missing the body of the defendant; that, thereupon, the defendant drew his own pistol and killed his assailant.

As to the first error complained of, that the court did not formally instruct the jury that they must accept the statements of the affidavit for a continuance as true, it may be admitted that this would have been the better mode of procedure; but the bill of exceptions shows that the Commonwealth's attorney admitted that the affidavit should be read with the admission that the facts therein stated were true; and this is ordinarily the plan adopted. But conceding, as we do, that the failure of the trial court to instruct the jury as to the evidential value of the affidavit was error, the appellant is not in position to complain of it on this appeal. In the case of *Ochsner v. Commonwealth*, 109 S. W., 326, a similar question to the one we have here, arose. Certain evidence was introduced for the purpose of impeaching the credibility of a witness, and the trial court failed to instruct the jury that the evidence was only admitted for the purpose named, and could not be received or weighed by them as substantive testimony. Upon complaint here of this failure, we held that it was the duty of the defendant to request the court so to rule, and, if this was refused, to except to the adverse ruling of the court; and that, in the absence of this action on the part of the complainant we would not reverse the judgment for the error of the trial court. Applying this principle to the case in hand, it was the duty of the

appellant to ask the court to instruct the jury that the statements in the affidavit for a continuance, of what the witnesses would testify, were to be taken as true, and if the court failed so to instruct them, then it was the duty of the appellant to except to the adverse ruling. His failure to do this was a waiver of the error, and he can not now be heard to complain of it.

The part of Susan Fugate's affidavit refused to be read was that wherein the statements tended to contradict the evidence of Stephen Crawford, a witness for the Commonwealth. Crawford testified that he saw the defendant shoot down the decedent, take from the body of the prostrate man his pistol and fire it twice in the ground, and then replace it in the holster. Now, when Crawford was asked if he did not make a statement different from this in the presence of Mrs. Fugate, he admitted that he had, and undertook to explain his inconsistent statements by saying that his first statement was made under fear of his life. The witness having thus admitted that he had, before the trial, made the very statements which the affidavit of Mrs. Fugate would have established, there was no basis for the contradiction, there being nothing to contradict. The court, therefore, properly ruled as to the affidavit, precisely, as if the witness had been present. If Mrs. Fugate had been on the witness stand, she could not have been asked to contradict Crawford, he having admitted making the inconsistent statements claimed by defendant. Conceding that the court should have allowed her affidavit as to the prior possession of money by the defendant to be read, all of this had been shown by the statements of the affidavit as to what other witnesses would have said if present, and admitted to be true by the Commonwealth. It having been thus admitted that the defendant had, prior to the time of the tragedy, even more money than Mrs. Fugate would have said he had, he was not injured by the court's refusal to allow that part of her affidavit to be read to the jury.

There is no complaint of the instructions given by the court, but instruction No. 2, which relates to voluntary manslaughter, is absent, and the clerk certifies that the reason it was not copied in the transcript is that it had been lost. It was appellant's duty to bring up the whole record, and in the absence of the instruction mentioned, we must assume that, as given, it was correct, and supports the judgment of the trial court.

Judgment affirmed.

MARTIN, BY, &c. v. SMITH, &c.

(Filed May 22, 1908—Not to be reported.)

1. Action of Widow for the Killing of Her Husband—Can not Control so as to Defeat Recovery by Children—A widow may dismiss an action for the killing of her husband, as provided by section 4, Kentucky Statutes, in so far as she is concerned, but she can not do so as to defeat the action of her children; nor will it bar an action instituted by them within the proper time.

2. Same—Design of Statute—The statute was designed to benefit the children as well as the widow.

3. Attorneys—Claim Of—The petition of the attorneys of Mrs. Martin presented a good cause of action and the court should have permitted it to be filed. (29 Ky. Law Rep., 804.)

R. S. Rose for appellants.

Appeal from Whitley Circuit Court.

Opinion of the court by Judge Carroll, reversing.

America Martin, as the widow of Demps Martin, filed her petition in the Whitley Circuit Court against appellee, Burrel Smith, and his sureties, in the bond executed by him as marshal of the City of Corbin. The action was brought under section 4, of the Kentucky Statutes, providing that:

"The widow and minor child, or either or both, of a person killed by the careless, wanton, or malicious use of fire arms, * * * not in self-defense, may have an action against the person who committed the killing; and all others aiding or promoting or any one or more of them; and in such actions the jury may give vindictive damages."

It was averred in the petition that Burrel Smith shot and killed Demps Martin, and that the shooting and wounding was done unlawfully, wantonly, maliciously and not in the necessary or apparently necessary self-defense of Smith. That Martin, at the time, was not suspected of having committed a felony in this State or out of it; and was not guilty of any violation of the laws. She asked judgment for \$20,000.

At the first term after the petition was filed, the infant children of Demps Martin by their next friend, filed an amended petition against the parties sued by America Martin, in which they sought the same relief as she did.

On the day the amended petition was filed, the defendants in the petition of America Martin filed the following verified writing, and moved the court to dismiss the action:

"The plaintiff, America Martin, states that since the filing of this action, she has thoroughly investigated the same, and finds that she has no cause of action which she desires to prosecute; that she has directed her attorney, R. M. Rose, to dismiss this action; that she now directs said attorney to dismiss same. She further states that she made this statement without any consideration whatever from the defendant, Burrel Smith, or any of his sureties, named in said action, or any other person; that no offer of compromise has been made or accepted by either this plaintiff or either of the defendants in this action, and she now moves the court to dismiss said action, provided her said attorney does not do so."

On another day of the term, and before this motion was disposed of, the infant children appeared in court, and asked that they be made parties plaintiff and be permitted to prosecute the action in the name of their next friend.

The court overruled the motion of the infant children to permit them to prosecute the action in the name of their next friend, and also overruled the motion of the attorneys of Mrs. Martin, who tendered a petition to be made parties, that will be presently noticed, and sustained the motion of America Martin, and dismissed the action. From this ruling the infants and the attorneys of America Martin prosecute this appeal.

The petition of the attorneys of America Martin, which was tendered after the writing signed by her was filed, asking that her petition be dismissed, set up in substance that America Martin had placed her claim for damages in their hands to bring suit thereon—that in obedience to her direction they had filed the petition before mentioned in her name—that under the contract of employment they were to be paid a reasonable fee for their services, which would be \$2,500—that after summons issued on the petition had been executed, the writing that resulted in the order of dismissal was executed. They further averred that, by the terms of the settlement, which was made without their knowledge or consent, America Martin was to and did receive from the defendants, money and other things

of value, or that the defendants and America Martin fraudulently agreed between themselves, to compromise the suit with the fraudulent purpose of depriving them of their fee, and that the settlement was not made in good faith. That one of these states of case was true, but they did not know which one was true. They asked that they be made parties to the action, and that their petition be treated as a cross-petition against the defendants, and that they recover of them \$2,500.

Taking up first the appeal of the infants. Under the statute *supra*, the action may be brought by the widow and minor child, or children, jointly; or, by the widow alone; or, by the minor child or children, alone; or, if there be neither widow, child nor children, by the personal representative of the intestate. (*Howard v. Hunter*, 31 Ky. Law Rep., 1092.) If the action is brought by the widow alone, the minor child or children, appearing by their guardian or next friend, have the right to be made parties plaintiff. The widow can not control the action so as to defeat a recovery by the minor child or children. She may, of course, dismiss it in so far as she is concerned, but the dismissal as to her will not be permitted to interfere with its prosecution by the child or children, if they are parties to it; nor will it bar an action instituted by them within the proper time. The statute was designed to benefit the children as well as the widow—the recovery, if any, being for their joint benefit. Therefore, we are of the opinion that the court erred in refusing to permit the infants to prosecute the action in their name.

In respect to the claim of the attorneys of America Martin, their petition stated a good cause of action against the defendants, and under the authority of *Proctor Coal Co. v. Tye & Denham*, 29 Ky. Law Rep., 804, the court should have permitted it to be filed, as it was offered before the action had been dismissed.

Wherefore, the judgment is reversed, with directions to proceed in conformity with this opinion.

CUMMINGS' ADM'R v. I. C. R. R. CO.

(Filed May 22, 1908—Not to be reported.)

Railroads—Killing of Trespasser—Lookout Duty—This case is, in its essential facts, identical with *N., C. & St. L. Ry. Co. v. Bean's Executor*, ante, which is conclusive of this. The judgment, is therefore, affirmed.

H. F. Turner and Lucas & Gilbert for appellant.

Trabue, Doolan & Cox, J. M. Dickinson, Corbett & White and Robbins & Thomas for appellees.

Appeal from Ballard Circuit Court.

Opinion of the court by Judge Barker, affirming.

John D. Cummings, while walking across a trestle of the Illinois Central Railroad Company, situated in Ballard county, Kentucky, was run over and killed by one of its trains. His son, Chester Cummings, qualified as his administrator and instituted this action to recover damages for the death of his father.

The accident occurred in the country, and not at a place where the decedent had a right to be. He was, therefore, a trespasser, and, under the principle well settled by this court in many cases, the employes of the corporation owed him no duty except to exer-

cise ordinary diligence to prevent injuring him after his peril was discovered. There was no evidence adduced to show that the employes in charge of the train, after the decedent was seen upon the trestle, failed in the performance of any duty which they owed to him. On the contrary, the engineer, who was put upon the stand by the plaintiff, testified positively that, immediately upon seeing the decedent upon the trestle, he reversed his engine, sanded the track, and did everything that was possible to prevent the accident. He said that his vision was much obstructed by a hard driving snow, which was falling at the time. There was some testimony in addition, which tended to establish the fact that it was not snowing. The witnesses who testified as to this did not see the decedent, and were some distance from the railroad, and their testimony, if true, would not contradict the engineer on the essential point. The real question was, whether or not, after the engineer actually saw the decedent, did he fail to exercise ordinary diligence to prevent his injury? Whether his failure to see him was from inattention or from blinding snow, was entirely immaterial. The engineer owed the decedent no lookout duty, and was not, therefore, chargeable with negligence for not seeing him or not looking down the track so that he might have seen him. The engineer, who was a witness for the plaintiff, says that, after he saw the decedent, he did everything in his power to prevent the accident, and nothing in this record contradicts him on this point.

This case, in principle and in all essential facts, is identical with that of *N., C. & St. L. Ry. Co. v. Bean's Ex'or*, decided May 8th, 1908, and the opinion in that case is conclusive of this.

Upon the close of the testimony for plaintiff, the trial judge awarded a peremptory instruction to the jury to find for the defendant. This ruling was correct, and the judgment is, therefore affirmed.

BRANDENBURGH v. ROSE.

(Filed May 22, 1908—Not to be reported.)

1. Homestead—Rule as to—The rule is well settled that where the owner of a homestead sells it, and with the proceeds buys another, the right to a homestead in the second tract is good against intervening creditors.

2. Same—Pleading—But in this action to be adjudged a homestead in the land in controversy, the petition does not state a cause of action and the demurrer to it should have been sustained, for the reason that it does not allege that he was occupying the property at the time of the levy of the execution and sale of the land, as a homestead, or that at that time it constituted his homestead.

S. P. Stamper for appellant.

Hazelrigg, Chenault & Hazelrigg and J. K. Roberts for appellee.

Appeal from Lee Circuit Court.

Opinion of the court by Judge Barker, affirming.

Appellee, G. B. Rose, obtained judgment against appellant, Thomas Brandenburg, for \$108.35. Execution issued on the judgment and was levied upon a tract of land containing seventy-five acres, situated

in Lee county, Kentucky, and, at sheriff's sale, was bought in by the execution plaintiff for the sum of \$186.68, that being the amount of the debt, interest and cost upon the judgment. Afterwards, the appellant (execution defendant) instituted this action against the appellee (execution plaintiff), describing the land and alleging it to be worth less than one thousand dollars, and that the appellant was a bona fide housekeeper with a family, using and occupying the land as a homestead, and praying that he be adjudged a homestead therein. A general demurrer was filed to the petition and overruled, whereupon appellee filed an answer, controverting all of the allegations of the petition. Upon the trial of the issues thus formed, the chancellor dismissed the petition; and of this the appellant is complaining.

The evidence shows that, while the particular tract of land involved here, was acquired after the creation of the debt to pay which it was sold, the execution defendant, prior to its creation, owned and occupied a homestead in Owsley county, Kentucky, and with the proceeds of the sale of that homestead, he purchased the land involved here; therefore, in contemplation of law, the right to the homestead, so far as the purchase of the land is concerned, antedates the creation of the debt, as the rule is well settled, that, where the owner of a homestead sells it and with the proceeds buys another, the right to a homestead in the second tract of land is good against intervening creditors.

Nor do we think the position of appellee is sound, that appellant abandoned his home by temporarily removing to Beattyville, for the purpose of educating his children, with the fixed purpose of returning again to his home. The facts shown do not constitute an abandonment, and the debtor did not lose his right to a homestead by his temporary removal. He left a tenant in possession to occupy the homestead for him, and with the proceeds supported his family in Beattyville while he was educating his children. This was a laudable purpose, and it is not the policy of the law to strain a principle in order to make a debtor lose the benefit of his homestead exemption. (*Herring v. Johnson*, 24 Ky. Law Rep., 1940; *Galloway v. Rowlett*, Id., 2503.)

But the difficulty with appellant's case is that his petition does not state a cause of action. After alleging the ownership of the property which is described by metes and bounds, he says: "That he is a bona fide housekeeper with a family, using and occupying said tract of land as a homestead; that said tract of land is worth less than \$1,000, and the only real estate owned by plaintiff, and that the same is exempt from execution sale." * * * He then sets forth the procedure under the execution leading up to the sale of the property and the purchase by the judgment-debtor; but he nowhere alleges that he was occupying the property, at the time of the levy of the execution and the sale of the land, as a homestead, or that it constituted at that time, his homestead. The allegations of the petition with reference to appellant's being a bona fide housekeeper with a family, all relate to the present—i. e., to the time of the filing of the petition—and can not, by the intendment, be made to relate back to the time of the execution levy and sale. The court should have sustained the general demurrer, and, upon failure to amend, dismissed the petition.

For this reason, alone, the judgment is affirmed, but this will not prejudice appellant's right to institute another action for the recovery of his homestead.

KENTUCKY UNION CO. v. COMMONWEALTH.

(Filed May 22, 1908—To be reported.)

Revenue and Taxation—Act of 1906—Delinquent Taxes—Liability of Taxpayer—For Subsequent Years—Construction of Act—There can be no objection to article 3, of chapter 22, of the acts of the Kentucky Legislature of 1906, relating to revenue and taxation, on the ground that it is an ex post facto law, in so far as said article applies to the years subsequent to 1906. The delinquent's liabilities for those years are to be measured by his liabilities if he has volunteered to list and pay his taxes, and it follows that the article, in so far as it requires the payment of interest and penalties for the years 1902, 1903, 1904, 1905 and 1906, is inoperative, and the delinquent for those years would be required to pay only taxes without interest or penalties, but the elimination of the interest and penalties for those years does not affect the other provisions of the article with respect to those years or years subsequent thereto.

W. B. Dixon, L. B. Wehle and C. K. Calvert for appellant.

James H. Jeffries and Ira Fields for appellee.

Appeal from Leslie Circuit Court.

Judge Lassing delivered the following response to petition for re-hearing:

Complaint is made in the petition for re-hearing that the opinion herein fails to state whether or not article 3, of chapter 22, of the acts of 1906, violates the Constitution of the United States. This question was fully considered and passed upon in the recent case of the Eastern Kentucky Coal Lands Corporation v. Commonwealth, 32 Ky. Law Rep., 129, and it was there held that the said article was not violative of any of the provisions of the Constitution of the United States. It is specifically urged that article 3 violates section 10, of article 1, of the Federal Constitution, in that it impairs the obligations of a contract, and the compact with Virginia is cited as the contract claimed to have been impaired.

Complaint is also made that said article violates section 1, of the Fourteenth Amendment, in that it deprives the owner of his property without due process of law, or that it denies to some persons the equal protection of the law, and also that it is violative of clause 1, section 10, article 1, of the Federal Constitution, which denies the right of any State to pass an ex post facto law. In none of these contentions do we concur. We see no reason for receding from the conclusions reached upon these several points in the case of the Eastern Kentucky Coal Lands Corporation v. Commonwealth, above cited.

There can be no serious objection to article 3 on the ground that it is an ex post facto law, in so far as the said article applies to years subsequent to 1906. But, it is insisted that as the act declares that delinquency for the years 1902, 1903, 1904, 1905 and 1906, shall be cause for forfeiture, which might have been removed on or before January 1, 1907, by the payment of the taxes and interest and penalties provided by law for the redemption of land sold for the non-payment of taxes, it visits upon the delinquent greater penalties than he was subject to prior to the passage of the act.

This would be true if the delinquent had voluntarily paid the taxes for those years; but the result is not necessarily the same had the delinquent been proceeded against by an officer authorized by law to collect back taxes; however, we are of opinion that the delinquent's liabilities for those years are to be measured by his liabilities had he volunteered to list and pay his taxes. It, therefore, follows that

the article, in so far as it requires the payment of interest and penalties for the years 1902, 1903, 1904, 1905 and 1906, is inoperative, and the delinquent for those years would be required to pay only taxes, without interest or penalties. But, for the reasons and upon the authorities cited in the opinion and consistent with the rulings of this court, the elimination of the interest and penalties for the years 1902, 1903, 1904, 1905 and 1906, does not affect the other provisions of the article with respect to those years, or years subsequent thereto.

As the appellant is under no disability, does not claim under a grant from the State of Virginia, and did not seek to list its property, or offer to pay the taxes for the years 1902, 1903, 1904, 1905 and 1906, either with or without interest and penalties, we hesitated in the opinion to pass specifically upon these questions raised by it. However, out of the consideration entertained for the eminent counsel presenting them, we have expressed our views upon these points, in order that he may have the benefit of specific adjudication thereon.

The petition for re-hearing is overruled.

WOBBLE, &c. v. FINCH, &c.

(Filed May 22, 1908—Not to be reported.)

New Trials—Motion For—Provision of Civil Code—The judgment complained of was rendered at the May term, and the motion to set it aside and grant a new trial was made the following September term. Under section 340, Civil Code, the motion came too late. However, it appears from the affidavits that a case was made out under section 518, of the Civil Code; but the lower court was authorized to grant the relief sought under section 340, of the Code.

R. T. Colston for appellants.

J. B. White for appellees.

Appeal from Wolfe Circuit Court.

Opinion of the court by Judge Carroll, affirming.

In February, 1907, appellants, who are citizens of Louisville, Ky., brought this action in the Wolfe Circuit Court against the appellees, to recover an undivided one-eighth interest in a tract of land, situated in Wolfe county. They averred that the appellant, Ida Wobble, was entitled to it by inheritance from her father, George W. Asburry, who died, leaving surviving him eight children.

At the following May term of the court, the defendants filed an answer, denying that appellant, Ida Wobble, was entitled to any interest in the land. No reply being filed, or other motion made by the plaintiff, when the case was called for trial at the May term of court, a jury was empaneled to try the issue, and a verdict was returned for the defendants, now appellees. Upon this verdict a judgment was rendered in conformity thereto.

At the September term, 1907, the appellants, who were plaintiffs below, appeared in court, and, after tendering a reply, moved the court to set aside the judgment and grant them a new trial. The grounds relied upon being first, that they and their attorney were prevented by accident and surprise, which ordinary prudence could not have guarded against, from attending the May term of court, or being present at the trial of the action; second, that they had a just and meritorious cause of action against the defendants. In addition

to these grounds, others of a purely technical nature were relied upon. In support of the ground first mentioned, R. T. Colston and J. D. Atkinson filed their affidavits.

After considering the motion, the court overruled the same, and from that ruling this appeal is prosecuted.

Under the Code provisions with reference to a new trial, the application came too late. It is provided in section 342 that:

"The application for a new trial must be made at the term at which the verdict or decision is rendered, and, except for the cause mentioned in section 340, sub-section 7, shall be within three days after the verdict or decision is rendered, unless unavoidably prevented."

If a person making the motion is "unavoidably prevented" from making the same within the three days, it may be made at any time during the term. But the words "unavoidably prevented" do not extend the time for making the application beyond the term. If a party lets the term at which the judgment is rendered go by, then he must look to other provisions of the Code for relief. (*L. & N. R. R. Co. v. Paynter*, 31 Ky. Law Rep. 163.)

In the case before us, it appears from the affidavits filed that the appellant has made out a case authorizing the granting of a new trial under section 518, of the Code, providing that the "court in which a judgment has been rendered shall have power after the expiration of the term to vacate or modify * * * for unavoidable casualty or misfortune preventing the party from appearing or defending." But the lower court was not authorized by motion for a new trial, under section 340, to grant the relief sought.

Wherefore the judgment is affirmed.

MANN BROTHERS v. JENKINS.

(Filed May 26, 1908—Not to be reported.)

Homestead—Adjoining Tracts—Husband and Wife—Where a husband and wife own adjoining tracts of land, which are cultivated as one farm, the fact that the dwelling house in which they reside is located upon the wife's part does not deprive the husband of the right of homestead in the part owned by him, as they are regarded as living upon his land within the meaning of the homestead law.

Vance & Heilbronner for appellants.

Appeal from Henderson Circuit Court.

Opinion of the court by Wm. Rogers Clay, Commissioner, affirming.

The Nelson Manufacturing Company, of St. Louis, Missouri, obtained judgment against T. M. Jenkins & Son and the appellants, Mann Brothers, in the Henderson Circuit Court. Thereafter the judgment was assigned to appellants. The latter caused an execution to be issued on said judgment, and the sheriff levied the execution upon a certain lot of ground, the property of T. M. Jenkins, in the city of Henderson, Kentucky, fronting 25 feet on Third street and extending back a distance of 185 feet. On April 14, 1903, appellee filed his petition in the Henderson Circuit Court, claiming the property levied on as his homestead, and seeking to enjoin the sale under appellant's execution. The petition alleges that plaintiff is a bona fide housekeeper with a family, a resident of this Com-

monwealth; that he now resides and for many years has resided with his family, upon the parcel of land in question; that the house and lot levied upon by the defendant are not worth, and are not of the value of \$1,000, and that said property is exempt to him as a housekeeper with a family. On September 9th, 1903, appellants filed an answer to the effect that there had never been a residence upon the lot of ground mentioned in plaintiff's petition and upon which the execution was levied, and denying that the plaintiff or his family had ever resided upon said parcel of ground, or that it was exempt to him as a housekeeper with a family. Proof was taken and the cause submitted to the chancellor, who adjudged that the property levied upon was not worth \$1,000, and that appellee was entitled to a homestead therein. The court also entered judgment enjoining the appellants from selling the property. From this judgment Mann Brothers appealed.

It appears from the record that the 25 feet levied on as the property of appellee, adjoins a lot fronting 75 feet on the same street, belonging to appellee's wife. Upon this lot of 75 feet, is a house which is occupied by appellee and his wife. Both the 75 feet and the 25 feet are in one enclosure. Appellee uses the 25 feet as a garden. It does not appear exactly when appellee conveyed the 75 feet to his wife. When asked when the conveyance was made, he stated he could not remember—that the deed would show. He does state, however, that the two pieces of property had been listed separately by him and his wife for several years. Appellee and his wife had resided upon the 100 feet of land for fully 40 years.

The law is well settled in this State, that, where a husband and wife own adjoining tracts of land which are cultivated as one farm, the fact that the dwelling-house in which they reside is located upon the wife's part of the land does not deprive the husband of the right to homestead exemption out of that part of the land owned by him, as they are to be regarded as residing upon his land within the meaning of the homestead law. (*Mason v. Columbia Finance & Trust Co.*, 18 Ky. Law Rep., 40.) And in the case of *Summers v. Sprigg*, 18 Ky. Law Rep., 206, it was held that, where a debtor moved from the tract of land owned and occupied by him as a homestead, to a tract owned by his wife, which was separated from his land, only by a public road, and used both tracts as though they were contiguous, it could not be said that he had abandoned his homestead; but his land being worth less than \$1,000, he was entitled to have it set aside to him as a homestead.

Appellants contend that appellee did not fix the time of the conveyance of the 75 feet to his wife, and that if the conveyance was made after the execution levy—the two pieces of property being worth more than \$1,000—appellee would not be entitled to homestead in the 25-foot lot. While it is true, that appellee did not state the time, and said he did not remember when the deed was made, but that the deed itself, which was lodged in the clerk's office, would show, it does appear from his testimony that he had listed the two tracts—the 75 feet to his wife and the 25 feet to himself—for a number of years. We think this testimony was sufficient to make out a prima facie case for appellee, and it was then incumbent upon appellants to show that the conveyance had, as a matter of fact, been made after the levy of the execution. Furthermore, the evidence fully showed that the only property owned by appellee was the 25 feet in question, and if appellants intended to rely upon a fraudulent conveyance by him to his wife, such fraud should have been pleaded and proved.

Judgment affirmed.

BOLTON v. AYERS, &c.

(Filed May 26, 1908—Not to be reported.)

Office and Officer—Action Against for Killing Person—Who May Maintain—As the right of action, under section 4, Kentucky Statutes, is made to vest in the widow or minor child, or in both, the appellant in this case, being one of the real parties in interest, it was not necessary to join either the town of Jellico or the Commonwealth, as plaintiff, and in this action against the marshal for the killing of deceased, the trial court erred in sustaining a special demurrer to the petition.

R. S. Rose for appellant.

Appeal from Whitley Circuit Court.

Opinion of the court by Wm. Rogers Clay, Commissioner, reversing.

Appellee, James Ayers, who was marshal of the town of Jellico, Kentucky, shot and killed Sampson Bolton. Thereafter, Martha Bolton, instituted this action for damages against appellee, James Ayers, and also appellees, Richard Perkins and B. M. Rose, sureties on the bond which said Ayers had executed to the town of Jellico for the faithful performance of his duties as marshal. Appellees filed a special demurrer to the petition, which was sustained. Subsequently appellant offered to file an amended petition, making the Commonwealth of Kentucky a party plaintiff, and asking that the action be prosecuted in the name of the Commonwealth of Kentucky, for her use. The court declined to permit the amended petition to be filed. To reverse the ruling of the court, Martha Bolton prosecutes this appeal.

By section 4, of the Kentucky Statutes, the widow and minor child, or either or both of them, of a person killed by the careless, wanton or malicious use of fire arms or other deadly weapon, are given a right of action against the person who committed the killing. By section 3690, the marshal of a sixth class town is required, before he enters upon the duties of his office, to execute a bond with approved sureties, to such town, in the sum of \$1,000, conditioned for the faithful performance of his duties; and for any unlawful arrest and unnecessary or cruel beating or assault upon any person in making an arrest, he and his sureties shall be liable to the person so injured on said bond. Section 18, of the Code, provides that every action must be prosecuted in the name of the real party in interest, except as provided in section 21. As section 3690, of the statutes, provides that the sureties on the bond shall be liable, in case of unnecessary or cruel beating or assault upon any person by the marshal of the town, to the person so injured, and, as the right of action, where the injury is such as to result in death is, by section 4, supra, made to vest in the widow or minor child, or in both, and, as the appellant in this case is one of the real parties in interest, we conclude that it is not necessary to join as plaintiff either the town of Jellico or the Commonwealth of Kentucky. The trial court, therefore, erred in sustaining the special demurrer to the petition.

Judgment reversed and cause remanded, for proceedings consistent with this opinion.

DENHAM, EX PARTE, ON PETITION.

(Filed May 26, 1908—Not to be reported.)

This appeal from an order of the judge of the lower court, overruling Denham's motion to qualify as Commonwealth's attorney, must be dismissed because neither the judge of the court below nor the acting Commonwealth's attorney is before the court, and no reason is shown for holding that the ruling of the court below was incorrect.

Hazelrigg, Chenault & Hazelrigg for petitioner Denham.

Greene & VanWinkle for Circuit Judge Moss.

Appeal from Whitley Circuit Court.

Opinion of the court by Judge Barker, dismissing appeal.

On the 5th day of December, 1907, G. A. Denham appeared in the Whitley Circuit Court with a commission of the then Governor of the Commonwealth, J. C. W. Beckham, appointing him to fill a supposed vacancy in the office of Commonwealth's attorney for the 26th judicial district of Kentucky, and requested that his commission be spread upon the records of the court, and he be allowed to discharge the duties of the office. His motion was overruled by the circuit judge, who gave several reasons for so doing, and, among them, that there was no vacancy in the office to be filled by the Governor's appointment, as an election had been held in the district, at the regular election in November, 1907, and one, Joseph B. Snyder had been elected to the office of Commonwealth's attorney, and was then filling the duties thereof. From the order overruling his motion, G. A. Denham prosecutes this appeal.

We know of no authority for such a procedure on the part of the ex parte petitioner. If he is entitled to the office of Commonwealth's attorney for the 26th judicial district and is prevented by any one from discharging the duties thereof, then he should institute a proper action against them, and create such issue or issues of law or fact as may be necessary to enable the court judicially to pass upon his legal rights. Neither the circuit judge, M. J. Moss, nor Joseph B. Snyder, the acting incumbent of the office, is before the court. Certainly we can not determine in this proceeding anything that would be detrimental to the title of Mr. Snyder as to his claim to the office in question, under his election; and no reason whatever is shown for holding that the ruling of the circuit judge was incorrect. Every intendment must be taken to support the validity of the judgment appealed from.

For these reasons, the appeal is dismissed.

PACE v. CAWOOD.

(Filed May 26, 1908—Not to be reported.)

Vendor—Age Of—Where Obtained Purchase Price—Appellant sold the land and received the purchase price upon the faith and credit of his verified statement that he was 21 years of age, and in view of this he will not be permitted to controvert the statements of his affidavit to the prejudice of the person dealing with him.

Isham G. Leabow for appellant.

H. C. Clay and J. B. Carter for appellee.

Appeal from Harlan Circuit Court.

Opinion of the court by Judge Carroll, affirming.

The only question in this case is whether or not the appellant was twenty-one years old in April, 1903, when he conveyed to the vendor of appellee, a tract of land.

In his petition, seeking to have the conveyance cancelled and be restored to the possession of the land, appellant avers he was born in March, 1884, and consequently did not become twenty-one until March, 1905, some two years subsequent to the execution of the conveyance. On the other hand, appellee's contention is that he was born in February or March, 1882, and was more than twenty-one years of age when he made the deed. The evidence as to his age is not entirely satisfactory.

Before the deed was made, the purchaser required appellant and his mother to make affidavits as to his age, and both of them signed and swore to statements that he was twenty-one years old on the 22d day of March, 1903. Appellee says he was induced to adopt this course, because Pace had previously repudiated a contract upon the ground that he was an infant, and he desired the affidavits to protect himself in the event Pace attempted to avoid the contract with him.

Pace and his mother, in their evidence, say they did not know how old he was in 1903, or in what year he was born.

In the county clerk's office there is kept a record book known as the "Marriage Bond Record," containing the names of persons who obtain license to marry, and other evidence touching their age and residence. The county clerk testified that pages 102, 104 and 106 of this record book contained records relating to marriage licenses issued on May 2d, May 3d, and May 5th, 1883. Page 108 of the book was torn out, as was also the index page containing the letter "P." The inference drawn from this book by the attorney for appellant, is that page 108 contained a record of the marriage of the parents of appellant, and that following pages, 102, 104 and 106, page 108 would establish that they were married sometime in May, 1883. It is also in evidence that page 108 was in the book about the time this action was instituted, and contained a record showing that appellant's parents obtained a license to marry on the 9th of May, 1883; but that a few months afterwards, when the record was again inspected, page 108 was missing, as was the index page devoted to the letter "P."

If appellant's parents were married in May, 1883, he was only twenty years of age in April, 1903, when the deed was executed; and the conclusion is drawn that the missing pages were taken from the book by some person interested in concealing the date of the marriage of the parents of appellant. But the evidential force of this record book is materially weakened by that fact that on page 110, there is an entry dated December 1, 1882. on page 112, one dated December 13, 1882, and on page 114 one dated December 26, 1882. Thus, demonstrating that the marriage entries were not recorded in the book in regular order of time. If they had been, the 1882 records on pages 110, 112 and 114 would have preceded the 1883 records on pages 102, 104 and 106. If, however, Pace was in fact only twenty when he executed the deed, his minority would not avail him in this case. He made an affidavit that he was twenty-one years of age at the time he executed and delivered the deed he is now seeking to cancel, and received the purchase price which he claims to have spent before reaching the age of twenty-one, and upon the faith of his sworn statement, the vendee was induced to make the

purchase. In addition to the affidavit there is evidence that Pace was permitted to vote at the regular election in 1903, upon his statement that he was more than twenty-one.

The evidence is not sufficient to justify us in saying that the purchaser knew that Pace was not of age; and having obtained the purchase Price upon the faith and credit of his verified statement that he was twenty-one years of age, he will not be permitted to controvert it to the prejudice of the person dealing with him. (*Harris v. Ronk*, 32 Ky. Law Rep., 967; *Schmitheimer v. Elseman*, 7 Bush, 298; *Ingram v. Isom*, 26 Ky. Law Rep., 48.)

Without further extending this opinion in repeating the conflicting evidence introduced for and against the proposition that appellant was twenty-one years of age when he executed the deed, we are not disposed to disturb the finding of the lower court that he was twenty-one or if not, that under the circumstances, he is estopped from depending on his infancy to practice a fraud.

Wherefore, the judgment of the lower court is affirmed.

TOLER'S HEIRS v. TOLER.

(Filed May 26th, 1908—Not to be reported.)

1. Lands—Suit to Divide—Pleading—The petition in this action fails to conform to section 499 of the Code. The statements are mere conclusions of the pleader and are not sufficient to show title.

2. Dismissal of Action—Does Not Preclude Another Action—In certain State of Case—The petition having been dismissed because it does not state a cause of action, plaintiffs are not precluded by the judgment from bringing another action to divide the land.

Stone & Wallace for appellants.

Appeal from Wayne Circuit Court.

Opinion of the court by Wm. Rogers Clay, Commissioner, affirming.

O. U. Toler instituted this action against G. C. Toler, for a division of a certain tract of land situated in Wayne county, Kentucky. Thereafter, O. U. Toler died and the action was revived in the name of his heirs, J. W. Toler, R. H. Toler, U. W. Toler and Sarah Toler. The petition states that one, A. J. Toler died the owner of, and in possession of, the tract of land in question; that after the death of said A. J. Toler, and within ten months from the time of his death, there was born to him a child, James Jackson Toler, who lived but a short time, and died in Wayne county, Kentucky, under twenty-one years of age, and who inherited said tract of land from his father, A. J. Toler; that at the death of said James Jackson Toler, the title to said tract of land descended to, and vested in O. U. Toler and G. C. Toler, brothers of A. J. Toler, deceased, and Arcy Toler and Sarah Toler, sisters of said A. J. Toler—they being the uncles and aunts of said James Jackson Toler—subject to the homestead rights of James Jackson Toler's mother, Minerva Jane Toler; that some time thereafter, Minerva Jane Toler, widow of said A. J. Toler, sold and by deed conveyed her life interest in said tract of land to defendant Granville C. Toler; that Arcy Toler and Sarah Toler, aunts of James Jackson Toler, deceased, sold and conveyed to the defendant, Granville C. Toler, their undivided interests in said tract of land; that plaintiffs are entitled to only one-fourth of the tract of land, and the defendant, Granville C. Toler, to three-fourths of said tract. The petition then concludes with a prayer

for a division of the tract of land according to the respective interests of the plaintiffs and defendant. To the petition the defendant, G. C. Toler, filed an answer denying that the plaintiff or his heirs owned any interest in the property in question, and also pleading the fifteen years' statute of limitation. Upon final submission of the case, the court held that the defendant had failed to sustain his plea of limitation, but dismissed the petition of plaintiffs upon the ground that it did not state a good cause of action. From a judgment so entered, both the plaintiffs and defendant appealed.

Counsel for appellants earnestly contend that their pleadings conform to the provision of section 499, of the Civil Code. That provision, however, requires that the written evidence of the title to the land, or copies thereof, if there be any, must be filed with the petition. In attempting to comply with this provision, appellants had filed certain deeds, but these deeds, in and of themselves, fail to show title in appellants. The petition further failed to show that James Jackson Toler left no issue; and also failed to state that the deceased left no brothers or sisters or other heirs who, by the law of descent and distribution, would have inherited before appellants. In an action brought pursuant to section 499, either written evidence of the title should be filed or the petition must state facts which show title, and these facts must be proved. In this case the allegation that the tract of land descended to, and vested in the plaintiff and defendant, brothers of said A. J. Toler, and Arcy Toler and Sarah Toler, sisters of said A. J. Toler, and the further allegation that plaintiff was one of the legal representatives and heirs at law of said James Jackson Toler, deceased, are simply conclusions of law, and do not state facts sufficient to show title. This very question was before this court in the case of *Larue, &c. v. Hays, &c.*, 7 Bush, 50, wherein a division of land was sought. The court said:

"It is insisted for the appellants that although the relationship of Phoebe Larue to Isaac Larue was not alleged or proved, and her title was expressly denied by the defendants, yet as it was alleged in the petition, and not admitted or denied by the defense, that she was 'one of the heirs' of the patentee, and as it was not controverted that some of the defendants held under the heirs of Isaac Larue through Neill and others, and it does not appear that they acquired the interest of Phoebe Larue and her husband in any other mode than through their deed to Neill and Rust, they must now, since the termination of such estate as James Larue had, be regarded as holding the land as the co-parceners of the plaintiffs, and subject to their right to a partition.

"But we are of opinion not only that the plaintiffs have failed to manifest their right to any recovery by any sufficient evidence of title, but that the petition is fatally defective, so far as it purports to allege the derivation of title by Phoebe Larue by inheritance from Isaac Larue—the averment that she was one of his heirs being but a conclusion of law, as this court has repeatedly decided, in effect, in passing upon the competency of evidence adduced to prove heirship. (*Banks v. Johnson*, 4 J. J. Mar., 649; *Currie, &c. v. Fowler*, 5 J. J. Mar., 145.)"

The petition of plaintiffs having been dismissed solely on the ground that it did not state a cause of action, they will not be precluded by the judgment from bringing another action.

No brief has been filed for appellee, and we are unable to find upon what ground he seeks a reversal of the judgment below. Suffice it to say, however, that we have examined the pleadings and evidence, upon which his adverse possession is based, and are not inclined to disturb the finding of the chancellor.

For the reasons given, the judgment is affirmed, both on the original and cross-appeal.

CINCINNATI, NEW ORLEANS & TEXAS PACIFIC RY. CO. v. EVANS, ADM'R.

(Filed May 27, 1908—To be reported.)

1. Trial—Statement of Case to Jury—Discretion of Counsel—Review on Appeal—In making a statement of the case to a jury, the matter is to be determined by counsel, and while the court in its discretion, might direct counsel to make a statement, or a fuller statement, when the court deemed it necessary, the court's discretion in a matter of this sort will not be reviewed on appeal.

2. Railroads—Negligently Causing Death of Brakeman—Statement of Conductor—Part of Res Gestae—Competency—A brakeman who was on a freight car, in discharge of his duty, was thrown therefrom by a sudden jerk of the train by the engineer, and run over by the car and killed. In an action by his administrator for damages, a witness stated that in a minute after the accident he went to the engineer and told him he had killed his brakeman, when he replied: "that is the way, whenever I get mad, I either hurt or kill somebody." Held—That the statement of the engineer to the witness was competent evidence as part of the res gestae.

3. Same—Non-resident Railroad—Resident Conductor—Trial—Evidence Heard—Dismissal as to Conductor—Motion for Removal—Delay in Motion—In an action for damages against a non-resident railroad company and its resident conductor, by the administrator of a deceased brakeman for causing the death of the decedent, where, on the conclusion of the evidence, the court, on motion of the defendants, dismissed the action against the conductor, it was too late then for the railroad company to ask that the case be moved to the federal court. A non-resident defendant can not answer without objection, and go through a large part of the trial and then, for the first time, make a motion for such transfer.

4. Same—Defective Petition—Amending Prayer—Discretion of Court—In an action against a railroad company for damage for the alleged killing of a brakeman, where the petition contained no prayer for relief, it was in the discretion of the trial court, after the evidence was heard, on the motion of the defendant for a peremptory instruction, to allow the plaintiff to file an amended petition praying judgment for the sum sued for and all proper relief.

5. Same—Instructions to Jury—Submitting Law and Facts—On the trial of an action against a railroad company by the administrator of a deceased brakeman, for causing decedent's death, it was error in the trial court to instruct the jury that "if the death of the deceased was caused by the gross negligence of the engineer they should find for the plaintiff, provided deceased was at the time in the performance of his duty as brakeman and exercising ordinary care for his own safety," as such instruction fails to inform the jury what the law of the case was as to gross negligence, and thereby the court submits both the law and facts to the jury.

O. H. Waddle & Son, John Galvin and Galvin & Galvin for appellant.

Sharp, Bethurum & Cooper, Catron & Tartar, Hazelrigg, Chénault & Hazelrigg and Wm. M. Catron for appellee.

Appeal from Pulaski Circuit Court.

Opinion of the court by Judge Hobson, reversing.

Logan Evans was a brakeman on a freight train in the service of the Cincinnati, New Orleans and Texas Pacific Railway Co.

When the train reached a station called Flat Rock, the conductor was notified by the station agent, to move a car, which stood on the side track, and put it at another point for loading. There were ten or twelve cars in front of this car. So to do what was wanted, they cut the engine off from the train, and went in with it on the side track and coupled to the cars. They then pulled out these cars, having the car they wanted to move at the rear, and backed in on the main track, where Evans cut off this car from the others, the plan being to put the other ten cars back on the side-track and then to come back with the engine and get this car and put it at the place where it was needed. After Evans had cut off the car the engine pulled up the main track with the other ten cars beyond the switch and the brakeman, who was still at the switch, turned it and signaled the engineer to back down on the side-track. This he did, and when the cars were backed in on the side-track, and reached the point where Evans was standing, he got up on the car furthest from the engine and was standing about the middle of the car when a man named Williams, who was loading a car a little lower down, called to him not to let those cars bump against the car he was loading. At this Evans started to the brake at the rear end of the car, and when he was within ten or fifteen feet of the brake, the engineer stopped the engine, giving the car on which Evans was, such a jerk that he was thrown over the end of the car, although he was ten or fifteen feet from it. He tried to catch on the brake, but his hold broke and he fell over the end of the car and was run over and killed. This suit was filed by his administrator against the railroad company and the conductor of the train on the ground that his death was caused by their negligence. At the conclusion of the evidence for the plaintiff the court instructed the jury to find a verdict for the conductor, and the case being submitted as to the railroad company on all the evidence, the jury found a verdict against the railroad company for \$7,500. From the judgment entered on the verdict, the railroad company appeals.

When the case was called for trial the plaintiff's attorney declined to make a statement to the jury of the facts which he expected to prove. The defendant's attorney objected to this and asked the court to require the plaintiff to make a statement. The court declined to do so and the defendant excepted. Section 317, of the Civil Code, is as follows:

"When the jury has been sworn the trial shall proceed in the following order, unless the court, for special reasons, direct otherwise:

"1. The plaintiff must briefly state his claim and the evidence which he expects to sustain it.

"2. The defendant must then briefly state his defense and the evidence he expects to offer in support of it.

"3. The party on whom rests the burden of proof, in the whole action, must first produce his evidence; the adverse party will then produce his evidence.

"4. The parties will then be confined to rebutting evidence, unless the court, for good reasons, in furtherance of justice, permit them to offer evidence in chief."

What statement of facts the plaintiff's counsel will make is necessarily a matter for him to decide. He can make it more or less elaborate as he sees proper. Often in practice the statement is made by simply reading the petition to the jury or by stating the substance of it. The court will not usually control the brevity of the statement the council may make; that is, he may make it as brief as he pleases and, therefore, the making of the statement is ordinarily a matter left entirely within the discretion of counsel. Our observation is that in practice the making of the statement is a matter to be determined by counsel, and that the section of the Code is regarded as

prescribing the order of the proceeding rather than as requiring a full statement of the facts to be made by counsel. At any rate, it is a matter resting in the sound discretion of the court, and we do not see how the defendant's substantial rights were injured by the action of the court in refusing to require the counsel to make a statement of the facts which he expected to prove. It is provided in the section that the party on whom rests the burden of proof in the whole action must first produce his evidence. But manifestly, if he declined to introduce evidence, the court would not require him to do so. The purpose of the Code in providing that the parties should each state his case to the jury, is to aid the jury in understanding the facts of the case. The court, in its discretion, might direct the counsel to make a statement, or to make a more full statement, when he deemed it necessary. But his discretion in a matter of this sort, will not be reviewed by this court unless abused.

The plaintiff introduced, as a witness on the trial, Fred C. Crouch, who said that he was sitting about thirty feet from the track and saw Evans thrown from the car and run over; that he at once went to the engine, reaching the engineer in about a minute, and told him he had killed one of his brakemen back there; that the engineer then said: "That is the way whenever I get mad, I either hurt or kill somebody." The defendants objected to this evidence and moved the court to exclude it from the consideration of the jury. The court refused to exclude the evidence and to this they excepted. In *McLeod v. Ginther*, 80 Ky., 399, there was a collision between two passenger trains. To the first man who met him, the conductor of one of the trains said, "I had until 10:10 to make Beards." The evidence was held competent. In *L. & N. R. R. Co. v. Shaw*, 21 Ky. Law Rep., 1041, Shaw had fallen from a passenger train. A man near by heard his cries and went to him. What he then said to this man, the first person to reach him while the departing train was still in sight was held admissible as *res gestae*. In *Brown v. Louisville R. R. Co.*, 21 Ky. Law Rep., 995, the declarations of the plaintiff at the place where she fell were admitted, but her declarations while passing down the street on her way home, were rejected. In *Floyd v. Paducah R. R. Co.*, 23 Ky. Law Rep., 1077, the declarations of the motor-man at the place of the collision, just after the accident, were admitted. In *L. & N. R. R. Co. v. Molloy*, 28 Ky. Law Rep., 1113, a passenger train struck a vehicle at a public crossing. What the driver of the vehicle said to the first man who got to him, and who ran to him as soon as he could, was allowed as *res gestae*. In *Rex v. Foster*, 6 C. P., 325, a statement made by the deceased as to the cause of the accident as soon as he was picked up after he had been run over was admitted as *res gestae*. In *Insurance Co. v. Moseley*, 8 Wal., 379, the deceased went down stairs and when he returned to his room, complained of his head hurting him, and said that he had fallen down the steps. The evidence was admitted as part of the *res gestae*. We do not see how this case can be distinguished from those cited. The statement of the engineer was, in effect, a declaration that he was mad, and that the jerk of the train which threw Evans off was due to this fact. It was not a bare expression of opinion, for the engineer was in charge of the engine and the engine had given the jerk which threw Evans off. The thing that he was explaining was how he came to give the train such a jerk. It is earnestly insisted that the evidence is wholly incredible, but the credibility of the witnesses is for the jury. If the evidence was competent it was properly admitted.

At the conclusion of the evidence for the plaintiff, the conductor, John Bowman, moved the court to instruct the jury to find for him. The court sustained the motion, and when this had been done, the railroad company filed its petition and moved the court to transfer the case to the circuit court of the United States. The court over-

ruled the motion on the ground that it came too late. The act of Congress provides that the motion may be made in the State court "at the time, or at any time before," the defendant is required to answer. The defendant had filed its answer at the previous terms and by not making the motion then, to transfer the case to the United States Court, had waived its right to such transfer. Although the conductor was made a defendant, the railroad company might then have filed its petition, and if it appeared later, that there was no reasonable ground for uniting the conductor in the suit, the court would have ordered the action transferred. But the defendant can not answer without objection and go through a large part of the trial, and then for the first time make a motion of this sort. The case of *Whitcombe v. Smithson*, 175 U. S., 675, is conclusive on this point. The conductor was evidently joined as a defendant on the ground that Evans would not have been hurt if the engine had been cut off from the cars before it was started back, and that the conductor should have done this. But the proof on the trial showed that the conductor had simply told the brakeman what to do, and that he was taking no part in the movement of the train. There was a failure of proof as to the conductor, but the railroad company should have made its motion to transfer the case at the proper time. In that way it would have preserved its rights. (*Dudley v. I. C. R. R. Co.*, 29 Ky. Law Rep., 1029; *Underwood v. I. C. R. R. Co.*, 31 Ky. Law Rep., 595.) But it could not, without objection to the jurisdiction of the State court, file answer to the merits, and after obtaining the judgment of that court on all the questions arising in the case down to the close of the plaintiff's testimony, then ask the removal of the case to another court that it might there relitigate all the questions on which the judgment of the State court had been unfavorable to it. If the objections to the testimony which were made by the defendant had all been sustained, little would have been left of the plaintiff's case. Without asking a removal from the State court it went to trial in that court and attempted to win its case there. When the rulings of the court were unfavorable to it, it could not withdraw the appearance it had entered unequivocally, and ask a removal of the case to the United States Court, to retry these matters there.

When the motion to remove the case to the circuit court of the United States was overruled, the railroad company moved the court to instruct the jury peremptorily for it. This motion was properly overruled by the circuit court, as there was evidence tending to show that Evans, while in discharge of his duty on the top of the car, was, by a sudden jerk of the train, thrown ten or fifteen feet and over the end of the car; that such a jerk is unusual and that there was nothing in the situation to require any such handling of the train by the engineer. After its motion for a peremptory instruction was overruled the defendant introduced its evidence which tended to show that there was no unusual jerk of the train; that the movements of the train were directed by the head brakeman who was the fellow-servant of Evans; that the train was stopped in obedience to his signals, and when the engineer did not know that Evans was on it. There was evidence also tending to show that Evans was under the impression that the engine had been cut loose from the cars, and that the cars were simply being kicked in by the engine; that he was under the impression that the cars would run until he stopped them with the brake; and that he was not on the lookout for the engine to stop them; that there is always more or less slack in a train, and that when the slack is taken up there is more or less jerk in the cars furthest from the engine. At the conclusion of the evidence the defendant renewed its motion for a peremptory instruction, and then called the court's attention to the fact that the plaintiff's

petition contained no prayer for relief. The petition showed that the estate of the deceased was damaged in the sum of \$20,000. It then concluded with these words: "For all proper and general relief." No objection had been made to the petition on the ground that it did not contain a prayer for relief. The reply contained a sufficient prayer. As defense had been made and the proof had been heard, it might well be argued, under section 90, of the Civil Code, that the omission in the petition was not material. But it is not necessary for us to determine this question. The court allowed the plaintiff to file an amended petition, in which he prayed judgment for \$20,000. In this there was no error. The amended petition corrected what was apparently a clerical error in the petition, made perhaps by the copyist. It was not in any sense a material change. The cause of action was the same before it was filed as after. After the amended petition was filed the defendant renewed its motion to remove the case to the circuit court of the United States. This motion was properly overruled, as the amended petition in no way affected the appearance which the defendant had entered to the action.

The court instructed the jury in substance that if Evans' death was caused by the gross negligence of the engineer, they should find for the plaintiff, provided Evans was at the time in performance of his duty as brakeman, and exercising ordinary care for his own safety. In requiring gross negligence on the part of the engineer the court was in error. Where a person does not die, and sues to recover on account of the negligence of his superior servant who is engaged in the work with him, under the rule laid down in this State, gross negligence must be shown. But this action was brought to recover for the death of Evans under the statute, and the statute authorizes a recovery for negligence, although it may not be gross. (Kentucky Statutes, section 6; I. C. R. R. Co. v. Coleman, 22 Ky. Law Rep., 878; Southern Railway Co. v. Otis, 25 Ky. Law Rep., 1686; Cincinnati R. R. Co. v. Cook, 113 Ky., 167.) In this respect the instructions are more favorable to the railroad company than they should have been. But the instructions are subject to this objection that they submit both the law and the facts to the jury. The law of the case is to be determined by the court; the jury are simply to find the facts. The instructions of the court here fail to inform the jury what the law of the case is. In lieu of instructions 1, 3, 4, A and B given, the court should, by its instruction, in substance, have laid down to the jury these propositions.

1. If the engineer negligently gave the cars a jerk which was unusual, unnecessary and so violent as to show a want of ordinary care on his part for the safety of the brakeman in charge of the train, or on it, and by reason of this Evans, while in the performance of his duty as brakeman and exercising ordinary care for his own safety, was thrown from the car and run over and killed, they should find for the plaintiff.

2. Ordinary care is such as a person of ordinary prudence usually exercises under like circumstances. Negligence is the want of such care.

3. If the engineer received a signal from the head brakeman to stop the train, and in obedience to this signal, and as required by it, he stopped the train in the usual manner where such a signal was given; or if Evans was under the impression that the engine had been cut off from the cars and the accident to him was due to this misunderstanding on his part, and not to the negligence of the engineer, as defined in No. 1, or if he was not on the car in the performance of his duty as brakeman, then in any of these events the jury should find for the defendant.

4. Evans, when he entered the service of the railroad company as a brakeman, assumed all the risks of the employment as usually

conducted, including the negligence of his fellow brakemen and such jerks of the cars as resulted from the taking up of the slack in the movements of the cars made with ordinary care by the engineer.

The instructions given on the trial do not sufficiently present the defendant's side of the case. The defendant is not liable to Evans for the negligence of his fellow brakeman, and if the stop was made at his direction, and as required by him, the plaintiff can not recover. So too, if Evans thought the engine had been cut off from the cars, and, acting under this mistake, was off his guard and thus brought about the accident, there can be no recovery; for the engineer was in nowise responsible for this and it is only for his negligence that the plaintiff may recover, as there is no negligence on the part of the conductor.

Judgment reversed and cause remanded, for a new trial.

BROWN v. BROWN'S ADM'RS.

(Filed May 26, 1908—To be reported.)

1. Trusts and Trust Estates—Investment of Wife's Money by Husband—Deed to Husband—Death of Wife—Claim of Child—A husband, in 1848, with the consent of his wife, sold two slaves belonging to her for \$500, which he invested in land and took the deed to himself. After the wife's death her daughter sued her father, claiming that he held the land as trustee for her. Held—That the money for which the land was sold in 1848 belonged to the father, as the law then stood, and the fact that the father sometimes gave it out in oral statements that he recognized the \$500 as a trust in his hands, first for the benefit of the mother, and afterwards for the daughter, amounts to an unexecuted promise which can not be enforced as a trust.

2. Same — Establishment of Trust — Definite Ascertainment — The rule is well settled that the subject of a supposed trust, as well as the cestui que trust must be definitely ascertained in order to be enforceable, and if this is not done no trust is established. A mere declaration of a purpose to create a trust is of no value unless carried into effect.

B. S. Grannis for appellant.

John P. McCartney for appellees.

Appeal from Fleming Circuit Court.

Opinion of the court by Judge Barker, affirming.

The appellant's cause of action is stated in the following excerpt from her petition:

"Plaintiff says that the estate of David Brown (her father) is indebted to this plaintiff in the sum of \$500; that the claim arises in this wise: That, during the lifetime of plaintiff's mother, now deceased, her said mother was the owner of two slaves; that, with her consent, David Brown sold said slaves, about 1847 to 1848, for the sum of \$500 and invested the proceeds thereof for the use and benefit of this plaintiff's mother, in a tract of land, taking the deed to himself; that, during the lifetime of plaintiff's mother, the decedent, David Brown, recognized the claim of his wife, this plaintiff's mother, for the said sum of \$500, and claimed to hold the same in trust for her; that this plaintiff's mother died, many years ago, intestate, leaving this child as her only heir at law, and, after her death, her father, David Brown, chose to, and did, recognize said claim of \$500 as belonging to this plaintiff, and claimed to hold said \$500 in trust for

this plaintiff; that he recognized said claim of \$500 up to the time of his death, and claimed to be holding said sum of \$500 in trust for this plaintiff."

Subsequently the plaintiff amended her petition, but, in our opinion, the amendment adds nothing to the value of the pleading. A general demurrer was filed to the petition as amended, and sustained by the court, whereupon the appellant (plaintiff) declined to plead further, and her petition was dismissed. From this judgment she has prosecuted an appeal.

We are of opinion that the trial court was correct in sustaining the demurrer. Appellant's father, David Brown, died in 1905. He sold two slaves, belonging to his wife, in 1847 or 1848, for \$500, which he invested in land, taking the title to himself. The money belonged to him as the law then stood. We think the allegations of the existence of a trust in regard to the money are entirely too vague to be enforceable. It had been a part of the estate of the father for fifty-seven years. It does not appear that he accounted either to the mother or daughter for any interest on the money invested, and the fact that he gave it out in oral statements that he recognized the five hundred dollars as constituting a trust fund in his hands, first for the benefit of the mother, and afterwards for the daughter, at best amounts to a verbal promise to pay that sum to them at some future time; and thus constitutes an unexecuted promise, which can not be enforced as a trust.

The rule is well settled, that the subject of the supposed trust, as well as the cestui que trust, must be definitely ascertained in order to be enforceable; and if this is not done, no trust is established. In the case of *Barkley, &c. v. Lane's Ex'or, &c.*, 6 Bush, 587, it is said: "But the authorities all agree that to fasten a trust on property by mere parol declaration the language used must be clear and explicit, manifesting the owner's purpose to transfer the right, and pointing out with certainty both the subject of the trust and the person who is to take the beneficial interest."

In the case of *Krankel's Ex'tx v. Krankel, By, &c.*, 104 Ky., 745, it is said: "If there is a mere intention to create a trust, or a mere voluntary agreement to do so, and the donor contemplates some further act to be done by him to give it effect, the trust is not perfect, and equity will not lend its aid to enforce it." (Citing 2 Pom. Eq. Jur., section 997; *Williamson v. Yager*, 91 Ky., 282; *Roche v. George's Ex'or*, 93 Ky., 609.) In *Perry on Trusts*, 5 edition, volume 1, section 86, it is said: "The subject-matter of the trust must be clearly ascertained, as well as the purposes of the trust and the persons who are to take the beneficial interests. Loose, vague, and indefinite expressions are insufficient to create the trust. A mere declaration of a purpose to create a trust is of no value unless carried into effect. A simple promise of a future donation, without consideration good or valuable, creates no trust that equity can enforce." In the case of *Allen v. Withrow*, 110 U. S., 119, the Supreme Court of the United States, said: "So far as the personal property conveyed to Withrow is concerned, it must be admitted that a trust may be established by parol evidence; but such evidence must be clear and convincing, not doubtful, uncertain, and contradictory, as in this case."

In the light of these authorities, giving the allegations of the petition the fullest effect, we are of opinion that they do not state facts which show a complete and enforceable trust. As said before, at best they merely show an intention at some future time to set apart five hundred dollars of the settler's money for the benefit of the plaintiff (appellant). Such an imperfect contract can not be enforced as a trust.

Judgment affirmed.

BUCKNER'S EX'OR v. KIRKLAND'S EX'OR, &c.

(Filed May 27, 1908—Not to be reported.)

1. Patents—Right of entry—The patent to the vendor of appellant did not have the effect to oust or disturb appellees in their possession, without an entry by the patentee or some one for him in the disputed territory, and this right of entry was not exercised.

2. Presumption—Long Continued Claim and Possession—The persons who made the entries and marked the boundaries claimed by appellees are long since dead. Considering their acts, their long-continued claim and possession without being disturbed, the presumption is that their acts were lawfully and intentions proper.

J. J. C. Bach and Hazelrigg, Chenault & Hazelrigg for appellant.

Hugh Riddell, Edward S. Jouett, John S. Goodwin, W. M. Beckner and G. W. Fleenor for appellees.

Appeal from Breathitt Circuit Court.

Opinion of the court by Judge Nunn, affirming.

Appellant instituted this action against appellees to enjoin them from cutting and removing timber from two patent boundaries of land, which were issued by the Commonwealth of Kentucky to M. J. Amyx on the 21st of February, 1868. Appellants are the remote vendees of Amyx. The two patent boundaries lay on the waters of Quicksand Creek. Appellees claim the timber trees in controversy by virtue of conveyances from the vendees of Green Howard and James Bradley. That is, they claim that one of the patents to Amyx is included within a boundary of land once owned by Green Howard, and that he, his vendees and descendants, have claimed and held, by actual adverse possession all the land to a well marked and defined boundary, for a period prior to the year 1844; and have continuously so held and claimed the land down to the time when this suit was instituted. Appellees present the same plea with reference to that part of the boundary in dispute owned by James Bradley. The timber on both pieces of land is claimed in the same manner by appellees, to-wit: That they bought, from the actual owner, the trees for a valuable consideration.

The facts, as they appear in the record are, in substance, as follows: Prior to the year 1844, one Thomas Higgins and three or four other persons, each entered and obtained patents for a small boundary of land lying on Quicksand Creek. The boundaries of these patents included about all the tillable land on the creek. Higgins bought two or three of these small patents adjoining his, and James Bradley became the owner of one or two of them. They settled and made improvements upon the patents, and about the year 1844, or prior thereto, they entered and extended their upper and lower lines, crossing the creek, from ridge to ridge, above and below the land. These cross lines, as well as the ridge lines, were clearly marked, and Howard and Bradley and their vendors and descendants lived on the land and claimed to the marked lines, and the land within the boundaries named were universally regarded after that as belonging to Bradley and Howard to the time of the institution of this action. These lands were thus held and claimed by appellees' vendors when, in 1868, the Amyx patents, under which appellants claim, were issued. It is agreed that neither Amyx nor any one claiming for him ever took actual possession of the lands included in the Amyx patent, or any part thereof. Appellees' vendors continued to hold and claim to their boundaries as described, notwithstanding the issue of the Amyx patent; but, as stated, their improvements did not ex-

tend beyond the boundaries of their small patents. Higgins made a deed of conveyance to Green Howard in 1844, and the boundary contained in the deed extended from ridge to ridge. In other words, included all the lands within the well-defined marked boundary referred to. Bradley divided his survey and conveyed it to his two sons. These deeds also included all the lands between the two ridges. The date of these deeds is not shown, but it appears that they were executed prior to the year 1865. His sons took their father's part and Green Howard the Higgins portion under these conveyances.

As we understand the facts in the case the only question to be determined is, whether the issual of the patents to Amyx, in 1868, ousted appellees' vendors from the possession of the lands included within the Amyx patent, other than the lands within the small patents referred to. It is unnecessary to enter into an extended discussion of the question, as the cases of *Beeler v. Coy*, 9 B. M., 312, and *Keaton v. Sublett*, 109 Ky., 106 (22 Ky. Law Rep., 631), settle it. The act of the General Assembly allowing limitations to run in such cases against the Commonwealth was not passed until the year 1873, therefore, the possession of Howard and Bradley from the year 1844 to 1868, did not toll the Commonwealth's right of entry. The patents gave Amyx a right to enter upon the land within his patents not theretofore granted by the Commonwealth; but he did not exercise this right of entry, as neither he nor any one for him took possession of the lands within his patents. At the time that the Amyx patents were issued the vendors of appellees were in the possession of the boundaries claimed by them, and the mere issual of the patents to Amyx did not have the effect to oust or disturb them in their possession, without an entry by the patentee, or some one for him, within the disputed territory. This is expressly decided in the cases referred to. In the case of *Keaton v. Sublett*, *supra*, this court said: "Many questions are raised by counsel for appellee as to the effect of a deed which Keaton obtained from Lykins, among others, that the appellants have not connected themselves with the James Reynolds patent, and have not shown that that patent covers the land in controversy. It must be admitted that the appellants' father entered upon this land under a color of title, and claimed it as his own until this action was instituted. We will not enter into a discussion of the question as to whether he had a perfect title before a patent was issued to the Crafts. He was in the actual, adverse possession of the land, claiming it as his own, until and at the time the patents were issued to the Crafts, in 1876, and that possession continued until this action was brought. The theory of the appellee is that it was vacant land at the time the patents under which he claims were issued, and that an actual, adverse holding, if there was one, did not toll the Commonwealth's right of entry. Assuming this to be true, still the same holding which constitutes actual possession of an individual's land will constitute actual possession of that belonging to the Commonwealth. Having entered upon the land and claimed to a well-defined boundary, although the land was vacant and unappropriated at the time he took possession, and during the time he held it, his actual possession was co-extensive with the boundary claimed. He may not have acquired a pre-emptive right by his settlement, the land being subject to appropriation by other persons when the patents issued to the Crafts, therefore, the previous possession could not affect the interest which the Crafts acquired from the Commonwealth. Assuming this to be true, still their father's possession became adverse to the Crafts as soon as they obtained patents, and having continued uninterrupted until this action was brought in 1896, without entry by the Crafts, it forms a complete bar to the right of entry and recovery.

"In *Beeler v. Coy*, 9 Ben Mon., 312, the court held that the issue of a patent at the instance of a patentee is not a direct assertion of title on the part of the Commonwealth, but a mere grant of her right, as it exists. If one, therefore, has acquired a right by possession and lapse of time, or the patentee permits the possessory right to ripen into a perfect title, the possession can not be recovered by the patentee."

Appellants also claim that there was no evidence introduced showing that Higgins, Howard and Bradley entered and took possession of these lands in good faith, and with the intention of obtaining patents from the Commonwealth. The persons who made these entries and marked the boundaries are all dead. It occurred about sixty years ago. Considering their acts, their long continued claim and possession without being disturbed, the presumption is that their acts were lawful and intentions proper. In the case of *Beeler v. Coy*, supra, this court said: "The principle of these presumptions, from long continued enjoyments, is that where possession, without a grant, would be unlawful, its long continuance being evidence that it was not lawful, affords ground for presuming a grant, by which it was lawful in its commencement; so that where a grant is presumed merely from long possession, it is presumed to have been coeval with the commencement of the possession, or at least to have been of that period at which the possession without a grant, would have been unlawful, and of course the grant thus presumed will overreach a grant made after its presumed date."

The facts of this last case were very similar to the facts of the case at bar, and the principles therein decided are conclusive of this case.

For these reasons the judgment of the lower court is affirmed.

Whole court sitting.

LOUISVILLE RAILWAY CO. v. ELLERHORST.

(Filed May 27, 1908—To be reported.)

1. Street Car Collision—Injury to Lady Passenger—Action for Damages—Allegations—Manifestation of Condition—Specific Injury Sued For—In an action by a lady passenger for damages caused by a collision between two street cars in which she alleged that she was injured in her womb, in her ovaries and in her bowels, and that she had frequent micturition and had sustained a shock to her nervous system, Held—That a diseased condition must be manifested by outward symptoms. Where specific injuries are sued for, any external symptoms which are evidence of the injury, may properly be admitted, for it is only by the external symptoms that an internal injury may be judged.

2. Pleading—Notice of Injury Sustained—Relevant Facts—Evidence Admissible—The plaintiff should, by his pleading, apprise the defendant what injury he seeks to recover for, but the evidence by which he will establish the injury need not be indicated by the pleading. A fact, though not in issue, is relevant when it is, or probably may have been, the cause of a fact in issue or the effect of it. Evidence which conduces though but slightly, to prove a fact in issue, or to repel a presumption which might otherwise arise favorable to the opposite party is admissible, and in a case of doubt the evidence should not be excluded.

Greene & VanWinkle, Fairleigh Strauss & Fairleigh and Robt. L. Greene for appellant.

W. O. Bradley and J. L. Richardson for appellee.

Appeal from Jefferson Circuit Court, Common Pleas Branch, Third Division.

Opinion of the court by Judge Hobson, affirming.

Catherine Ellerhorst was a passenger on a street car of the Louisville Railway Co. going north on Second street. At the corner of Second and Broadway the car collided violently with an East Broadway car, throwing Mrs. Ellerhorst upon the seat in front of her. She filed this suit to recover for her injuries, and a verdict and judgment having been entered in her favor in the sum of \$2,000, the defendant appeals.

The only ground relied on for reversal is, that the court erred in the admission of evidence. The plaintiff alleged in her petition that she was painfully injured by being thrown from the seat which she occupied against the seat opposite her; that she had suffered great bodily pain and mental anguish; and that she was so injured as to greatly reduce her power to earn money for months to come. In an amended petition she averred that she was thrown violently against the car seat, her abdomen striking it, and was seriously and permanently injured in her bowels and the regions thereof, and suffered a severe nervous shock from which she has not recovered, and that she had, and would have, recurrent pains in her bowels and the regions thereof on account of the injuries. The defendant, without asking that the petition be made more certain, filed an answer controverting its allegations. In a second amended petition she alleged that, in addition to the injuries theretofore alleged, she received a rupture in the right groin. In still another amended petition she alleged that her right ovary was enlarged and tender; her womb retroverted and she had frequent micturition; and that she was permanently injured. This amended petition was taken as controverted of record. During the progress of the action the court directed a personal examination of the plaintiff by a physician named by the court, and provided in the order that the plaintiff and defendant might both have a physician present during the examination. The examination was made as provided in the order. On the trial the plaintiff introduced Dr. F. L. Cessna, who was allowed, over the objection of the defendant, to testify as follows:

"Q. Has she any other injury except the lower part of the abdomen for which you have been treating her?"

"A. She has had trouble with her head and nervous system. She is a very nervous woman—very much so."

The defendant objected to the answer on the ground that no specific injury to the head is alleged in the petition, and moved the court to exclude the answer.

By the court: "It seems to me that the nervous system—he had a right to say if she complains about the nervous system, and if the condition of the head is only a symptom of that, he would have a right to show it. Yet he cannot undertake to show any specific injury to the head."

By the witness: "This nervousness is due to the injury in the abdomen. I should think, largely. Her nervous system is considerably shattered. She is very nervous indeed. I attribute a great deal of that to this injury that she sustained."

Q. "State whether or not this suffering in the head is a symptom of the nervous shock that she had sustained."

A. "That, many times, would cause trouble to the head."

Q. "Will you describe the symptom of her suffering in the head?"

A. "She complains of vertigo, or quite a lot of swimming in the head, and pains through the head, especially in the top and back parts. She complains a great deal of her head at times; not continu-

ously, but it is periodical that these troubles occur. It seemed to me she would be better at times, and then she would be worse again. It seemed like her nervous system gave down. She would have these sinking or weak spells—prostration rather."

She also introduced Dr. Curran Pope, who was allowed to testify as follows:

"I also examined the pupils of both eyes, and the pupil of the right eye moves very little."

The defendant, by counsel, objected to any evidence concerning the eye.

By Mr. Bradley. "I will ask you the question: 'Did you find anything about the head or eyes indicating a nervous shock?'"

Objected to by counsel for defendant; objection overruled; exception for defendant.

By the court: "If there is any condition of the eyes or head that would be a symptom of nervous shock, it is competent."

A. "The symptoms I found are absolutely indicative of nervous shock and nervous disease."

The defendant excepted to the ruling of the court and to the last answer.

By the witness: "I found the right pupil would hardly move at all, what we call immobility, and in looking back into the back of the eye, the optic nerve, or the nerve of vision, shows beginning wasting."

Objected to by counsel for defendant; objection overruled; exception for defendant.

Dr. Dudley Reynolds was introduced as a witness for her and testified as follows:

Q. "Did you find anything indicating a nervous shock?"

A. "I did."

Q. "What was it?"

A. "In the irregularity of the pulse and unnatural throbs of the pulse and of the breathing, and in the second place the pupils of the eye are irregular in their contraction on exposure to the light. The pupil of the right eye scarcely moved at all, and the left one contracted irregularly. The contraction was irregular all round. What we call eccentric pupillary contraction. This indicates an injury to the base of the brain, disturbing the breathing and disturbing the pulse rate. It is due to an injury of that character, shock to the central nervous system, which is the brain and spinal cord."

Q. "What will be the probable result of this shock and this injury to the eye?"

A. "It interferes with the steadiness of her movements and with her strength and with her ability to sit quietly and observe new scenes, and a little noise in an unexpected quarter will throw her out of condition. The nervous manifestations would show also in the exaggerated muscular reflexes."

Q. "You were speaking of the contraction of the eye, etc. What danger, if any, would there be of loss or impairment of the sight?"

A. "There is already impairment of the sight from that cause in the right eye, shrinkage of the optic nerve, which is by some called wasting, but what I would call atrophy—that has already set in."

The evidence of this witness as to the injury to the eye objected to by counsel for defendant on the ground that there is no allegation of injury to the eye in the petition or amended petitions; objection overruled; exception for defendant.

By the court: "The record speaks for itself on that."

By the witness: "I have not said that there was any injury to the eye."

By the court: "I understand your testimony."

The defendant, after this testimony was admitted, moved for a continuance on the ground of surprise as no injury to the eye was alleged

in the petition. The court overruled the motion, but offered to allow the defendant to have an expert surgeon and physician to make further examination of the plaintiff, which the defendant declined. The court, at the conclusion of the evidence, gave the jury this instruction:

"In estimating the damages to the plaintiff the jury are not to consider any specific injury to the head or eyes of the plaintiff, and the evidence in relation thereto should only be considered by the jury to whatever extent it may bear on the nervous shock, which the plaintiff claims to have sustained by reason of the collision."

It is insisted for the defendant that the court erred in admitting the evidence referred to and that the error was not cured by the instruction which the court gave. In *L. & N. R. Co. v. Richmond*, 23 Ky. Law Rep., 2395, the plaintiff was a passenger on a railroad train and was injured in a collision. She alleged in her petition that in the collision she was greatly injured in her person; the muscles of her shoulders were greatly torn and lacerated and she was greatly bruised in her person, especially in her arms and side. On the trial she was permitted to show, over the objection of the defendant, that her spinal cord and eyes were injured. The court told the jury, when the testimony was given, that they could not consider any injury to her eyes as an item on which to fix damages, but might consider that fact only to show an injury to the spine. When the case was finally submitted to the jury, the court, by a written instruction, eliminated any compensation for the injury to the eyes. On appeal to this court the judgment was affirmed. The court said:

"The spinal cord might be reasonably expected to be injured on complaint of injury to the back. It is evident that the theory of the court in admitting proof of injury to the eyes, and then excluding that injury from the consideration of the jury in estimating damages, was that it might be shown, reasoning from effect back to cause, that the spinal cord was injured, as was demonstrated by proof of the resultant defect to the eyes shown. There was not claimed a direct injury to the eyes, but this was a resultant injury from the injury to the spinal cord, located in the back, of which the appellant's counsel had notice, as is shown by the affidavit filed some time before the trial."

In *International and Great Northern Railroad Co. v. Thompson*, 37 S. W., 24, the plaintiff charged an injury to the spine, and on the trial, was allowed to show an impairment of vision as part of the injury. The court instructed the jury that they might consider the injury to the eye in fixing the damages. The judgment was reversed on the ground that the instruction was erroneous, but the opinion in effect holds that the evidence was admissible; at least it does not hold that the evidence was improperly admitted, and only holds that the instruction was erroneous.

In the case of *Wilkins v. Nassau Newspaper Co.*, 90 N. Y. S., 678, evidence was admitted that the plaintiff had locomotor ataxia, and the instructions of the court to the jury were in substance the same as in the Thompson case; the judgment was reversed for the error in the charge to the jury, and to this the attention of the court was mainly directed. In *Chesapeake, &c., R. R. Co. v. Hanmer*, 66 S. W., 375, and *L. & N. R. Co. v. Roney*, 32 Ky. Law Rep., 1326, the court had before it what the plaintiff might recover for under the allegations of the petition, but that is not the question in this case. The question is what evidence was competent to sustain the allegations of the plaintiff's petition. She alleged, in her petition, that she was injured in her womb; in her ovaries; in her bowels; that she had frequent micturition, and that she had sustained a shock to her nervous system. A diseased condition must be manifested by outward symptoms. If the plaintiff had been unable to show any external manifestations of the injuries of which she complains, the jury would reasonably con-

clude that she was not as badly hurt as she alleged. If she had shown that she had suffered from insomnia since the accident, and had been a healthy woman up to that time, it would have been some evidence of a nervous derangement. A nervous shock often shows itself in the eyes; and if the plaintiff's eyes had remained normal it would have been some evidence that the nervous shock was not very serious. Where specific injuries are sued for, any external symptoms which are evidence of the injury may properly be admitted, for it is only by the external symptoms that an internal injury may be judged. As the injury to the eye was not sued for the court properly excluded it from the consideration of the jury in fixing damages; but as it furnished some evidence of the internal injury of which she complains, the proof was properly allowed to go to the jury.

The plaintiff should, by his pleadings, apprise the defendant what injury he seeks to recover for; but the evidence by which he will establish the injury need not be indicated by the pleading. A fact, though not in issue is relevant when it is or probably may have been the cause of a fact in issue or the effect of it. (Stephens on Evidence, art. 2.) Evidence which conduces, though but slightly, to prove a fact in issue or to repel a presumption which might otherwise arise favorable to the opposite party is admissible, and in case of doubt the evidence should not be excluded. (Shannon v. Kinney, 1 Mar., 3; Holt v. Crume, Litt. Sel. Cas., 500.) The record shows that the defendant filed affidavit on the ground of surprise, but the affidavit is not in the transcript and we must presume that the court ruled correctly in refusing to continue the case in the absence of the evidence; and as the testimony related to a condition then discoverable by a physician, we cannot see that the court's offer to allow a further examination of the plaintiff by a physician did not afford the defendant a full opportunity to get the truth before the jury. After declining this offer the defendant introduced on the trial a physician who had examined her and testified that he could see nothing wrong with her eyes.

Judgment affirmed.

FISHER v. LOTT, &c.

(Filed May 28, 1908—Not to be reported.)

1. Wills—Construction of—By Court of Last Resort—The appellee was one of ten children who took the land in question from a will by her father, which excluded, by expression, her husband, she being vested with a life estate, with remainder to her children. Her father died in 1857. The controversy arises over the expression in the will, "should any of the children of W. W. Southgate die without issue and unmarried, their part to go to the remaining brothers and sisters and their descendants."

2. Same—This clause was construed by this court, in 1865, in precisely the same state of case as this, in the matter of another child of Southgate, who took under the will. In that case the court held that upon the birth of a child, the remainder then vested, and upon his death it passed to his heir-at-law; that the condition in the devise above quoted should be construed to mean that, upon her marriage and subsequent issue, the contingency happened, and the estate was no longer de'feasible.

3. Same—Deed—Mrs. L's conveyance of the property in which her husband and only child joined, was sufficient to pass title.

F. M. Tracy for appellant.

Sidney Arthur for appellees.

Appeal from Kenton Circuit Court, Common Law and Equity Division.

Opinion of the court by Chief Justice O'Rear, affirming.

Appellant, Nannie S. Lott, is a daughter of W. W. Southgate, deceased, who was a son of Richard Southgate, Sr., of Covington. The latter died testate, in Kenton county, about July, 1857. By his will, which was duly probated, he devised a large estate to his children and grandchildren, by names or classes, among the latter being a devise to each of the ten children of his deceased son, W. W. Southgate. This devise was to some of the ten by name, as to whom he specified the estate they took, and as to others, who were then infants, the devise was to them in severalty as a class. The clause, which has now become the subject of this suit for construction, reads as follows:

"I give and bequeath to Thomas D. Kennedy and George M. Southgate one-sixth part of said real estate for the use and benefit of the children of William W. Southgate, my deceased son, to be equally divided between them, but subject to the following restrictions:

"That said trustees will hold one-tenth part of said real estate for the use and benefit of Laura Walker for her life, and at her death remainder to her children. That said trustees will hold one-tenth of said real estate in trust for the children of Samuel J. Walker, by his wife Martha. That said trustees will hold one-tenth of said real estate for said Adeliza Arthur for life, remainder to her children, paying over to said Laura Grant and Adeliza Arthur the rents and profits of said real estate for their separate, sole and exclusive use. The real estate herein conveyed to said Laura and Adeliza to be free from all right to curtesy or control of their husbands. One-tenth in trust for Richard Southgate, one-tenth in trust for each of the other children (one of whom is the appellee, Nannie S. Lott), to be conveyed to them on their arrival at age. The conveyance to the daughters for life, remainder to their children, and to their sole and separate use. * * * Should any of the children of W. W. Southgate die without issue and unmarried, their part to go to their remaining brothers and sisters and their descendants."

Nannie Southgate, one of the ten children of W. W. Southgate, arrived at age, was married to appellee, George G. Lott, by whom she has had one child, the appellee, George S. Lott. The proceeds of the devise to her were invested in a parcel of ground in Covington, described in the petition and contract herein. She and her husband and son contracted to sell the lot to appellant, and tendered their general warranty deed signed by all three of the Lotts. The purchaser declined to accept the deed, under the fear that Mrs. Lott's interest being only a life estate, and her husband being excluded by the expression in the will impressing this devise as sole estate of the female devisee, the fee would be only contingently vested until her death, when if she should survive her son, the deed tendered would not convey the complete title. The circuit court held that the deed was sufficient to pass the whole estate, and the purchaser appeals.

It is admitted that Mrs. Lott took only a life estate under the will, with remainder to her children. But the principal ground of contention lies in the clause "should any of the children of W. W. Southgate die without issue and unmarried, their part to go to their remaining brothers and sisters and their descendants."

The item of the will above copied was before this court for construction in 1865. (Kennedy v. Arthur, 3 Ky. Opin., 466.) There the daughter of W. W. Southgate, Mrs. Adeliza Arthur, had died, but having been married, and having had a child born of that marriage, who

preceded her in death, the question was what became of the title to the lot devised to her. This court held that, upon the birth of her child, the remainder then vested, and upon his death it passed to his heir-at-law; that the condition in the devise "die without issue and unmarried," should be construed to mean that upon her marriage and subsequent issue the contingency happened, and the estate was no longer defeasible.

Mrs. Lott's relation is precisely that of Mrs. Arthur, and Mrs. Arthur's son and George S. Lott occupy also the same relation in ownership of the devised parcels of land.

Without the benefit of the learned opinion above cited we might have had great difficulty in reaching the same conclusion as was there attained by the court. The court then said of its own conclusions:

"While we admit that we feel with neither mathematical certainty nor full assurance, that we have followed the true clue to this testamentary labyrinth, we are satisfied that it is the best which we could adopt with any assurance approaching judicial confidence. The construction we have adharmonizes the whole will—any other would make some of its provisions motionless, inconsistent and absurd."

The court, in construing the language set out in this opinion recourses, as will be inferred from the foregoing excerpt, to other provisions of somewhat similar nature, wherein it was thought a general, uniform purpose of the testator was discoverable with reference to all his children, including grandchildren.

If Mrs. Lott were now deceased, there would be no difficulty at all in following identically the opinion in *Kennedy v. Arthur*, supra. Nor do we experience any in so far as that opinion went, or could go. The deed tendered would convey Mrs. Lott's life estate—her interest being no longer contingent. It would also convey the vested remainder of George S. Lott.

The foregoing objection is the only one raised in the circuit court or in this court. Appellant seems content with the title, if the trouble raised by his fears respecting the defeasibility of Mrs. Lott's estate and the consequent danger of her sisters or brothers taking as reversionsers, is dispelled. Deciding only the question presented, and which was the only one raised in and decided by the circuit court, we hold that appellant's objection is not well taken.

Whatever doubt we may have had concerning the construction placed upon this clause of the will is resolved in favor of that consistency which ought to prevail in the opinions of the court concerning identical matters, particularly where the title to real estate is involved, and upon the faith of which previous opinion the public may have been led into a sense of security in trafficking in these titles, relying upon the presumption that when once authoritatively construed by the court of last resort of the State, that construction is conclusive.

The judgment is affirmed.

BROUGHTON v. SAYLOR, &c.

(Filed May 28, 1908—To be reported.)

1. Co-Sureties—Indemnity—Contribution—Obstruction of Rights—Release of Liability—Where a co-surety in a forthcoming bond became a surety in the supersedeas bond, he thereby obstructed the right of his co-surety in the forthcoming bond to take steps to protect himself as such surety, and by this act relieved the co-surety in the forthcoming bond from all liability to him for indemnity or contribution.

2. Same—Rights of Co-Sureties—Interference Therewith—There is no substantial difference between the legal effect of an obstruction of, or interference with, the rights of the surety by the creditor, and an obstruction or interference with the rights of the surety by the act of another person, who might otherwise have looked to the surety for contribution or indemnity if there had been no obstruction.

N. J. Weller and Weller & Points for appellant.

Wm. Low and E. N. Ingram for appellee.

Appeal from Bell Circuit Court.

Opinion of the court by Judge Carroll, affirming.

The appellant and appellee, Ingram, were the sureties in a forthcoming bond executed by S. W. Saylor and Andy Broughton in February, 1904, in a suit of J. J. Durham against them. In October, 1904, judgment was rendered in the action in which the bond was executed against the defendants Saylor and Andy Broughton, who were the principals in the forthcoming bond. The defendants prosecuted an appeal from that judgment to this court, and executed, in January, 1905, a supersedeas bond with the appellant, Henry Broughton and one Knuckles, as sureties therein. Subsequently, the appeal was dismissed by this court, and, therefore, in proceedings against the sureties in the forthcoming bond, Henry Broughton was required to pay the value of the property for which the forthcoming bond was executed. After Broughton satisfied the damages growing out of his suretyship in the forthcoming bond, he brought this action for contribution against his co-surety Ingram. From a judgment dismissing his petition, this appeal is prosecuted.

There is some conflict in the evidence as to whether or not S. W. Saylor and Andy Broughton, the defendants in the action in which the forthcoming bond was executed, had any property subject to execution at the time the judgment against them was rendered in October, 1904, or at the time the supersedeas bond was executed in January, 1905. But the weight of the evidence supports the conclusion that soon after the execution of the forthcoming bond, they disposed of the property released by its execution, and had little or no property subject to execution, either in October, 1904, or January, 1905. So that, if the judgment had not been superseded, it is fair to assume that Broughton and Ingram, as sureties in the forthcoming bond, would have been compelled to satisfy the same, and that neither of them could have collected the amount paid from the principals in the bond. If the principals in the forthcoming bond had been solvent when the supersedeas bond was executed, it is conceded that Broughton, as surety in the supersedeas bond, could not look for contribution to Ingram as co-surety in the forthcoming bond; because the execution of the supersedeas bond would have been prejudicial to Ingram in that it prevented him from looking to the principals for indemnity or from having their property subjected to the payment of the amount due on the forthcoming bond. But, as this state of case is not presented, the question may be disposed of as if Ingram was not prejudiced, looking at the matter from a financial standpoint, by the execution of the supersedeas bond. The controversy then narrows down to the single question, whether or not, under these circumstances, Broughton, by enabling the judgment defendant to stay proceedings upon the judgment, rendered himself liable for the full amount of the forthcoming bond. If the supersedeas bond had not been executed,

it is of course clear that Broughton, as surety in the forthcoming bond, could recover from his co-surety, Ingram, one-half the amount that he was required to pay. When the judgment was rendered in the lower court, the judgment creditor, except for the execution of the supersedeas bond, could have at once proceeded to collect his debt from the sureties in the forthcoming bond. And the sureties, if they had then satisfied the bond, could at once have proceeded against the sureties for indemnity; but the execution of the supersedeas bond stayed all proceedings upon the judgment. It prevented any steps being taken to enforce its collection. Nor could the sureties in the forthcoming bond thereafter, or while the supersedeas was in force, take any action to protect their interests. And when, by the execution of the supersedeas bond, Broughton obstructed the right of his co-surety in the forthcoming bond, to take any steps to protect himself, he thereupon and by this act relieved the co-surety in the forthcoming bond from all liability to him for indemnity or contribution. The fact that Broughton was surety in the forthcoming bond, and that as such surety he was obliged to satisfy the judgment, does not affect the question, because if Ingram had been required to pay it, he might have recovered from Henry Broughton the amount he was compelled to pay. And so it follows that having paid the bond, Broughton can not look to Ingram for contribution. If the judgment creditor had made any arrangement with the judgment debtors, by which an extension of time was granted to them, or had placed himself in a position by which he was prevented from enforcing the collection of his debt, or had in any way interfered with the right of the sureties to protect themselves, his action would have released the sureties. Thus, it is said in *Sneed v. White*, 3 J. J. Mar., 525:

"Any settled agreement or active interference by the obligee whereby the surety may be injured or subjected to increased risk, or deprived of or suspended in the assertion of his equitable right to force the obligee to sue the principal, or of his right to pay the debt and occupy the attitude in equity of the obligee, will release the surety. Any act of the creditor which entitles the principal obligor to indulgence, after the debt shall have become due according to the terms of the original contract, will in equity discharge a surety who has not consented to the indulgence; and his consent can not be inferred from his silence or neutrality; but must be evinced by some positive act. A stay of execution by the creditor after a levy of it on the property of the principal debtor will exonerate the surety. * * * It is not material whether the property so exempted was sufficient to discharge the whole debt or not. It is the fact that the creditor interfered and thereby increased the risk of the surety, and not the extent of the injury resulting from his act which will relieve the surety from his liability in equity.

"To make the right to relief depend on the degree of injury, would, in the language of Loughborough, in *Rees v. Barrington*, 'lead to a vast variety of speculations upon which no sound principle could be built.'"

The principle announced in this case has been approved in a long line of decisions, among which may be noticed: *Preston v. Henning & Speed*, 6 Bush, 556; *Mays v. Lane*, 116 Ky., 566; *Struss v. Masonic Savings Bank*, 89 Ky., 61; *Tudor v. Goodloe*, 1 B. Mon., 322; *Ross v. Clore*, 3 Dana, 189; *Sparks v. Hall*, 4 J. J. Mar., 35.

In our opinion, when Broughton, by the execution of the supersedeas bond, prevented the judgment creditor from collecting, or attempting to collect, his judgment, it had the same effect on the sureties in the forthcoming bond as similar conduct on the part of the judgment creditor would have, and resulted in releasing, so far

as Broughton was concerned, the surety in the forthcoming bond. We are unable to perceive any substantial difference between the legal effect of an obstruction of, or interference with, the rights of the surety by the creditor and an obstruction or interference with the rights of the surety by the act of another person who might otherwise have looked to the surety for contribution or indemnity if there had been no obstruction.

In either case the injury to the surety is the same.

In *Brandenburg v. Flynn*, 12 B. Mon., 397, an execution against Tracy was replevied with Hulsey and Joseph Brandenburg as sureties. Afterwards, the execution defendant, Tracy, enjoined the collection of the debt, and executed an injunction bond with Flynn as surety. Flynn being compelled to pay the debt, brought an action against Brandenburg, the surety in the replevin bond, seeking either re-imbusement or contribution. In considering the case, and denying the relief sought, the court said:

"We know of no case in which, on the ground of either contribution among co-sureties or of substitution to the securities of the creditor, a subsequent surety, coming in aid of the debtor alone, without request or concurrence of the original sureties, and in the regular course of the remedy for coercing the debt from him alone, or for the purpose of obstructing its collection by his own separate proceeding, and for his own benefit, has obtained in equity either partial or full re-imbusement from the prior sureties. On the contrary the doctrine established by the adjudged cases, and as we think in conformity with the true principles of equity, is, that if under such circumstances a prior surety is compelled to pay the debt, he thereby becomes entitled by substitution to the rights of the creditor against the subsequent surety to the whole extent of the payment made and of the obligation of the subsequent surety; which precludes all right on the part of the subsequent surety, should the debt be coerced from him, to claim re-imbusement from the prior surety."

In *Kellar v. Williams*, 10 Bush, 216, an execution against Mount was replevied by him with Williams as surety. Upon the maturity of the bond, and after an execution had issued thereon, Mount prosecuted an appeal from the judgment upon which the execution issued and executed a supersedeas bond with Kellar as surety. The judgment of the lower court having been affirmed, Williams was required to pay the debt, and thereupon brought an action against Kellar to recover the full amount so paid. In the opinion holding that Williams was entitled to the relief, the court said:

"The doctrine of substitution is founded alone upon principles of equity and justice; and when this debt was in a condition to be made out of the property of the principal debtor, Kellar interposed his conditional obligation to pay the money, thereby causing this loss to Williams; and there is no reason why equity should not intervene by substituting Williams to the rights of the original creditor, so as to enable him to compel Kellar to pay only what he had undertaken by his conditional obligation to pay."

It is true that in these cases the rights of the prior sureties were prejudiced by the execution of the bonds delaying the collection of the debts; as when the delay bonds were executed the principal debtors had property out of which all or a part of the debts might have been paid. But the decisions are not rested distinctly upon this ground, but more particularly upon the ground that the rights of prior sureties were obstructed by the execution of the subsequent bonds.

The solvency or insolvency of the judgment debtors, who were principals in the forthcoming bond, does not enter into the case.

It is not material whether they were solvent or not. We think this case should be governed by the same principles that apply as between a creditor and a surety. If the judgment creditor in this case had put it out of his power to collect or attempt to collect his judgment, it is manifest that his act would have released the sureties in the forthcoming bond, and this, without reference to the solvency or insolvency of the principals in the bond. And so when Broughton executed the supersedeas bond, the extension of time that was granted the judgment debtors by the execution of this bond released from liability as to him the sureties in the forthcoming bond. His act effectually stayed all proceedings upon the judgment and prevented the judgment creditor from collecting his judgment and also hindered the sureties in taking any steps to protect their interests. The execution of the supersedeas bond was an independent act upon his part by which he assumed unequivocally the payment of the debt in the event the judgment should be affirmed, Ingram did not request or procure the execution of the supersedeas bond, or waive his right to insist that its execution relieved him from liability. Ingram was one of the attorneys for the defendants in the judgment, and there is evidence tending to show that as such attorney, he believed the judgment should be reversed, and entertaining this opinion he advised an appeal and probably the execution of a bond to stay proceedings upon the judgment pending the appeal. This advice was tendered in his capacity as attorney. He did not request or urge the execution of the supersedeas bond in his relation as surety on the forthcoming bond, and his action as attorney did not have the effect of estopping him from interposing the defense that the execution of the supersedeas bond released him from liability on the forthcoming bond. If, as surety in the forthcoming bond, he had requested or procured Broughton to execute the supersedeas bond, it might be urged with great force that he would be jointly and equally liable with Broughton, upon the principle announced in the Brandenburg and Keller cases supra that "all persons who are bound, although by different instruments, executed at different times, for the same debt or duties of the same individuals, are bound as co-sureties to contribute to any loss which either may sustain." But this rule has no application to the facts of this case; nor does the circumstance that Broughton was a surety in the forthcoming bond, enter into it in considering the rights and liabilities of either Ingram or Broughton, because Broughton, in signing the supersedeas bond, occupied as to the forthcoming bond the same relation as a stranger would, and is in no better position than any other person would be who had signed as surety the supersedeas bond.

Wherefore, the judgment of the lower court is affirmed.

WINN, AS SHERIFF, &c. v. SCHENCK, &c.

(Filed May 28, 1908—Not to be reported.)

Wills—Inheritance Tax—Liability of Devisee Therefor—A will was made in 1899 by a son devising to his mother one-half his entire estate, under a contract made at the time with his mother to keep a valid will at all times devising to her son's god-son one-half of the property she received from him, which she made, and under which the god-son received the property so devised by the mother. The mother died after the inheritance tax law of 1906 was enacted in this State. Held—That at the time the contract between the

son and mother was made, there was no inheritance tax law in force in this State and the property received by the god-son under the will was not subject to the payment of such tax.

Will D. Jesse for appellant.

Field McLeod for appellee.

Appeal from Woodford Circuit Court.

Opinion of the court by Judge Lassing, affirming.

This appeal involves the right of the Commonwealth to collect an inheritance tax under the act of the General Assembly, approved March 15, 1906, on certain property to which the appellee, Robert C. Schenck became entitled upon the death of Mrs. Mary E. Greathouse, in 1906, after the act in question became operative. Several minor objections are made by appellant, the sheriff of Woodford county, who was attempting to collect the tax, but a disposition of the real question in the case necessarily renders a determination of these minor questions unnecessary. Had the State the right to impose and collect this tax. The history of the transactions, through and under which appellee became entitled to the property in question, is as follows: Clarence R. Greathouse was a man of considerable wealth. In 1899, while in Korea, he was stricken with what was regarded as a mortal disease; while in this condition, and recognizing that his recovery was unlikely, he made a will, devising to his mother his entire estate. At the same time, it appears that he desired to make some provision for the appellee, who was his god-son. He and his mother thereupon, simultaneous with the execution of the will by him, entered into a written contract, by the terms of which she obligated and bound herself to make and keep on hand at all times during her life a valid will, by which she devised to appellee one-half of the property which she received from her son. It was provided in this contract that, should it become necessary, Mrs. Greathouse might use as much of the principal as might be necessary to enable her to live in comfort and that style becoming a woman of her years and station in life. She made the will, as she agreed to, and, upon her death, appellee asserted title to one-half of the property to which he was entitled thereunder.

For appellant it is claimed that appellee is the beneficiary of the bounty of Mrs. Greathouse, and that, therefore, the property is subject to the tax; while, on the other hand, it is urged for appellee that he receives this property through the provisions made for him by his god-father in the contract with Mrs. Greathouse in 1899.

If Clarence R. Greathouse, instead of disposing of his property by will, and the contract with his mother that she should make provision for his god-son, as he did, had made a will giving his estate to his mother for life, with power to use such of the principal as might be necessary for her welfare and support, and with a provision that at her death one-half of the remainder should go to appellee, he would have reached the same result as that which he did by the methods employed. Had he pursued the plan suggested there can be no doubt but that the property would not be subject to the inheritance tax, for it would have gone to him under the will of Clarence R. Greathouse, and not through the bounty of Mrs. Mary E. Greathouse. The question is further simplified by determining what would have been the rights of appellee if Mrs. Mary E. Greathouse had violated the contract which she made with her son, and failed to make provision, by will, for appellee, as she had agreed to do. If, under these circumstances, he would not have had any enforceable

right against the property which she received, then it comes to him under the will of Mrs. Mary E. Greathouse and is liable for the payment of the tax. If, on the other hand, he had a right to and could look to the contract lien to coerce from the estate of Mrs. Greathouse, the payment of this money, then the source from which he derived title, is clearly not the will of Mrs. Mary E. Greathouse. That one may enforce a contract made for his benefit, though not made with him or to him, has been too often decided by this court to need further consideration here. (*Allen v. Thomas*, 3 Met., 178; *Smith v. Smith*, 5 Bush, 625, and *Louisville & Nashville Railroad Co. v. Schmidt*, 112 Ky., 717.) So that, had Mrs. Mary E. Greathouse violated her contract which she made with her son for the benefit of appellee, the latter would have had a perfect right, after she had accepted the estate of her son, under the terms of his will, to have enforced the contract which she had violated. Reading the will and contract together, as they must be read, Mrs. Mary E. Greathouse took in the property of her son a life estate, with the power to use any part of the principal that might become necessary, and with the express agreement that she should devise to appellee one-half of such portion as should not be consumed by her in maintaining and supporting herself in the style and manner in which her son desired that she should live. This obligation, on her part, was mandatory, and she could not avoid it if she would. We have been unable to find any case directly in point, nor are we referred to any such, but questions somewhat similar have arisen in other jurisdictions where the inheritance tax laws have been longer in force.

In the case of *Nathaniel H. Emmons v. Shaw*, 171 Mass., 410, the Supreme Court of Massachusetts passed upon a question somewhat similar. There one Thomas B. Wales had devised certain property to his son, George W. Wales, for life, subject to his disposition by will, but in the event that he died intestate, with further limitations as to the fee, the son disposed of the property by will, under the power, and an inheritance tax law having been adopted after the death of his father, but before his death, an effort was made to collect the tax from his property. The court declined to enforce it, and in so doing said: "What is done under a power of appointment is to be referred to the instrument by which the power is created and operates as a disposition of the estate of the donor."

And the Supreme Court of New York, in the case of *In Re Lansing's Estate*, 182 N. Y., 238, in passing upon a similar question, held that where property was devised by a man to his daughter for life, and after her to her heirs at law, with the power to devise the remainder, by will, in such manner, and under such limitations, as she might desire, and the daughter, in the exercise of this power, devised the property to her own daughter absolutely, the daughter's will operated to transfer nothing that was not given to the heir at law by the grandfather's will, and, as at the time the will of the grandfather took effect, there was no law imposing a transfer tax, the property was not subject to said tax.

So with the case at bar. At the time that the contract was entered into between Clarence R. Greathouse and his mother, which secured to appellee one-half of the estate of Clarence R. Greathouse, there was no inheritance tax in force in this State, and, consequently, the trial court did not err in holding that the property which appellee received was not subject to the payment of said taxes.

Judgment affirmed.

BRADLEY & GILBERT v. JACQUES.

(Filed May 28, 1908—Not to be reported.)

Municipalities—Members of City Council—Contracts with City—Validity—Injunction by Taxpayer—Under Kentucky Statutes, sec. 2768, part of the charter of cities of the first class, providing that "councilmen shall not be directly or indirectly interested in any contract with the city," &c., any citizen and taxpayer of such city may maintain an action to enjoin the payment of any claim sought to be enforced against the city for supplies furnished the city under a contract with one of whom is a member of the city council.

Carroll & Middleton for appellants.

A. T. Burgevin for appellee.

Appeal from Jefferson Circuit Court, Chancery Branch, First Division.

Opinion of the court by Judge Barker, affirming.

This action was instituted by the appellee, Charles N. Jacques, to enjoin the payment by the city of Louisville, of a bill, amounting to three hundred and fifty dollars and eighty cents, claimed by the Bradley & Gilbert Company, a corporation, to be due for supplies sold and delivered to the city. The Bradley & Gilbert Company intervened and filed a petition, which was taken as its answer to the allegations of the petition of the appellee. In sustaining a general demurrer to the answer of the Bradley & Gilbert Company, the chancellor delivered an opinion, which clearly and lucidly states the facts and the proper conclusions of law arising therefrom, and we adopt it, as written, as a part of our opinion in this case. It is as follows:

"The plaintiff, Jacques, a citizen and taxpayer of the city of Louisville, seeks to restrain the city and its officers from paying three hundred and fifty dollars and eighty cents to the Bradley & Gilbert Company for supplies furnished the city by said company, upon the ground that one of the defendants, George B. Coder, a member of the general council of the city of Louisville, is a salaried bookkeeper of the Bradley & Gilbert Company. The answer further shows that said Coder is in effect a stockholder in the Bradley & Gilbert Company. His stock has not yet been paid for or delivered to him, though it has been set aside and held for him.

"The case is now submitted upon plaintiff's motion for a restraining order as prayed for in the petition, and also upon plaintiff's demurrer to the answer of the Bradley & Gilbert Company, which shows that its bill is for ordinary office supplies furnished by it to the city for the month of January (with the exception of one item) upon oral orders as and when needed by the city, and at the usual prices charged the public. It does not appear that Coder had anything to do with making the sales, or that he even knew of them. No charge of bad faith is made against any of the defendants; on the contrary, the entire good faith of all the defendants is not only conceded by the plaintiffs, but is fully concurred in and adjudged to be true by the court. It has, however, been expressly decided by the Court of Appeals that the fact of the good faith of the transaction is immaterial under the statute.

"After prescribing the qualifications of councilmen the city charter provides:

"They (councilmen) shall not be directly or indirectly interested in any contract with said city, or in any application therefor, or a

candidate for or hold any office or employment for pay in any company or corporation which holds or is an applicant for any contract with the city. Stockholders in corporations may be eligible, but shall not vote on or interfere, directly or indirectly, with any matter, or questions, affecting a contract between such company and the city or its right or duty under the same.' (Ky. Stats., sec. 2768.)

"When this statute came up for construction in *Nunemacher v. City of Louisville, &c.*, 98 Ky., 334, it was contended that it referred only to the question of the councilman's eligibility to hold his office, and that it did not affect the validity of the contract. The Court of Appeals, however, overruled that contention in the following explicit language:

"In our opinion the effect of this section is to render void contracts between the city and any person who is a member of the council, or between the city and any corporation which has a member of the council for one of its officers or paid employes. When so construed it becomes, in fact, merely declaratory of common law principles on this subject.'

"It is, however, contended by the defendant company that the term 'contract,' as used in the statute, does not embrace a case of this character, where the goods have not been ordered or bought under a formal pre-existing contract between the city and the corporation for the furnishing of supplies, but that this is simply a case where the city goes out on the market and buys its daily supplies as it needs them, without any previous contract having been made therefor. And in this connection, attention has been called to other provisions of the statute, which apply to expenditures and contracts on behalf of the city. Among them, and the principal one, is section 2822, of the Kentucky Statutes, which reads as follows:

"Whenever it becomes necessary for either of said boards to make an expenditure by a contract, written or oral, of an amount less than two thousand dollars, said contract must be made with the approval of the mayor unless otherwise provided by ordinance. When the expenditure is to exceed two thousand dollars, the contract shall not be made without the approval of the mayor and the general council. If supplies and other forms of personal property are to be purchased, they shall be purchased by the city buyer, subject to the provisions of this act.'

"It will be noticed, however, that this section merely provides a business regulation for expenditures based upon their size; and further, that it, by its terms, applies to all contracts—both oral and written. Furthermore, it would seem that the last sentence of the section was intended to cover such a case as we have here; for after throwing certain safeguards around the larger expenditures to be made 'by a contract written or oral,' it then says: 'If supplies and other forms of personal property are to be purchased, they shall be purchased by the city buyer, subject to the provisions of this act.'

"The plaintiff contends that certainly one of the provisions here referred to is the general one affecting public policy as pointed out in the *Nunemacher* case. I am of opinion that this position is well founded, for there is clearly no good reason why the principle so carefully inserted in the statute should apply to large expenditures and not to small ones—even though section 2822 did not contain the final saving clause applicable to the purchase of 'supplies and other forms of personal property.' If the prohibition here invoked did not apply to small purchases of supplies, many larger cases could be brought into that class by cutting large purchases into many small ones and thus wholly defeat the intention and opera-

tion of the statute. The statute prohibits 'contracts' in the broadest sense of that term; and when it is recalled that every allowance or payment for goods or services, whether it be for services rendered or goods furnished under a formal, written contract, or for ordinary supplies as in this case, must be voted by the general council, it must be admitted that the prohibition applies in principle equally to all transactions, or it applies to none.

"Moreover, a verbal order for supplies creates a contract for the city and imposes an obligation upon it as fully as a written contract, or a contract wherein the price is agreed upon in advance. I assume that the prices of these goods were agreed upon in advance between the city buyer and the Bradley & Gilbert Company, or, what is practically the same thing, that they were ordered with the tacit understanding, usual in such cases, that they were to be furnished at the market prices. That being true—and it is the view most favorable to the company—it can not take the case out of the terms of the statute, for the transaction constitutes, in law, a contract on the part of both parties, and may be enforced, if not declared to be void by the statute. In the Nunemacher case above quoted from, the Court of Appeals expressly held that the effect of the statute is to render the contract void, not that it rendered the councilman ineligible to hold the office to which he has been elected. The latter question was not decided. Upon the former point the court said:

"'It is a matter of small concern, comparatively, who may or may not retain a seat in the council, but the public is vitally interested in the execution of the contracts of the city.'

"It will be seen, therefore, that the chief purpose of the statute was, in the opinion of the court, to protect the city against this class of prohibited contracts, which is accomplished by making the contract void and unenforcible. Relief was denied Nunemacher because he did not ask the proper relief. He asked the court to reject the bid of another, and further that the city be compelled to accept his bid, though it appeared there was a third bid lower than Nunemacher's bid. Nunemacher was suing solely for himself and not for the public. He did not ask that the city be enjoined from paying out the money, as is here asked. Upon that point, the court said:

"'In the case at bar the appellant, by his petition, sought, by mandamus, to compel the mayor of the city and its comptroller, to reject the bid of the Courier-Journal Job Printing Company, for printing certain municipal reports, although that bid was the lowest made, upon the ground that it could not be accepted, and to compel those officers to accept the appellant's bid because it was next lowest. Under the advertisement for bids, the mayor was authorized to reject any or all of them, and as it appeared that another was willing to do the work for a less price than the appellant was, his bid was properly rejected. The manifest purpose of the action was to compel the city authorities to award the contract to the appellant, and, while he amended his petition by stating that he was a taxpayer and citizen of the city, he does not change or enlarge his prayer for relief. He does not now insist, however, on the right to have the contract awarded to himself. We do not doubt the right of a citizen and taxpayer to enjoin the authorities of the city from paying out money on a void contract, but this is not such an action.'

"The statute expressly provides as follows:

"'Before any member-elect shall take his seat in either board he shall make an oath or affirmation that he has the qualifications and is free from the disqualifications prescribed herein.'

"If a member, eligible at the time he takes his office, could subsequently be rendered ineligible by the unknown act of his employer in making a contract with the city, we would have an unusual application of a statute primarily intended to accomplish a different purpose.

"It would seem plain, therefore, under the broad language of the opinion of the Court of Appeals, that the purpose of the statute was to prohibit all contracts of this character. It would hardly be contended that the city charter could, or that it intended to, prevent the defendant, Coder, from continuing in his position as bookkeeper with the Bradley & Gilbert Company if he were eligible when he took office; but it can declare void and non-enforcible any subsequent contract the corporation may make with the city and in doing that the city is effectually protected. This is the result of the opinion in the Nunemacher case, *supra*, in so far as it applies to this case; and it, therefore, follows that the plaintiff's demurrer to the answer of the Bradley & Gilbert Company will have to be sustained, and that plaintiff's motion for a temporary injunction will also have to be sustained, upon giving bond as required by law."

Since the opinion of the chancellor in this case was rendered, we delivered an opinion on a similar question between the same parties, the style of which is *Jacques v. City of Louisville*, 106 S. W., 308, in which we re-asserted the principles enunciated in *Nunemacher v. City of Louisville*, 98 Ky., 334, and which fully sustains the judgment of the chancellor herein.

Judgment affirmed.

JOHNSON v. ALLEN, &c.

(Filed May 28, 1908—Not to be reported.)

1. Roads and Passways—Use of as Matter of Right—Appellant has claimed the use of the passway, as a matter of right, for more than twenty years; moreover, appellant and the remote vendor of appellees. in 1885, entered into an agreement by which each gave the other a passway over the land, a good and valuable consideration moving from one to the other.

2. Same—The fact that a country road has been opened which gives appellant another outlet, can not militate against the outlet already acquired. (104 Ky., 144.)

Kash & Kash and J. J. C. Bach for appellant.

Appeal from Breathitt Circuit Court.

Opinion of the court by Judge Lassing, reversing.

This appeal involves the right of George Johnson, the appellant herein, to a passway over the lands of appellees. The facts, briefly stated, are as follows:

Prior to 1885, one Thomas Johnson, was the owner of a considerable body of land on Lick Branch, in Breathitt county, Kentucky. In 1885 he sold and conveyed a portion of said farm to appellant. At that time there was no convenient way of reaching the land purchased by appellant except to pass over the remaining portion of the land which was owned by Thomas Johnson. Appellant testifies that he discussed the question of an outlet with his brother, Thomas, before he made the purchase, and that on the same day on which the deed conveying him the land in question

was executed, he entered into a written agreement with his brother by which each was to have a twelve-foot road over the land of the other. That appellant continued to use this passway from that time uninterruptedly until about the first of January, 1906, at which time appellees, having come into possession, by purchase, of the land which Thomas Johnson owned in 1885, and adjoining the lands of appellant, closed up the passway.

It appears from the record that Thomas Johnson, in 1897, sold and conveyed the land through which the passway runs, and which is now owned by appellees, to one, Buck McIntosh, and in this deed made reservation for an outlet in the following language:

"I, Thomas Johnson, in conveying the within described land, hereby except a twelve-foot road beginning at George Johnson's corner at the mouth of Big Fork, said road is to run the way the old road ran to the river."

The same land was sold by Buck McIntosh and wife to Mrs. Hense Short and Mrs. Hense Short and husband sold and conveyed it to appellees. There was no mention of the reservation of this passway in the deed from McIntosh to Short or from Short to appellees, so far as the record shows.

During the years that George Johnson, appellant, has owned this land he resided on another tract of land situate on Snake Branch, a tributary of the Kentucky River above the mouth of Lick Branch. His only way, which was at all convenient, of reaching the farm which he bought from his brother, Thomas, was over the land now owned by appellees. Some two or three years ago a new county road was opened up which ran almost parallel to appellant's passway, over the land of appellees, and after this new county road was opened up appellant could reach his farm by going over the new county road, and this was, according to the proof in the case, almost, if not quite, as convenient a way to reach said farm as over the passway in question. All of the witnesses in the case, practically, for both appellant and appellees, testify that this passway in question was used uninterruptedly by appellant in going to and from the farm which he bought from his brother Thomas, from 1885 until it was closed in 1903 by appellees.

Appellant and his brother Thomas testify positively that at the date upon which the deed was executed they entered into an agreement, by which each gave to the other a passway through his farm twelve feet in width, and the magistrate, who took the acknowledgment to the deed, and who was introduced as a witness by appellees, testifies that there was such a writing drawn up between them on that date. Appellant also testified that but for the fact that he received this outlet from his brother, he would not have made the purchase of this land at all. Many witnesses who testified for appellees, showed that the new road which had been opened up provided appellant with as convenient a way of reaching his farm as the passway afforded him. From the testimony of a number of witnesses it appears that the passway over the land of appellees is now in the same place that it was in 1885, except at one point, where it was changed by appellant and Mrs. Hense Short, by agreement, when it was taken out of a low place in the bottom and put up near the foot of the hill. The trial judge, with this evidence before him, denied appellant the right to the use of the passway in question, and dismissed his suit, from which judgment he appeals.

The chancellor does not state the ground upon which he bases his finding and judgment, but it must have been upon the idea that the new road which was opened up offered to appellant practically as convenient an outlet to and from the farm as the passway afforded him, and for this reason, the passway being no longer a necessity, he denied to appellant the right to further use it. There is much merit

in this course of reasoning, but, if appellant had, either by contract or adverse use, acquired a right to the passway in question, could he be deprived of this right simply because, by the opening up of a new road, he had been provided with another means of reaching the property? We think not.

The evidence in this case establishes beyond question three proposition. First, that at the time that Thomas Johnson sold and conveyed the land to George Johnson there was no suitable or convenient way of reaching said land save over the remaining lands of Thomas Johnson; second, that on the date upon which Thomas Johnson executed the deed to George Johnson they drew up an agreement, by the terms of which each was to have a passway over the lands of the other, twelve feet in width; and, third, that George Johnson from that time until in January, 1906, had and enjoyed the free, uninterrupted and unquestioned use of this passway over the lands which are now owned by appellees. The fact that the passway has been changed at one point since appellant commenced to use it does not militate against the rights of appellant thereto, for the reason that, in establishing the fact that such change had been made it was developed that it had been made by mutual consent between appellant and the then owner of the land. There can be no doubt whatever but that appellant, from the date of the purchase of the land which he bought of Thomas Johnson, in 1885, regarded this passway as his own, and, that it was so regarded by the neighborhood is evidenced by the fact that it is testified to by some of the witnesses that it was known as "George Johnson's passway."

We are of the opinion that the evidence clearly shows that appellant claimed, as a matter of right, the use of this passway for more than twenty years, and in this way acquired a right thereto which can not now be taken from him, but, aside from this, the fact is established and by no one denied, that at the time of the purchase and sale of the farm in question, in 1885, appellant and his brother, the remote vendor of appellees, made and entered into an agreement, by which each gave to the other a passway over his land, twelve feet in width. The consideration moving from the one to the other was the right to the use of the passway over the other's farm, and this was certainly a good, valuable and sufficient consideration to uphold the contract. The execution of the contract being fully established by appellant and three other witnesses, one of whom was the magistrate who took the acknowledgment to the deed, and the consideration being ample to support it, appellant acquired thereunder an unquestioned right to the use and enjoyment of this passway. There is no intimation in the record that the passway through appellant's land has not at all times been open for the benefit of the owners of the land now owned by appellees. The fact that a county road has been opened up which gives to appellant another outlet can not militate against or take from him the outlet which he has already acquired, as was expressly decided in *Estop v. Hammons*, 104 Ky., 144, wherein this court held that a right of way or easement acquired over the land of another was not lost or affected by the purchase of another and different outlet.

This being true, we are of opinion that appellant was entitled to the relief sought, and the trial judge erred in refusing to grant same.

The case is reversed and remanded, with directions to the trial court to enter a judgment in favor of appellant in conformity with the prayer of the petition.

COMMONWEALTH v. LEDFORD.

(Filed May 28, 1908—To be reported.)

Intoxicating Liquors — Merchants — License, to Sell — Bond to Observe the Law—Validity of Bond—A county court is authorized to grant a license to one who is a bona fide merchant, to retail liquors at his storehouse in quantities not less than a quart, not to be drunk on his premises or adjacent thereto, but the court is not authorized to exact a bond of such merchant, conditioned that he will faithfully observe the law in conducting his business, and such bond being unauthorized, is not good as a common law bond.

James Breathitt, Thos. B. McGregor, Chas. H. Morris and Denny P. Smith for appellant.

C. H. Anderson and C. H. Bush for appellee.

Appeal from Christian Circuit Court.

Opinion of the court by Chief Justice O'Rear, affirming.

The county court is alone authorized to grant merchant's license to retail liquors in quantities not less than a quart and not to be drunk on the premises. (4224, Kentucky Statutes.) The procedure required by the statute is that the applicant shall first post notices of his intention to apply for the license for so many days before the application is heard; then the residents of the neighborhood may protest against the license being granted, the neighborhood to be defined by the court. If a majority of the legal voters protest, the license must be refused. Nor shall a license be granted to a person of bad character, or who keeps a disorderly house. However, if the applicant is a person of good character, keeps an orderly house, has complied as to posting notices of his application, and a majority of the voters of the neighborhood do not protest, the county court has but little discretion left as to whether the license shall be granted. (Hodges v. Metcalfe County Court, 25 Ky. Law Rep., 772.) But in Christian county the county court exacted as a condition precedent to the granting of a merchant's license to Ledford that he enter into bond with the Commonwealth in the penal sum of \$500, conditioned that he would faithfully observe the law with respect to conducting his business. And appellee, Ledford, with his suerty, entered into such covenant. This suit was brought upon the bond by the Commonwealth, charging its breach in that Ledford sold to inebriates, to minors and in quantities less than a quart, as well as in other quantities to be drunk on the premises; and that he kept a disorderly house. A recovery of the penal sum named in the bond was asked for. The circuit court sustained a demurrer to the petition. We think properly so. It is conceded by the State's attorney that there is no provision of the statute authorizing the taking of such bond. Unless, it is said, the statute applicable to tavern keepers should be held to apply. While in olden times a tavernkeeper may have been deemed a retailer of liquor, or a merchant retailer, we think the Legislature of this State, by naming them separately and providing different conditions as to each, intended that they should not be any longer regarded as synonymous employments. And as bond is expressly required of tavernkeepers, but not of merchants, the county court was without authority to exact or to receive such bonds of the latter. They are without consideration besides. It amounts to this: A. is concededly entitled to have a certain license granted to him upon his paying the fees. But, in addition, he is required to execute a covenant not to violate the law. The requiring the covenant was as

much unauthorized as if in addition to the toll legally exactable by a ferryman, he should also require a bond of the traveler to keep the peace. In neither event is it a voluntary bond. And not being such, it is not good as a common law bond. (Perry v. Hensley, 14 B. Mon., 381.)

Judgment affirmed.

STILES, GADDIE & STILES v. LOUISVILLE & NASHVILLE RAIL-
ROAD CO.

(Filed May 28, 1908—To be reported.)

Carriers—Injury to Live Stock—Absence of Infirmary in Stock—Common Law Liability—Applicability—The common law liability of a common carrier for injury to freight applies in this State to live stock the same as to inanimate freight. Where horses were burned by a conflagration in the city of Louisville, while in charge of the carrier, the loss being one not growing out of the infirmity of the animals themselves, the carrier is liable to the owner for their value.

Geo. S. & John A. Fulton for appellants.

John S. Kelley, R. C. Cherry and Benjamin D. Warfield for appellee.

Appeal from Nelson Circuit Court.

Opinion of the court by Judge Barker, reversing.

This action was instituted for the purpose of recovering the value of thirty head of horses shipped from East St. Louis, Illinois, to New Haven, Ky., over the railroad of defendant, and which were destroyed by fire in Louisville, Ky. There is no allegation in the petition of any negligence on the part of the carrier, and a general demurrer to the petition was sustained by the court. The plaintiffs declining to amend their petition, it was dismissed; from which judgment this appeal is prosecuted.

The sole question arising on the record is, whether or not, in Kentucky, the common-law rule as to the liability of a common carrier for inanimate freight delivered to it prevails as to live stock; it being conceded that if this rule does prevail the petition states a cause of action, and if it does not the judgment of the trial court is correct.

It is not denied that, at common law, the common carrier of inanimate freight was an insurer of its safe delivery, except where the loss was from the act of God or the public enemy, or resulted from the inherent infirmity of the goods; that this rule prevails in Kentucky is quite beyond question. The question for adjudication is: Does the same rule apply as to consignments of live stock? In the case of Hall & Co. v. Renfro, 3 Met., 51, there was involved the loss of a jack by a public ferryman while it was being transported across a river. After stating that the keeper of the ferry was a common carrier, his responsibility for the loss of the jack was thus stated:

"Did he thereby subject himself to the obligations and liabilities of a common carrier? The authorities are conclusive of this question. * * *

"The general rule is, that common carriers are responsible for the goods which they undertake to carry unless the loss or damage is the result of inevitable accident, as lightning, tempests, and the like (which are usually termed the acts of God), or is occasioned by the public enemies. (See the authorities cited.) This rule, however, must be understood with certain qualifications. For instance, it is said that the liability of the carrier would not cover losses arising from the ordinary deterioration of goods, in quantity or quality, in the course of transportation, or from their inherent infirmity or tendency to decay.

"So, although a carrier is liable for the safety of animals delivered to him for transportation, yet, if an animal is injured by the peculiar risks to which it is exposed, the carrier is clearly excusable. He would not be liable for any accident arising from the animal's own viciousness or want of temper. (Angell on Carriers, section 210, 214, and the cases there cited.) 'Such a case,' says the author, 'would seem to be analogous to the case of the loss of merchandise, owing to some inherent defect which caused the destruction of it while in transit.'"

The court then goes on to clearly recognize the exception to the general rule as above stated, that the carrier was not liable for the loss of the jack if it, without negligence on the part of the carrier, fell out of the boat, or was thrown out of it in consequence of its own restiveness or viciousness of temper, or the restiveness or viciousness of the other animals on board with it at the time.

In the case of C., N. O. & T. P. Ry. Co. v. Sanders & Russell, 80 S. W., 488, the following rule is quoted with approval as being the law in Kentucky: "And the rule as now established by the great weight of modern authority is that railroad companies are common carriers of live stock with substantially the same duties and responsibilities that existed at common law with respect to the carriage of goods, except that they are not liable as insurers against loss and injury resulting from the inherent nature, propensities, or proper vices of the animals themselves."

And in Cleveland, C., C. & St. L. Ry. Co. v. Drulen, Id., 778, in discussing the loss of live stock by fire, we said: "At the common law, which obtains in Illinois as well as in this State, a common carrier is liable for loss of freight in its charge occurring by fire, whether or not caused by its own negligence; its liability being that of an insurer."

The cases cited by the appellee in support of the judgment of the court are not apposite to the question before us. They are cases where the stock was killed or injured by reason of its inherent propensity, and the loss may be said to have resulted from the infirmity or vice of the animals; and while the court, perhaps, used general language in regard to the negligence or non-negligence of the carrier which, if disassociated from the particular loss that was being discussed, might seem to modify the general rule; yet it was clearly not the intention of the court so to do. Undoubtedly, where the result may have arisen from the natural infirmity or vice of the animal, then the question of the negligence or care of the carrier arises; but that principle has no application here. Appellants' horses were burned by a conflagration in Louisville, Ky., while in charge of the carrier. This was a loss in no wise connected with or growing out of the infirmity of the animals themselves, but falls under the common-law rule which makes the carrier an insurer of the safe delivery of the goods committed to it for transportation.

It results, therefore, that the court erred in sustaining a demurrer to appellant's petition, and the judgment is reversed, for proceedings consistent with this opinion.

FOLEY v. GRAHAM'S GUARDIAN, &c.

(Filed May 28, 1908—Not to be reported.)

1. Lands—Divisibility of—Code Provisions—The Code does not require that the indivisibility of property shall be required by proof other than that furnished by the pleadings and exhibits, nor must it be established as a condition prerequisite that the sale would be in the interest of the infant. The best interests of the infant must be looked to, and in some cases a sale can not be avoided.

2. Duty of Administrator—Sale in Entirety—If in the judgment of the administrator it would impair the property to divide it, his duty to the estate would require that he ask the court for a sale of the entire tract.

3. Bond—Section of Code Sale is Under—The sale in this case was under section 497, of the Code, therefore, no bond was required before the sale.

4. Judgment of Chancellor—The proof establishes a state of case where the chancellor was authorized to conclude that the land was indivisible, therefore, he did not err in ordering a sale of the entire tract.

Bertram & Phelps for appellant.

J. T. Montgomery for appellees.

Appeal from Russell Circuit Court.

Opinion of the court by Judge Lassing, affirming.

Appellant became the purchaser of a small parcel of land ordered sold in the judgment in this case and because of certain alleged defects in the title he filed exceptions to the report of sale, and the circuit judge having decided adversely to his contention, he appeals.

Some twelve years or more ago a suit was instituted in the Russell Circuit Court for the purpose of settling the estate of A. M. Vaughn, and such proceedings were had in that suit that a tract of land owned by him containing about two hundred acres was sold. The parcel of land, which was bought by appellant in this action, is a small portion of the two hundred acres above referred to. The record in the suit to settle the estate of A. M. Vaughn is made a part of the record in this case. It appears from the record in the old suit of Vaughn's administrator, that he left surviving him his widow and one infant child. That he owed many debts, some of which were liens upon the real estate. That his land, the 200 acres above referred to, was valuable chiefly because a spring (the waters of which possessed certain medicinal qualities), was located thereon; buildings had been erected conveniently near by, and it had been converted into a health resort. In this property the widow held a dower interest, subject to the lien debt. It was alleged that the land was not susceptible of division without materially impairing its value, and that it was necessary to sell the entire tract to pay the debts and settle the estate.

The case was referred to the commissioner of the court to settle the accounts of the administrator and report on claims. His report was filed in due time and showed an indebtedness against the estate of something like \$1,600 more than the amount of the personal assets which came to his hands. A guardian ad litem was appointed for the infant child, and he resisted a sale on the ground that A. M. Vaughn, a short time before his death, had entered into a verbal contract and agreement with one, G. Graham, by the terms of which the said Graham was to pay him \$1,700 for a one-half interest in the property including the personal property, household effects, &c., and furnish-

ings of the hotel building at the spring. He asked that this contract be enforced and the indebtedness in this way discharged and the remaining one-half of the property saved from sale. After the filing of this answer, the case was submitted for judgment on the pleadings, exhibits, commissioner's report, &c., and the court rendered a judgment directing a sale of all of the land and personal property, as a whole. The land was appraised at \$2,700. It and the personal property were purchased by the widow, M. S. Vaughan, and G. Graham, jointly for \$3,400. This sale was, in the course of time, confirmed, the debts were paid and the remainder was apportioned between the widow and her infant chi'd, according to their rights thereto. It is not claimed that the land did not bring its full value, and the only question is as to whether or not the proceedings were so irregular as to render the sale void.

The first, second, third and fifth exceptions to the report of sale are substantially the same. The first being because the whole tract was sold without division, when it should have been divided and sold in lots. Second, because there is no proof that said land is not susceptible of division without materially impairing its value. Third, because more land was sold than was necessary to pay the indebtedness of the estate and cost of administration. Fifth, because there was no proof to show that it would redound to the interest of the infant to have the land sold. The proceeding to sell this land was under sub-section 2, of section 694, of the Code, and sub-section 2, of section 490, of the Code.

For appellees, it is urged that the land and its condition and uses appear from the petition and exhibits on file, and that these clearly show that it could not be divided without materially impairing its value. That the chief value of the property, and in fact the only substantial value that it had, was in the spring and the buildings, surrounding it. There is much force in this argument when it is considered that Vaughn in his life, and just a short while before his death, contracted to sell a half interest in the entire property, personal as well as real estate, for \$1,700. If the buildings on said land are given anything like their real value the land itself was practically worthless. A general description, location and boundary of property, together with the uses to which it is put, frequently provide the judge with information sufficient to enable him to determine whether or not the land is susceptible of division without impairing its value. (Foley v. Fuller, 13 Ky. Law Rep., 591, and Friddle v. Kohn, 14 Ky. Law Rep., 312.)

So that the trial judge, from the pleadings and exhibits, having determined that the land in question was indivisible, and it being necessary to sell a portion thereof, he was, by express statutory provision, (sub-section 2, section 694, and sub-section 2, section 490), authorized to direct a sale of the whole, and thereafter make the proper order for the distribution of the surplus fund.

The provisions of the Code, do not require that the indivisibility of the property should be established by proof other than such as may be furnished by the pleadings and exhibits, nor must it be established by proof as a condition prerequisite that the sale would be to the interest of the infant. In fact, where the land is indivisible and a sale is necessary it might happen that it would not be to the best interests of the infant that the land should be sold, and yet a sale can not be avoided in such cases; even though the court should be of opinion that it was not to the best interests of the infant that the whole be sold, he would be bound to so direct. Having so found, the trial judge did not err in directing a sale of the entire tract and, in our judgment, by so doing the best interests of the widow and infant defendant were subserved.

The fourth exception to the sale is that an administrator has no right to prosecute a suit for a sale of real estate for any purpose other than the payment of debts against the estate. It was his duty to seek a sale of a sufficient amount of the land to pay the debts (sections 428 and 429 of the Code), and if the nature of the land was such that it could not be divided without materially impairing its value, then it becomes his duty to ask for a sale of the entire tract. It quite frequently happens, in the settlement of an estate that it would be impossible for the administrator to determine whether or not a sale of the entire tract is necessary for the payment of debts, and in such a case it is the duty of the administrator to present the facts to the court and leave it for the court to decide this point, and, while it is customary and usual for the prayer of the petition to ask for a sale of enough of the real estate only to satisfy the debts, still, if, in the judgment of the administrator, it would impair the value of the property to have it divided, his duty to preserve the estate would require that he should ask for a sale of the entire tract, as was done in this case.

Complaint is also made that no bond was executed, as required by section 493, of the Code, before a sale was ordered. We are of opinion that this sale is governed by the provisions of section 497, of the Code, and no bond is, therefore, required before the sale, but the share of the purchase money found to be due the infant would remain a lien upon the land until the infant arrived at age or until the bond, as provided by section 493, had been executed, but in no event would the sale be void. It appears that, before the sale in the present suit was ordered, the guardian of the infant, Marie Vaughn, executed the necessary bond and the purchase money found to be due her was paid over to him as such guardian, and thus the title of the infant children of G. Graham in the land purchased by appellant was perfected, and the trial judge properly so held.

For appellant it is urged that under the rule of law announced in the case of *Elliott v. Fowler*, 112 Ky., 376, the sale of the 200 acres in the suit to settle the Vaughn estate was absolutely void because no proof was taken showing that the land could not be divided without materially impairing its value. We are of opinion, however, that this case differs from that case in the following particulars. There is no allegation in the pleading in that case that the land was indivisible but, on the contrary, the petition alleged that it was necessary to sell some part or all of the real estate, which consisted of some 900 acres of land, and, before the amount of the indebtedness had been ascertained, and without any allegation as to the amount thereof, a sale of all the land had been decreed. The land was sold in two tracts for something more than \$11,000. The indebtedness, including cost of administration, proved to be about \$7,000. Although the judgment ordering a sale provided that so much of the purchase money as was going to the infant should not be collected, but should remain a lien upon the land, the whole of the purchase money was paid into court and the infant's share thereof was entirely lost. There was nothing in the record in that case to show that the land could not be divided without materially impairing its value, but, on the contrary, the very manner in which it was sold furnished the best evidence of the fact that it could be divided and sold advantageously, in fact one of the parcels so sold brought a sum almost sufficient to pay the entire indebtedness. It not appearing in that case that the land was indivisible, this court held that the sale of same in excess of enough to pay the indebtedness of the decedent was void. That finding, under the facts in that case, was correct, and the principles of law announced in that opinion are now adhered to, but, in the same opinion it was said:

"Where the lot of land sought to be sold is indivisible without impairment of its value, the Code furnishes ample and exclusive provision for proceedings to sell it as an entirety. Where the lot is indivisible, and some part of it is necessary to pay the ancestor's debts, * * * the provisions of the Code as to suits to settle decedents' estates, and those provisions applicable to the sale of infants' lands under circumstances of indivisibility, must be read and applied together."

The proof, as furnished by the pleadings and exhibits in this case, demonstrates, to a reasonable degree of certainty, that the chancellor was correct in his conclusion that the land in question was indivisible, and that no part thereof could be sold without materially impairing the value of the remainder or of the whole. Hence, he did not err in directing a sale of the entire tract, and his finding and judgment in so doing is in perfect harmony with the rule announced by this court in the Elliott case above cited.

For the reasons indicated, the judgment of the lower court is affirmed.

BROCK v. COMMONWEALTH.

(Filed May 28, 1908—Not to be reported.)

1. Homicide—Trial—Motion by Defendant for Continuance—Absent Witnesses—Corroborating Evidence—On the trial of one for murder, in which the jury found the defendant guilty of voluntary manslaughter, and fixed his punishment at 21 years in the penitentiary, where the case had been continued for the defendant at a former term of the court, it was not error in the court to refuse a second continuance where the defendant had ten witnesses present who swore to facts tending to show that the shooting was accidental, and the court permitted the affidavit of nine absent witnesses to be read as their depositions whose testimony was substantially the same as that of the ten who were present.

2. Same—Evidence of Commonwealth—Duty to Apprise Defendant Thereof—Allegations of Indictment—On the trial of one indicted for murder the Commonwealth does not owe the defendant the duty to apprise him of what it expects to prove further than the information set out in the charge in the indictment.

3. Conflicting Evidence—Absence of Errors—Refusal of New Trial—On the trial of one for murder where the evidence is conflicting, that is if the defendant and his witnesses are to be believed the killing was an accident and the defendant should have been acquitted, but if the Commonwealth's witnesses are to be believed it was a deliberate and unprovoked murder, and, in the absence of any irregularity or error in the trial, the verdict of a properly instructed jury should not be disturbed.

B. B. Golden, Cleon K. Calvert, J. G. Forrester and J. G. Begley for appellant.

James Breathitt and T. B. McGregor for appellee.

Appeal from Leslie Circuit Court.

Opinion of the court by Judge Lassing, affirming.

Appellant, Riley Brock, was tried in the Leslie Circuit Court upon the charge of having murdered "Thee" Brown, found guilty and his punishment fixed at confinement in the penitentiary for the period of 21 years. Because of this judgment he appeals, and assigns

numerous reasons why the judgment should be reversed. The principal grounds for reversal are that the trial court erred in refusing to grant him a continuance because of the absence of certain witnesses. That it erred in refusing to set aside the swearing of the jury and continue the case on the ground that he and his counsel were taken by surprise by certain testimony which was given by two witnesses for the Commonwealth; and because the court did not properly instruct the jury.

The killing for which the accused was prosecuted took place at a voting place at Marrowbone, in Leslie county, Kentucky, in the summer of 1907, about mid-day, while appellant and Grant Sizemore, who had been specially deputized for that purpose, were attempting to quiet deceased, whom they had arrested for being drunk and disorderly on the ground. There were present at this voting place at the time of the killing a large number of men and some women, the witnesses stating the number from 75 to 200. About the time the killing occurred several men in the crowd became boisterous, many of them were drinking and at least two fights were in progress, and considerable excitement prevailed. A justice of the peace and a deputy sheriff, who were present, were using their best endeavors to preserve order. When the disturbance had increased to such an extent that the justice of the peace could not control the situation, he issued a proclamation and deputized every sober man on the ground to assist in keeping the peace. The deceased, though unarmed, was very drunk and was creating much disturbance by cursing and hallooing.

The deputy, sheriff, one Z. R. Colwell, specially deputized appellant and Grant Sizemore to arrest deceased and take him off the grounds. They proceeded to do so, Sizemore taking hold of him on his left side and appellant on his right side, appellant catching hold of his right hand with his left hand and in this way they proceeded to take him off the grounds. He offered such resistance as a drunken man could by pulling back and talking. While pushing and jerking him along his feet became entangled in some weeds and he fell to the ground. At the time that he stumbled and fell appellant had hold of him with his left hand and had a pistol in his right hand, and almost immediately following his fall upon the ground the pistol was fired, the ball entering the deceased's left breast above heart and passing out above the hip in the back.

Up to this point all of the witnesses for the Commonwealth and the accused agree. Appellant insists that when the deceased fell he, having hold of him by the arm or hand, it jerked him around and caused his right hand, in which he had the pistol, to swing around over the body of deceased, and that in some way it was caused to fire the shot which killed deceased. That he did not intend to do so. That he did not intend to fire it at all but that it was purely an accident. That he thinks that someone struck the barrel of the pistol before it fired and that this caused it to fire. He introduced many witnesses whose testimony tends to support his theory as to the manner in which the killing occurred, while the Commonwealth contends and introduced a large number of witnesses in support of this contention, that appellant became angered because deceased did not yield readily when placed under arrest and did not accompany him and Sizemore off the grounds as they desired him to do, but continued to pull back and offer all the resistance that he could to being taken off the grounds, and that when he fell appellant jerked his arm one or more times, and when he did not arise, deliberately aimed the pistol at him and fired, saying, according to two witnesses, after he had fired the shot, "Now, God damn you, I guess you will get up," or "give up," the witnesses were

not clear as to which expression was used. The Commonwealth also proved that, after the shot was fired, appellant was in the act of firing a second shot when they asked him to desist, as he had already killed deceased. Appellant testified that there never had been any trouble between himself and deceased and that they had always been good friends. After the shot was fired appellant said that his pistol had been accidentally discharged. The deceased lived until some time during the following night.

Appellant admits firing the shot, but claims that it was an accident. The Commonwealth claims that it was deliberately and intentionally done, and there being proof tending to support each of these respective theories it was proper for the jury to say which of the theories presented was correct. They decided against the contention of appellant and, under the well established rule, their finding will not be disturbed unless some prejudicial error was committed by the court in the conduct of the trial.

The indictment was returned at the October term, 1907, of the Leslie Circuit Court. At the same term of court the case was called for trial, the Commonwealth announced ready, and the case was set for the 8th day of the October term, which was the 16th of October. On this day the defendant moved the court for a continuance, and filed in support of his motion his own affidavit. The motion was sustained and the case was continued and set for trial on the 4th day of the next term of court. The bond of the defendant was fixed at \$15,000, which he gave. The witnesses for the Commonwealth, some twenty odd, were recognized and permitted to go, and, on motion, certain witnesses for the defendant were likewise recognized in the sum of \$200 each for their appearance as witnesses in this case on the fourth day of the next term of court. When the case was called for trial on the fourth day of the next term of court, which was the 6th of February, 1908, the Commonwealth again announced ready for trial, the defendant moved for a continuance and in support of his motion filed his affidavit. The attorney for the Commonwealth thereupon agreed that the affidavit might be read to the jury as the evidence of the absent witnesses, should the court be unable to procure the attendance of such absent witnesses to testify before the jury. The motion for a continuance was overruled and a forthwith warrant of arrest was ordered to be issued for the absent witnesses mentioned in the affidavit, and all other witnesses the defendant desired. The trial was proceeded with.

The defendant complains that his case was prejudiced by this ruling of the trial judge. That the affidavit should either have been admitted as true or else the case continued. Section 189, of the Criminal Code, provides that, when an application shall be made for a continuance by a defendant, based upon affidavits stating the absence of one or more material witnesses, and the facts which such absent witnesses would, if present, prove, the attorney for the Commonwealth shall not be compelled, in order to prevent a continuance, to admit the truth of the matter which it is alleged in the affidavit such absent witness or witnesses would prove, but, only that such absent witness or witnesses would, if present, testify as alleged in the affidavit. It is further provided in this section that it does not apply to a motion for a continuance made at the term at which the indictment was found, and this court, in the case of *Hardesty v. Commonwealth*, 88 Ky., 537, held that where a motion is made for a continuance at the same term at which the indictment is found, upon the ground of the absence of material witnesses, the Commonwealth can not force the accused into a trial unless it admits the facts stated in the affidavit to be true, provided, the affidavit shows the materiality of the testimony of the absent witnesses.

The indictment in this case had been found at a former term of court, hence, the Commonwealth was not called upon nor required to admit the affidavit as true, but, under the provisions of section 189, above quoted, it was only called upon to admit the affidavit as the deposition of the absent witnesses, and the court did not err in so holding.

It has been repeatedly held that while the trial judge has a large discretion in determining when a continuance should be granted because of the absence of witnesses whose testimony is alleged to be material, still where proper diligence has been shown to procure their attendance, and it is shown that there are reasonable grounds to believe that their attendance can be procured at the next succeeding term of court, the continuance should be granted (*White v. Commonwealth*, 80 Ky., 480), but where other witnesses have testified to the same facts which it is alleged the absent witnesses, if present, would testify to, it is not error on the part of the court to refuse to grant a continuance. (*Williams v. Commonwealth*, 13 Ky. Law Rep., 753; *Simmons v. Commonwealth*, 13 Ky. Law Rep., 839; and *Roberts v. Commonwealth*, 15 Ky. Law Rep., 341.)

In the case at bar, appellant moved for a continuance on the ground of the absence of nine witnesses, each of whom he alleges were present at the time of the difficulty and saw all that transpired, and that if they were present at the trial they would testify that the killing occurred substantially under the circumstances and as he alleges it did occur. He introduced some ten witnesses who testified to substantially these same facts, and the evidence of the absent witnesses, whose presence he desired to procure, would have been but cumulative, as it is not alleged in the affidavit that any one of them would have testified to facts which were not brought out in the trial, either by the witnesses for the Commonwealth or for the accused. Besides, the court offered to have a forthwith warrant of arrest issued for each and all of said witnesses and any other which the accused desired, and no complaint was made during the progress of the trial that any request of his in this particular was not being complied with, or carried out by the court and its officers. In our judgment, the court did not abuse its sound discretion in refusing to continue the case and permit the affidavit to be read as the deposition of the absent witnesses.

In the case of *Hopkins v. Commonwealth*, 25 Ky. Law Rep., 2117, a similar question was before this court, and it was there held that the court did not err in refusing to continue the case when an affidavit as to what the absent witness would testify to was read to the jury as the deposition of such absent witness. The same rule was announced in the case of *Aiken v. Commonwealth*, 24 Ky. Law Rep., 523. After the jury was sworn and much of the testimony had been introduced for the Commonwealth, appellant filed an affidavit in which he alleged that he and his attorneys were greatly disconcerted and taken by surprise by the testimony of certain of the Commonwealth's witnesses, because said witnesses had testified in substance that after his pistol was discharged and the deceased was shot, he made a demonstration and effort as if to shoot again, when, as a matter of fact, he says that he and his counsel had talked with said witnesses and had not been advised by them that they would make such statements. That he was also surprised at certain other statements which said witnesses made, and which they had not indicated to him they would make. That, by reason of their having testified to what they had not notified him they would testify to, he was prevented from procuring other witnesses, who would have contradicted them upon this point. We are of opinion, that this objection on the part of appellant is not well taken, for two

reasons. In the first place, the Commonwealth owed to appellant no duty to apprise him of what she expected to prove, further than that information which was conveyed to him through the charge set out in the indictment. If, in his efforts to learn from the witnesses of the Commonwealth what they would testify to upon the trial, they failed to disclose to him all of the facts to which they would testify, he may have cause to feel aggrieved against the witnesses, but certainly not against the Commonwealth. The point, in our opinion, is not well taken for the further reason that the absent witnesses, by which appellant hoped to have contradicted the statements made by these witnesses for the Commonwealth, were not shown to have been any nearer the killing, if as near, as many of the witnesses who did testify. It is more than probable that if all of the absent witnesses whose names are set up in the affidavit for a continuance had been present, their testimony would have thrown no additional light upon what was said and done on that occasion, to that which was given in evidence by the witnesses who were present, and did testify.

This tragedy, as above stated, occurred in the broad day light, at a place where a large crowd of people were gathered together in a reasonably small place. There is no material difference between the testimony of the witnesses for the Commonwealth and for the accused as to the manner in which it occurred. They differ, as is always the case, upon the exact language that was used by the participants in the difficulty and their respective friends. They likewise differ as to the motions and maneuvers of appellant just before and just after the killing. Appellant's witnesses, who were present, were interrogated along this line for the purpose of contradicting the witnesses for the Commonwealth, who gave the damaging evidence against appellant of which he complains. Had the absent witnesses for him been present and testified as he says they would have testified, their evidence upon this point would have been merely cumulative. He did not ask the court to use its compulsory process to procure the presence of these witnesses, although the court had previously proffered such service had it been desired. In our opinion, the court would not have been justified in setting aside the swearing of the jury and continuing the case upon the grounds set up in the affidavit.

Appellant also complains of the instruction given by the court and especially of that instruction in which the court told the jury that if the killing was the result of an accidental discharge of appellant's pistol, then they should acquit him. A close examination of this instruction shows that it is not subject to criticism. The instructions, as a whole, are remarkably clear and simple, presenting to the jury the whole law of the case—defining the rights of appellant as a citizen and officer—and are certainly as favorable to appellant as he was entitled to have them. We have carefully read and re-read this record and fail to find a single ruling of the court which was prejudicial to the substantial rights of appellant. This is, in some particulars, a remarkable case. If appellant and his witnesses are to be believed, this killing was an accident, pure and simple, and appellant should have been acquitted on the ground of accidental killing. If, on the other hand the witnesses for the Commonwealth are to be believed, it was a deliberate, unprovoked and wanton murder of a helpless man. Under proper instructions, a jury of his countrymen have heard the facts as detailed by the witnesses and they have rejected the theory of appellant that it was an accidental killing and found him guilty.

In the absence of any irregularity or error in the trial, their finding and verdict should not be disturbed and the judgment is, therefore, affirmed.

NAPIER v. COMMONWEALTH.

(Filed May 28, 1908—Not to be reported.)

1. Criminal Law—Joint Indictment—Separate Trial—Election by Commonwealth—Mistrial—Second Trial—Second Election by Commonwealth—Where several persons are jointly indicted and a separate trial as to one or more of them is demanded, the Commonwealth has the right to elect which one he will try, and if there is a mistrial as to the one selected, or if there is a conviction and a new trial is granted, the Commonwealth may, when the prosecution is again called for trial, elect to try the one previously convicted or either of the other defendants.

2. Trial—Absent Witnesses—Failure of Defendants to Object—Subsequent Objection—Where a defendant, indicted for a felony, announces ready and goes into trial without making any suggestion to the court as to the absence of any witness, he assumes the risk of their attendance, and it is too late after the trial has begun to ask a continuance to procure the attendance of his witnesses.

3. Joint Indictment—Proof of Confederation—Evidence Admissible—Where, on a trial of one defendant, jointly indicted with others, charged with confederating and banding together to alarm, disturb and injure Martha S., proof of the fact that all of the defendants appeared together at her house in the middle of the night and all of them assisted in the outrage there committed, was, in and of itself, sufficient evidence of a confederation and conspiracy, and this fact being established, it was competent to prove the unfriendly relations or enmity that existed between any of the conspirators and the persons they assaulted.

Wootton & Morgan, Jesse Morgan, Bailey P. Wootton and H. C. Davidson for appellant.

James Breathitt and J. F. Lockett for appellee.

Appeal from Perry Circuit Court.

Opinion of the court by Judge Carroll, affirming.

The appellant, Napier, in connection with John Hensley, William Miller, and other persons, was indicted under section 1241a of the Kentucky Statutes, charged with the offense of confederating and banding themselves together for the purpose of alarming, disturbing and injuring Martra Stidham. Upon a trial before a jury, appellant was found guilty and his punishment fixed at four years confinement in the State penitentiary.

John Hensley, one of the defendants in the indictment, was tried and convicted in 1907. Upon appeal to this court, the judgment was reversed and the prosecution as to him remanded for a new trial. Afterwards, in March, 1908, when the prosecution was again called for trial, the defendants having theretofore demanded separate trials, the Commonwealth elected to try appellant.

Appellant insists that the Commonwealth, having elected, in the first place when separate trials were demanded, to try Hensley, that it could not try the other defendants until the prosecution against Hensley had terminated. It is said that when the Commonwealth elects to try one of several persons jointly charged in an indictment that the trial as to him must be prosecuted until it is finally disposed of before either of the other defendants can be tried. We are unable to perceive any reason why this procedure should be adopted, and counsel for appellant has not furnished us any authority in support of his position. When several persons are joint-

ly indicted, and a separate trial as to one or more of them is demanded, the Commonwealth has the right to elect which one it will try; and if there is a mistrial as to the one selected, or if there is a conviction and a new trial is granted, the Commonwealth may, when the prosecution is again called for trial, elect to try the one previously convicted, or either of the other defendants. Persons jointly indicted have a right to demand a separate trial, but they can not regulate the order of the trials, or determine for the Commonwealth which one shall be first tried.

It is next insisted that the court erred in failing to grant appellant a continuance. The record shows that, on the 7th day of the term, the trial was commenced without any request upon the part of appellant for a continuance. On this day the evidence was partially heard, and on the following day it was concluded. After all the evidence had been introduced for both the Commonwealth and the accused, appellant entered a motion for a continuance, which was overruled. In support of the motion he filed his own affidavit, in which it was stated that Martha Moore, and Lillie Bell Allen, important witnesses for him, and whose attendance he had exercised proper diligence to obtain, failed to appear on account of sickness—that except for sickness they would have been present and testified on the trial. A state of case might arise where the defendant would be entitled to a continuance on account of the absence of a witness or witnesses who were present when the accused announced ready for trial, but we have not before us a question of that kind. Neither of these witnesses was present when the case was called for trial, and appellant announced ready for trial without making any suggestion to the court concerning the absence of these witnesses. He should not have announced ready for trial until satisfied that he could obtain the presence of the witnesses he desired to introduce in his behalf. When he went into the trial in the absence of these witnesses, he assumed the risk of their attendance; and it was too late after the trial had been commenced to ask a continuance to procure their presence. The Code of Practice, section 188, provides that: "When an indictment is called for trial, or at any time previous thereto, the court, upon sufficient cause shown by either party, may direct the trial to be postponed to any time in the same term or to another term." This section regulates the practice in respect to asking a continuance, and affords the accused ample opportunity to apply for a postponement of the trial if he desires it continued. To permit a defendant in a criminal prosecution to have a continuance in the midst of a trial he had gone into without asking its postponement would involve the trial of all criminal cases in uncertainty. It would encourage persons charged with crime to go into trial when they were not ready, and give them the advantage of obtaining a continuance at any time during the trial when it appeared that a continuance might be to their interest. This practice, aside from being in direct violation of the Code, would often result in a miscarriage of justice, and tend to obstruct the orderly administration of criminal procedure.

During the examination of the prosecuting witness, she was allowed to testify that she and James Napier, one of the defendants, had some trouble a few months before she was assaulted and that it had continued up to the time of the assault. Her evidence upon this point was very trivial, but is objected to upon the ground that no conspiracy had been proven between James Napier and the accused to commit the crime they were charged with. All of the defendants were identified as being present, aiding and assisting each other in the assault made upon Martha Stidham and her family. The fact that all of them appeared together at her home in the middle of the night, and that all of them assisted in the outrages

there committed, was, in and of itself, sufficient evidence of a confederation and conspiracy between them within the meaning of the statute. And when this fact was established, it was competent to prove the unfriendly relations or the enmity that existed between any of the conspirators and the persons they assaulted, for the purpose of showing their feeling of hostility towards the person assaulted, and furnishing a motive for the commission of the crime.

It is further objected that the Commonwealth was permitted to prove by one, John Miller, that the defendant, Hensley, endeavored to get him to intercede with the prosecuting witness for the purpose of adjusting in some way the prosecution. While John Hensley, who was one of the defendants, was on the witness-stand, he was asked by the attorney for the Commonwealth, who fixed the time and place, if he had not requested Miller to effect a compromise with the Stidhams. Upon his denial, Miller was introduced by the Commonwealth as a witness for the purpose of proving that Hensley had requested him to intercede with the Stidhams, with a view of adjusting the trouble between them. This evidence was introduced to impeach Hensley and was competent for this purpose alone. It was not offered for the purpose of proving a conspiracy, because the object of the conspiracy had been accomplished, and any statements then made by Hensley would not be competent against his associates; but, it was admissible for the purpose of impeaching the credibility and veracity of Hensley.

It is further complained that one of the attorneys employed to assist in the prosecution made an improper argument to the jury. The alleged improper argument was not in our opinion open to criticism or objection. But, if it had been, no exception or objection was taken to it, and therefore, it would not be available error upon this appeal.

The instructions are also the subject of criticism, but they fairly presented the law of the case.

In connection with the motion for a new trial, appellant filed his affidavit, setting out that the jury had boarded, during the trial, at the home of the county attorney. The affidavit does not disclose any improper conduct on the part of the jury or the county attorney, but if it did we would be powerless to interfere as it has been repeatedly held that when an alleged error in the trial of a case is presented for the first time in a motion for a new trial, this court, under section 281, of the Criminal Code, has no jurisdiction to review it. We may, however, observe that when a jury selected to try a criminal case boards at the home of one of the attorneys engaged in the prosecution, it has a tendency to excite suspicion and create unfavorable comment, and for these reasons, if none others were presented, it would be better for the jury to engage board at some other place. We have no doubt that if, during the trial, the attention of the court had been called to the fact that the jury were boarding with the county attorney, who was actively engaged in the prosecution, he would have suggested to the sheriff in charge of them the propriety of selecting some other boarding house for the jury.

It is also insisted that there is no evidence to support the verdict. This ground is wholly lacking in merit. The appellant, and others of the accused, were positively identified as parties engaged in the unprovoked and brutal assault upon the prosecuting witness. All of the defendants attempted to establish an alibi, but the jury evidently accepted the statements of the prosecuting witnesses in preference to the testimony of the accused and the persons who corroborated their evidence.

Perceiving no error prejudicial to the rights of the accused, the judgment of the lower court must be affirmed.

MAY, &c. v. MAY.

(Filed May 28, 1908—Not to be reported.)

1. Statute of Frauds—Parol Contract for the Sale of Land—A parol contract for the sale of land is not binding and after demanding possession, the vendor may institute an action to rescind the contract and recover possession of the land upon equitable terms.

2. Same—Petition—Memorandum of Writing—The petition seeking the rescission does not take the place of the memorandum required by the statute, constituting a ratification of the sale. The signing of a petition to rescind an invalid contract of sale does not have the effect of making the contract valid.

D. D. Sublett for appellants.

John H. Gardner for appellee.

Appeal from Magoffin Circuit Court.

Opinion of the court by William Rogers Clay, Commissioner, affirming.

Some time in the year 1895, appellee, S. D. May, sold, by parol contract, a small piece of land situated in Magoffin county, Kentucky, to appellants, Abel May and James May, and put them in possession of same. Appellants remained in possession of the property for a period of about ten years, when appellee demanded possession of same, and, upon appellants' declining to give him possession, he instituted this action. Appellants defended on the ground that they had fully paid the purchase price of the land, and that appellee was now estopped to claim possession; also on the ground that the petition signed by appellee was such writing or memorandum as amounted to a confirmation and ratification of the parol contract of sale. Appellants further asked, in case the contract of sale was rescinded, that they be allowed the purchase money with interest; also the value of the improvements which they made on the land and the natural increase of its value. The court below entered judgment rescinding the contract of sale, and further held that the rents and profits were about equal to the amount of purchase money and interest and the value of the improvements, and that these two claims be off-set against each other. From this judgment, Abel May and James May prosecute this appeal.

While the statute of frauds in some cases works a hardship—and doubtless worked a hardship in this case—it is nevertheless true, that a parol contract for the sale of land is not binding, and that the vendor may, after demanding possession from his vendee, institute an action to rescind the contract and recover possession of the land upon equitable terms. (Dean v. Cassiday, 88 Ky., 572.)

Nor is there anything in appellants' contention, that the petition which was signed and sworn to by appellee took the place of the memorandum of writing required by the statute of frauds, or constituted a ratification or confirmation of the parol contract of sale. We can not hold that the signing of a petition to rescind an invalid contract of sale has the effect of making the contract valid. In other words, a party does not lose his legal rights by the use of the methods prescribed by law for their enforcement.

It appears from the record that appellants paid to appellee, the sum of \$59.25, for the land. It further appears that they cleared about six acres of land, and, according to their contention, this was worth \$8 per acre, or a total of \$48. They also made and laid up about 300 rails and about 100 panels of fence, a portion of the

rails of which appellee furnished. Placing upon the latter work a value of about \$12, which is really in excess of its value according to the testimony of disinterested witnesses, the whole value of the improvements made by appellants amounted to about \$60. According to the testimony, the profits and use of the land to appellants were worth from \$15 to \$20 per year, which, for a period of ten years, would amount to from \$150 to \$200. It is manifest, therefore, that the value of the improvements added to the purchase money, with interest, did not exceed the lowest estimate placed upon the value of the profits and use of the land to appellants. That being the case, the appellants have no cause to complain of the judgment of the lower court in offsetting the value of the improvements, purchase price and interest against the value of the profits and use of the land.

Judgment affirmed.

L. & N. R. R. CO. v. MARSHALL.

(Filed May 29, 1908—Not to be reported.)

1. Railroads—Negligence in the Operation of Trains—Evidence—Injury to Passenger—Extent Of—The evidence shows that the trains that collided, in which collision appellee was injured, were recklessly run by those in charge of them, showing such lack of regard for the safety of the passengers as to amount to gross negligence.

In view of the extent and character of the injuries as disclosed by the evidence, and their permanent character, the verdict herein complained of can not be said to be excessive.

2. Instructions—Measure of Damages—In defining the measure of damages the court, in telling the jury that they might find for her "for the loss of time, if any, which she has sustained, and for the loss of time in the future which the jury may believe from the evidence it is reasonably certain she will suffer, if any, and for the loss or impairment of her ability to earn money, if any," the court meant that they were authorized to compensate her for loss of time, when she was unable to work, but when she became able to work, and her power to earn money was impaired, she should be compensated for the difference in her earning power in her impaired condition and what it was before the injury.

S. D. Rouse and Benjamin D. Warfield for appellant.

Myers & Howard and J. W. Lilly for appellee.

Appeal from Kenton Circuit Court.

Opinion of the court by Judge Nunn, affirming.

Appellee, a widow twenty-nine years of age, with one child, was injured while a passenger upon one of appellant's trains, which collided with another passenger train. She brought this action for \$20,000 damages, and recovered \$12,500. Appellant asks for a reversal; first, because, as its counsel claims, there was an entire absence of testimony as to the cause of the wreck, or that it was due to gross negligence on its part, therefore, the court erred in giving the jury an instruction authorizing them to find punitive damages; second, because the evidence as to appellee's permanent injury is wholly unsatisfactory, the jury could do no more than guess as to whether or not the injuries were permanent; and, there-

fore, the amount of recovery is excessive; third, because the court erred in its instruction on the measure of damages.

We will consider these questions in the order stated. Appellant's contention is that there was absence of testimony as to the cause of the wreck, and, therefore, a punitive damage instruction should not have been given; and cites, as authority supporting this proposition, the cases of Southern Railway Company in Kentucky v. Lee, 30 Ky. Law Rep., 1360, and the same against Brewer, 32 Ky. Law Rep., 1374, and other cases. Lee and Mrs. Brewer were injured in the same wreck, and the court said the punitive damage instruction should not have been given; because there was no evidence showing how the collision occurred; that it may have occurred, so far as the evidence showed, by reason of some accident, over which the persons in charge of the train had no control. In the Lee case, the action of the court was certainly correct, and the majority of the court was of the opinion that the facts as presented in the record were the same in the Brewer case, as in the Lee case. But the facts of this case, as they appear in the record, show conclusively the cause of the wreck. It occurred between Independence and Latonia, the distance between the places being about eight miles. There was only a single track between the two places. There was a switch about three miles from Latonia, where trains could pass. The trains which collided were number eight, a heavy passenger train going north, and number nine, a local passenger going south. According to the time card they should have passed in Latonia; but that day number eight, the through train, was fifteen minutes late. Number nine, the local passenger train, should have left Latonia at 3:56 o'clock, but did not leave until 4:03 o'clock, and those in charge of it undertook to reach Maurice switch, about three miles from Latonia, and there enter it for number eight to pass. When number nine left Latonia, for the switch it had only eight minutes in which to reach it and enter. When it left the station in Latonia it had about one mile to travel within the city limits where it had to keep its train under control, and then to go to the switch, throw it, enter and close it, but about the time it reached a point one thousand feet from the end of the switch, the collision occurred. The impact was so great that it turned the engines end for end. Several persons were killed and many injured.

Butler, the section boss, testified that he saw the collision, and looked at his watch and it was 4:08½ o'clock. The telegraph operator at Independence testified that number eight, the through train, passed his station at 4:04 o'clock; that it was traveling at the rate of forty-five or fifty miles an hour. Butler testified that it made no check when it arrived at Maurice switch, but about the time it passed the switch it put on more steam and ran faster. The testimony shows, without contradiction, that it should have stopped at Maurice switch, when those in charge of it saw that number nine was not on the siding, and remained there until number nine arrived, or at least three minutes. These uncontradicted facts show that those in charge of both trains were operating them without any care; that their conduct was reckless, and without regard for the safety of the passengers in their charge, and shows gross negligence on their part.

Appellant's counsel spent much time in his brief trying to induce the court to say that the principle of allowing punitive damages, in any case, is wrong. All the common law writers, on the subject and the highest courts of every State in the Union, and this court for one hundred years, have recognized the principle that punitive or exemplary damages are a proper element of recovery. For these reasons it is too late now, even if we felt inclined to do so, to change the rule with respect thereto.

The second proposition made by appellant's counsel is that there is no satisfactory proof of the permanency of appellee's injury; and, therefore, the verdict is excessive. The testimony shows that appellee, prior to her injuries, was a healthy person; that she lived in Glencoe, Kentucky; that she was then and had been for a long time, employed as an expert seamstress in Cincinnati, Ohio, at the price of two dollars a day over and above all expenses. The trial took place fifteen months after the collision of the trains. She had not been able to walk since the collision; had only been out of the house twice—once when she was carried to the hospital in Cincinnati, where she remained for several weeks, and once when she was carried to the courthouse as a witness in this case. At the time of the trial she had not been able to straighten her body. She had a tendency to lean forward and to one side. She had suffered intensely since receiving her injuries—had convulsions. She had not been able to rest without taking an opiate. The witnesses differ as to the probable duration of her suffering, they vary from one to five years. The evidence tended to show that if there ever was a complete recovery it would only be accomplished by other surgical operations. There were two operations performed on her while she was in the hospital in Cincinnati. The nature and extent of these can better be understood in the language of the surgeon, which is as follows:

"The operation was two-fold. In other words, there were two operations at one time. The first operation was made by making an incision in the median line of the abdominal wall, large enough to admit my hand, by which I seized the uterus, brought it forward and then shortened the ligaments or guy ropes which nature intended as the natural means of support for this uterus. In other words, by this means I restored the uterus to its normal position, and then with my hand in the abdominal cavity, and this operation complete, I explored the displacement of the kidney, the region of the left kidney, and found the kidney displaced, and it had seemed perfectly obvious through the abdominal wall, that it was. I put it back in its position and then turned the patient on the side and made a long, oblique incision along the margin of the lower ribs, cut down upon the kidney, lifted it out entirely, but leaving it, of course, attached to its blood vessels, inspected it carefully, subjected it to a certain amount of friction, for the purpose of securing its adhesion after it was replaced; I cleaned out and removed some of the super-abundant fat—not super-abundant, because it was not super-abundant; but the fat that is generally found in the nest that is occupied by the kidney—I removed that—I then took advantage of the ligament which grows from the lower end of the kidney, and I switched that into the angle of the womb, very much as I indicate by my finger. This ligament stitched in the lower angle of the womb, made a permanent fixation by means of which the kidney was held and is still held in its normal position. These incisions were then closed, and the patient made a very satisfactory recovery, as surgical recoveries go."

This surgeon stated, from the evidence introduced on the trial, and his examination of appellee a few days before the trial, that his opinion was, that her recovery would not take place without, in all probability, these operations were repeated. The proof was that she had already expended and incurred \$1,500 for doctor's bills, paid considerable sums for nurses and board in the hospital, and for nurses for herself and child after returning from the hospital to the time of the trial, and the loss of time from her employment to the time of the trial, and, of course, it could not have been posi-

tively known at the time of the trial, when she would be able to resume her work, if ever. It was also a matter of conjecture as to the amount that would necessarily have to be expended by her in the future, for other surgical operations, and other expenses necessary in attempting to effect a cure.

The jury had a right, under the evidence, to consider all these things, and in addition to compensate her for the mental and physical suffering which she had endured as a result of her injuries, and the mental and physical suffering that was reasonably certain, from the evidence, she would endure in the future as a result of her injuries. The physician testified that her left kidney, at the time of the trial, was what they call a "floater;" and it may waste away and give her relief from pain, but she would be minus a kidney; that if she could not get rid of it in that way, other operations would have to be performed. In view of the evidence, we are of the opinion that the jury had the right to conclude that she could never recover her healthy, robust condition that she enjoyed before the injuries were received, and that her injuries were permanent. In view of these facts do not feel authorized to say that the verdict is excessive.

The instruction on the measure of damages, complained of by appellant, is as follows:

"If the jury find for plaintiff under instruction number one, the measure of her damage will be such a sum of money as, governed by the proof, will fairly and reasonably compensate her for the pain and suffering of both body and mind, if any, which she has suffered, and such as the jury believe it is reasonably certain she will suffer in the future, if any, as the direct and proximate result of said injury, if any, and for the necessary and reasonable expenses incurred, or which may be incurred by her in the future, if any, for medical and surgical attention, and medicine, as the direct and proximate result of the injury; for the loss of time, if any, which she has sustained, and for such loss of time in the future which the jury may believe from all the evidence it is reasonably certain she will suffer, if any, and for the loss or impairment of her ability to earn money, if any, as the direct and proximate result of her injuries in the evidence described, not exceeding in all, however, the sum of twenty thousand dollars (\$20,000) the amount claimed in the petition."

That part of the instruction to which objection is made is as follows:

"For the loss of time, if any, which she has sustained, and for such loss of time in the future which the jury may believe, from the evidence it is reasonably certain she will suffer, if any, and for the loss or impairment of her ability to earn money, if any."

Appellant's counsel claims that this language in the instruction authorized the jury to find double damages for the future loss of time—allowing a recovery both on the score of loss of time and also for loss or impairment of appellee's ability to earn money. The criticism of the instruction is incorrect. It does not bear the construction placed upon it by appellant's counsel. What the court meant, and the jury must have so understood it, was that they were authorized to compensate her for her loss of time, that is when she was unable to work, but when she became able to work, if ever, and her power to earn money was impaired, then the jury was directed to compensate her for the difference in her earning power in her impaired condition and what her earning power was before the injury. (L. & N. R. R. Co. v. Logsdon, 114 Ky., 746, and the authorities therein cited.)

For these reasons the judgment of the lower court is affirmed.

GRAND LODGE ANCIENT ORDER OF UNITED WORKMEN OF KENTUCKY v. DENZER.

(Filed May 29, 1908—To be reported.)

Life Insurance—Benefit Society—Policy by Father for Son—Change in Beneficiary—Withdrawal of Father from Society—Death—Rights of Son—A. D. took out a \$2,000 certificate in a benefit society payable to his son, H. D., which he subsequently transferred to his said son, upon his payment of the annual dues thereon, which he paid as long as the company would accept same. Later, the father changed the beneficiary, and then withdrew from the society and died. In an action by the son against the company to recover the insurance, Held—That under the laws of the company, the beneficiary named in the certificate had no vested right therein until the death of the member, that the member had the right to change the beneficiary without the consent of the named beneficiary, and the father having withdrawn from the society, the certificate was thereby forfeited.

Caruth, Chatterson & Blitz for appellant.

Pryor, Sapkinsky & Castleman for appellee.

Appeal from Jefferson Circuit Court, Common Pleas Branch, First Division.

Opinion of the court by Judge Nunn, reversing.

It appears that one Adolph Denzer, became a member of the order of the Ancient Order of United Workmen in the year 1877. He joined Antiquity Lodge, No. 30, in Louisville, Kentucky, on July 23, 1877. A certificate of insurance was issued to him wherein it was agreed that the Grand Lodge would pay, at his death, the sum of \$2,000 to his wife, Mary Denzer. Appellee, Henry Denzer, at that time was a small boy. It appears that in March, 1886, Adolph Denzer had the above benefit certificate changed so as to read as follows:

"To Mary and Henry Denzer bearing relationship to me of wife and son, \$1,000 each."

This certificate remained in the possession of Adolph Denzer until August 15, 1890. His wife died August 13, 1890. Appellee at that time was living with his parents, being then a young man about twenty-two years of age. After Adolph Denzer's wife died, he took the last mentioned certificate to the home office of the recorder of the lodge and requested that the certificate be changed, and a new one issued making his son, appellee, the sole beneficiary of the entire sum of \$2,000. This request was granted, and the recorder of the lodge, living near Mr. Denzer, carried the same to his house and delivered it. Adolph Denzer then, in the presence of the recorder, gave the certificate to appellee, with the understanding that he (appellee) would pay, thereafter, all the dues, assessments and charges against same. Appellee faithfully complied with this agreement, and out of his own money and estate paid the grand lodge, through its subordinate lodge, all the charges against same. These payments continued until July, 1896, when the lodge refused to receive any further payments from appellee. Appellee repeatedly tendered to the officers of the lodge the dues and assessments which were refused, and he was ordered not to return to the office, as they would not receive same from him. The reason the lodge refused any further payments from Henry Denzer, as it appears in the record, was that at about this time appellee and his father became estranged, they were engaged in a law suit, and just prior to that time, Adolph Denzer

had married again; and he made an affidavit that the former certificate of insurance was not in his possession and that he could not obtain it, and asked that it be cancelled and that another certificate be issued, and that his last wife and four grandchildren, naming them, be made the beneficiaries of it. Soon after this, Adolph Denzer made application to the lodge for a final card withdrawing his membership, which was accepted and the card issued; and from that time to his death, in 1905, he was not a member, in any sense of the order, and the last certificate payable to his wife and grandchildren lapsed, and became of no effect after the date of his withdrawal from the lodge. After his father died, in 1905, appellee instituted this action upon the certificate of insurance of date, July, 1890, the one in which he was made the sole beneficiary. He claimed that he received the certificate under a valid gift from his father upon the consideration that he would pay all the dues and assessments due the lodge by his father; that appellant, through its agents and officers, knew of this gift at the time it was made, and knew that appellee had paid all the dues and assessments from that time until 1896, and by reason thereof he had a vested interest in the certificate of insurance of which his father, Adolph Denzer, had no power or right to divest him, and the acts of Adolph Denzer and the officers of defendant, in attempting to divest him of his rights under the certificate sued on by issuing another payable to Adolph Denzer's last wife, and grandchildren, and by finally issuing to him a withdrawal card as a member of the lodge, were wrongful and void and did not have the effect to divest appellee of his interest in the certificate sued on.

Appellant, by answer, put in issue all the affirmative allegations of the petition, and by a second paragraph set forth the change in the certificate by Adolph Denzer, and the fact that he ceased to be a member of the lodge in October, 1896, and asked that appellee's petition be dismissed.

The parties tried the case before a jury, and the court instructed it as follows:

"If you shall believe from the evidence that at the time mentioned in the petition, Adolph Denzer gave the policy or certificate of insurance sued on herein, to his son, Henry Denzer, and put him in possession of it on the condition that Henry Denzer should pay the charges, assessments and dues on the said certificate, and that the said Henry Denzer did thereafter, pay the charges, dues and assessments on the said certificate as long as the defendant would accept the dues, charges and assessments, and that the defendant, by its officers or agents, knew that Adolph Denzer had given the policy to his son and that the son paid the dues, &c., mentioned, then the law is for the plaintiff, and you should so find."

A second instruction gave the converse of the first.

The jury returned a verdict in behalf of appellee for the full amount of the certificate less the charges, assessments and dues which would have been due and payable on the certificate, considering Adolph Denzer, a member of the lodge until his death.

The jury found in favor of appellee, on the issue of facts, therefore, the only question to be considered on this appeal is: Did appellee, under the facts referred to, obtain a vested interest in the certificate of insurance, which his father had no power thereafter to cancel or change? In the certificate sued on is this language:

"This certificate is issued subject to and is controlled by the laws of the order."

This was the only reference to the laws of the order; they were not copied into the certificate, nor were they attached thereto. They were, however, filed and made a part of the pleadings in the action. We copy the following:

"Sec. 4. In the portion of this fund to which the beneficiaries of the deceased member are entitled, the members themselves have no individual property right; it does not constitute a part of their estate to be administered, nor have they any right in or control over the same except the power to designate the person or persons to whom, as beneficiaries, the sale shall be paid at the death of the member. The beneficiaries thus designated, have no vested right in said sum, until the death of the member gives such right and the designation may be changed by the member in the method prescribed by the laws of the order at any time before his death.

"Sec. 5. No liability for the payment of any money from this fund shall arise by virtue of any beneficiary certificate, or otherwise, unless the member of the order named in such certificate shall, in every particular while a member of the order, comply with all the laws, rules and requirements thereof; and shall, at the time of death, be a member of said order in good standing; and that the certificate, by virtue of which the demand is made, shall not have been surrendered, or the rights thereunder surrendered by the member, or said certificate or his rights thereunder cancelled at his request.

"Sec. 6. Any member desiring to change his beneficiaries may do so without the consent of the beneficiary, &c.

"Sec. 7. Any member in good standing may sever his connection with the order by paying all dues, fines and assessments charged against him, surrendering his beneficiary certificate in writing, together with all rights, benefits and privileges that he may have acquired by virtue of his membership in the order, when a final card shall be issued to him without the payment of any fee for such final card."

It appears from the laws of the order, which are a part of the contract as stated in the certificate, that Adolph Denzer had no property right in the fund named in the certificate, nor did it form any part of his estate to be administered; that the beneficiary named in the certificate had no vested right therein until the death of the member gave him such right; that the member had the right at any time to change the beneficiary without the consent of the named beneficiary. It is further provided that the society should not be liable for the payment of the sum named in the certificate, unless the member of the order named in such certificate should, in every particular, while a member of the order, comply with all the laws, rules and requirements thereof, and at the time of his death be a member of the order in good standing. It is clear, under these provisions of the contract, that appellee did not and could not take a vested interest in the certificate of insurance. He took it subject to the rights of his father who, at any time, with the consent of appellant could change the beneficiary. Appellee claims, however, that under section 679, of the Kentucky Statutes, the laws of the order, copied above, can not be considered a part of the certificate, or contract, because the same were not written in the certificate nor attached thereto. The statute, so far as applicable to the question at issue, is as follows:

"All policies or certificates hereafter issued to persons within the Commonwealth by corporations transacting business therein under this law, which policies or certificates contain any reference to the application of the insured, or the constitution, by-laws or other rules of the corporation, either as forming part of the policy or contract between the parties thereto or having any bearing on said contract, shall contain or have attached to said policy or certificate a correct copy of the application as signed by the applicant, and the portion of the constitution, by-laws or other rules referred

to; and unless so attached and accompanying the policy, no such application, constitution, by-laws or other rules shall be received as evidence in any controversy between the parties to or interested in said policy or certificate, and shall not be considered a part of the policy or of the contract between the parties." (This statute has been repealed as to benevolent societies.)

It will be noticed that the certificate sued on was issued in July, 1890. The statute just quoted became a law after that date, and it expressly states that it applies to "all policies or certificates hereafter issued," and consequently it could have no application to the case at bar. To adjudge that appellee, under the facts stated, obtained a vested interest in this certificate; that his father, the member of the order, was thereafter prevented from making any change in the beneficiary or from withdrawing his membership from the order, and to adjudge that the order was prevented from expelling him as a member for improper conduct, which, of course, would cancel the certificate, would, in the nature of things, thwart the order from carrying out the benevolent purposes for which it was organized, as shown by its by-laws. It would sometimes compel a person to remain a member of the order against his will, and compel the order to retain a member after he had violated all the rules and regulations of the order, and after he had become unfit to remain a member of any organization.

In the case of *Schillinger v. Boes, &c.*, 85 Ky., 357, this court, commenting upon the right of a member to change a beneficiary, said:

"The member as well as the beneficiary acquires his rights under the act of incorporation, and when the law of the association, as well as the certificate of benefit, empowers the member to change the beneficiary, there is no question of public policy involved, and the change being authorized by an express law or statute of the order, the right to make the change can not be questioned. * * * He had the right to cancel the certificate or decline to pay the dues, and thereby forfeit his right to the insurance."

In the case of *Masonic Benefit Association v. Bunch*, 109 Mo., 561, the court said:

"All the authorities agree that the right of members of benefit societies in the sums agreed to be paid at the death is simply power to appoint the beneficiary, and that the constitution or charter and the by-laws are the foundation and source of such power. * * *

"And it is equally well settled that the beneficiary acquires no vested interest, nor has he any property in the certificate. He has simply an expectancy which may be divested by the member by changing the beneficiary. * * *

"Nor is the right to change the benefit affected by the fact that the first beneficiary paid the assessments. * * *

"Nor does the possession of the certificate by the beneficiary deprive the member of the right to make the change. * * *

"This right to change has generally been held analogous to a testamentary disposition of the benefit. It, like a will, is revocable at any time during the life of the testator."

See further the case of *Fiske v. Eq. Aid Union*, 11 Atl. Rep., 84, wherein the court said:

"Notwithstanding the fact that the certificate was delivered to the plaintiff, and the assessments thereon were paid by him, his wife had the right, on presenting it to the supreme secretary, to apply for and effect a change in the designation of the beneficiary named therein. When plaintiff accepted the original certificate, and paid the assessments thereon, he knew, or ought to have known, that he held it subject to the right of his wife, to change the desig-

nation of those to whom the insurance money should be paid upon her death."

It is true that there are respectable authorities sustaining appellee's contention, but the weight of authority is to the contrary. (*Fisher v. Fisher*, 42 S. W. Rep., 448.) It was there said:

"It is held in a number of cases, principally in New York and California, following the New York cases, that the beneficiary who pays the assessments does acquire an interest which can not be divested without his consent, when there is a special agreement to that effect, or that no substitution shall be made. (3 Am. & Eng. Enc. of Law, 2 ed., 993, and note 4.)

But these cases are not in accord with the weight of authority. (*Id.* 990, and notes.) The rule approved in the majority of the cases, is based upon the provisions and reservations contained in the charter and by-laws of the society, and this furnishes the distinction between ordinary life and mutual benefit insurance policies, (*Id.* 990.) This rule adopted in the majority of the cases is in accord with the objects and purposes of beneficial orders in which the benevolent feature prevails largely. * * * The laws, articles of association, and certificates of membership of the order determine the rights of the members, and these laws, articles and provisions of membership will be respected and enforced by the courts. * * * The beneficiary, during the life of the member, can have no more than a mere expectancy, resting entirely upon the volition of the member; and this can not, during the member's life, rise to the dignity of a vested property right. It is no more than the mere expectancy of a legatee or devisee, which, although it may be recognized by one will, it may be defeated and extinguished by the execution of a subsequent will. The final power of disposition rests in the testator or member, so long as he lives. The laws and regulations of the order enter into and become a part of every certificate issued to a member. Nor can it alter the rule that the expectant beneficiary has paid assessments or incurred expense upon the faith of the provisions in his behalf in a certificate which is afterwards cancelled and changed. * * * But under the prevailing rule as laid down: and recognized by the current of authority, and by our own cases, the member's right to dispose of the insurance exists, notwithstanding the beneficiary originally named, has paid assessments or incurred expense."

For these reasons the judgment of the lower court is reversed and remanded, for further proceedings consistent herewith.

CARLTON v. SMITH.

(Filed May 29, 1908—Not to be reported.)

1. Parties to Appeals—Persons who are not named in the statement are not parties to an appeal and no relief can be given against them. (22 Ky. Law Rep., 1738; 23 Ky. Law Rep., 831, and 24 Ky. Law Rep., 1566.)

2. Pleading—A paragraph in an answer was not sufficient to prevent a recovery on a note, its payment being averred, when no proof was made showing its payment.

3. Land—Sale of Enough to Pay Debt—The judgment was erroneous in not limiting the amount of land to be sold to only enough to pay the debt sued on.

C. C. Williams for appellant.

Bethurum & Bethurum for appellee.

Appeal from Rockcastle Circuit Court.

Opinion of the court by Judge Hobson, reversing.

On November 19, 1902, Henry Carlton bought of J. W. Marler and his wife, Serena Marler, a tract of 135 acres of land, for \$200, and they executed to him a title bond. He paid all of the purchase money except a note for \$32.40. This note was assigned by Marler to W. F. Smith, on May 23, 1905, and Smith brought this suit on April 17, 1906, to obtain a judgment on the note and to enforce a lien on the land, alleging that the note was wholly unpaid and that Marler and wife had, on Dec. 31, 1903, made a deed to Carlton for the land, but that he had declined to accept it. The deed was tendered with the petition. Carlton filed an answer, in the first paragraph of which he alleged that he had paid the note. In the second paragraph he pleaded that Marler had entered upon the land after he had sold it to him and after January 1, 1904, and cut a lot of timber off the land of value, \$200, which he had converted to his own use. By the third paragraph he alleged that Marler had trespassed upon the land to his damage in the sum of \$50. In the fourth paragraph he alleged that Marler had collected \$13.50 a year which was paid on an oil lease on the land for three years and that the \$40.50 thus collected more than paid the note. He made the second, third, and fourth paragraph of his answer a cross-petition against Marler and wife. They entered their appearance to the cross-petition and filed a demurrer to it. The court sustained the demurrer, and, he failing to amend, the cross-petition, was dismissed. The action was then submitted as between him and Smith; and the court entered a judgment in favor of Smith and directed a sale of the land to pay the note subject to a credit of \$10 which was endorsed on the back of the note.

Marler and wife are not made parties to this appeal. We can not therefore, consider whether the court acted properly in sustaining their demurrer to the cross-petition against them. The statute requires the appellant to endorse on the record the names of the appellant and appellees. Persons who are not named in the statement as appellees are not parties to the appeal; and no relief can be given against them. (*Board of Councilmen v. Farmers Bank*, 22 Ky. Law Rep., 1738; *Bordie v. Parsons*, 23 Ky. Law Rep., 831; *Chinn v. Curtis*, 24 Ky. Law Rep., 1566.)

The allegation in the answer that the note was paid was but an affirmative denial of the allegation of the petition, that the note was unpaid. No reply was necessary and the burden of proof was on the defendant to show that he had paid the note. (*Ermert v. Dietz*, 19 Ky. Law Rep., 1639; *Logan Co. Bank v. Barkley*, 20 Ky. Law Rep., 773.) As Carlton had taken no proof to show that the note was paid and as the burden of proof was on him, the note making out a prima facie case for the plaintiff, the first paragraph of the answer was not sufficient to prevent a recovery.

The second paragraph of the answer setting up that Marler had cut from the land timber after January 1, 1904, and after his right to remove the timber, under the bond, has ceased, is not sufficient to prevent a recovery by Smith as it is not averred that the timber was cut by Marler before the note was assigned to Smith or he had notice of it. The timber standing on the land was a part of it. The timber passed to Carlton with the land and if Marler took off the land timber which formed a part of the consideration of the note, to this extent Carlton should not be required to pay the note to Marler, and if he had this defense against Marler in May, 1905, when Marler assigned the note to Smith, as Smith took it subject to all defenses which Carlton had against the note, in the hands

of Marler, he may make the defense against Smith. But for the reason indicated, the answer is not good against Smith, as it does not appear from the answer that Carlton had this defense against Marler at the time the note was assigned to Smith or before he had notice of the assignment.

The third paragraph of the answer is also insufficient for the reason that no trespass which Marler committed on the land could be pleaded against Smith in the absence of a showing that the cause of action accrued before the assignment of the note by Marler to Smith and that Marler was insolvent at the time of the assignment or before Carlton had notice of it. (Newman on Pleading, sec. 475, E. New Edition, and cases cited.)

The fourth paragraph of the answer, however, seems to us sufficient. The oil on the land was a part of it. By the bond which Marler made to Carlton, he sold him the land and agreed to make him a good deed to it. There was no reservation of the oil or the oil lease, which had been made to the New Domain Oil and Gas Company. Carlton is entitled to a reduction of the price to the extent that the oil lease diminishes the value of the property. In other words he must have the whole property or he can not be compelled to pay the whole purchase money. This paragraph of the answer which shows that Marler was collecting the royalty and not paying it to Carlton showed that Carlton had not received all that the bond bound Marler to convey to him.

The judgment of the circuit court is also erroneous in this, that it orders a sale of the entire tract of land. It must be presumed that a tract of 135 acres of land is divisible; and therefore, a sale should have been ordered of only so much of the land as was necessary to pay Smith's debt.

On the return of the case to the circuit court, the defendant will be allowed to amend his answer if he desires to do so. He can not have any judgment over against Smith, but he should not be required to pay the note in the hands of Smith, if he could not have been required to pay it in the hands of Marler, at the date of the assignment to Smith, or when he had notice of it.

Judgment reversed and cause remanded, for further proceedings consistent herewith.

CITY OF COVINGTON v. WEBSTER.

(Filed May 28, 1908—Not to be reported.)

1. Towns and Cities—Defective Sidewalk—Notice to City—Appellee, in his action for damages for injuries occasioned by a defective sidewalk, stated his case in the alternative, setting up that he was injured either by stepping into a hole which appellant could have discovered by ordinary care, or by stepping through the crust of ordinary cinders which appellant had not properly supported. Held—It was not necessary to prove notice of the defects in the construction of the walk in order to hold the city liable under that theory of the case.

2. Instructions—Appellee was entitled to have these two theories submitted to the jury for it matters not which condition caused the injury, the city being negligent in either event.

John E. Shepard for appellant.

R. C. Simmons for appellee.

Appeal from Kenton Circuit Court.

Opinion of the court by Wm. Rogers Clay, Commissioner, affirming.

Appellee, Thomas W. Webster, was injured by falling through an opening in a cinder sidewalk on the south side of West Third street, in the city of Covington. The accident occurred about 6 o'clock p. m., early in November, and the darkness was intensified by an unusually heavy fog. It appears that the plank walk had been partly removed and its place supplied by a cinder fill, supported on the south by a wall constructed out of the wooden planks and beams which had previously constituted the plank walk. In some places this wall supporting the fill contained openings of such size that the cinders escaped through same and left holes in the path, or hollowed out the space beneath the crust of cinders. While appellee was passing along the walk his left foot went down through the surface of the walk and was caught in an opening in the wooden retaining wall. His back struck a post, and his right leg remained above the surface of the ground. He was painfully injured. Appellee stated his cause of action in the alternative, claiming that he was injured either by stepping into a hole in the sidewalk, which appellant could have discovered by the exercise of ordinary care, or by stepping through the crust of the cinders, which appellant had negligently failed to properly support. Upon the trial of the case, appellee recovered judgment in the sum of \$775. From that judgment the city of Covington appeals.

It is insisted by counsel for appellant, that appellee based his action upon two theories, one of which showed negligence, while the other did not, and that, under the rule laid down by this court in the case of Louisville Gas Co. v. Kaufman, Straus & Co., 20 Ky. Law Rep., 1069, the court should not have submitted the case to the jury. Counsel takes the position that it was necessary to prove that the city had notice of the defective construction of the cinder walk in order to hold the city liable under that theory of the case. The evidence conducted to show that the boards had not been placed close enough together to keep the cinders from running through. As the cinders from beneath the crust ran through the opening in the supporting wall, there were places beneath where there was nothing to support the crust of the walk. The city having constructed the walk and put up the retaining wall, we do not think it was necessary to prove notice of the defects in the construction thereof. The defect in the retaining wall was apparent when the city built it, and no subsequent notice of this defect was necessary.

The only complaint made of the instructions is that both theories of appellee's cause of action were submitted to the jury; i. e., the court authorized a recovery in case the sidewalk was unsafe, either from a hole therein which appellant could have discovered by ordinary care, or from the negligent and defective construction thereof. We think appellee was entitled to have these two theories submitted to the jury. It matters not which of the conditions caused appellee's injury; the city was negligent in either event.

The instructions fairly presented the law of the case, and, as there was sufficient evidence to justify the verdict, we are of opinion the judgment should be affirmed; and it is so ordered.

INDIAN HEAD COAL CO. v. MILLER.

(Filed May 29, 1908—Not to be reported.)

Mines and Mining—Falling of Roof of Mine—Injury to Servant—Action for Damages—Instructions to Jury—In an action by a coal miner against the company for an injury by the falling of coal on him from the roof of the mine which had not been sufficiently propped, there was evidence by the foreman that he told plaintiff and another

hand that they must "timber" the roof. The court should have instructed the jury that if it was the duty of the plaintiff and his fellow-servant to prop the roof, and they failed to do so, and but for this the injury would not have occurred, or if the foreman, when plaintiff called his attention to the roof told him he must "timber" it and he failed to do so, and but for this the injury would not have incurred, then in either of these events the jury should find for the defendant.

O. H. Waddill & Son for appellant.

James Denton for appellee.

Appeal from Pulaski Circuit Court.

Opinion of the court by Juge Hobson, reversing.

Charles Miller was a miner in the service of the Indian Head Coal Co., and was injured by a lot of slate falling on him. He brought this suit to recover for his injuries and recovered a judgment for \$1,400. The defendant appeals.

Miller had worked in the coal mine ten or twelve years as a driver. He had worked as a miner only two or three months, up to the time that he was hurt. He and a man named Columbus King worked together. Their duties were to shoot down the coal and load it after two other men had cut under it with a machine. The machine required nine feet to work in, and no props were usually put nearer the edge of the coal than nine feet. It was the duty of Miller and King to prop the roof and keep it propped within nine feet of the coal as they blew it down. The props were furnished by the company at the mouth of the mine. Miller and King selected there what props they wanted and they were then brought in to them on the cars and put up by them. The mine boss was named Heaps. There was a horse-back in the room in which Miller was working. On the morning of the accident Miller and King called Heaps' attention to the horse-back, saying that they were afraid to work there; that the room was unsafe. They complained of this no less than three times. Heaps took a pick and slapped the horse-back with it and said to them, as Miller and King testified, that he thought it was all right. Thereupon they went on to work and shortly afterwards the slate fell on Miller. On the other hand, Heaps testified that when he was there in the morning the props had not been set within nine feet of the bank of coal, but that there was a space of eighteen feet. His testimony as to what took place between him and Miller is as follows:

"Q. Explain to the jury how that room was worked."

"A. It was mined by machinery; the machine was in on Friday, and they would do the drilling and shoot the room down that night, and Monday morning they went in to loading their coal; I went down that morning in the room next to that and Miller called me and said he wanted me to show him how to fix some slate that was in there right along here; and I went and showed him and told him where to set his timbers so that it would not interfere with the air, and I was under this piece of slate and he called my attention to the horse-back where this loose coal was lying; I looked it over and said there is no danger, it is not showing itself, but I said: 'You must timber your room,' and he said, 'I will go out and get some timbers as soon as I load this coal,' and I said: 'It ought to be timbered now,' and he said 'it ought,' and said: 'I will go as soon as I load this car' or coal,' I do not know which,"

On this evidence the court gave the jury the following instruction: "If you believe from the evidence that the plaintiff, Charles Miller, while engaged, by the defendant in its mines, received the injuries complained of, by the falling of slate from the roof of said mines

upon him, and that he called the attention of the mine foreman to the condition of said roof and had been assured by said mine foreman that same was safe and directed to continue at work therein by said foreman, when the said foreman knew, or could have known, by the use of reasonable care, that the roof of said mine was in an unsafe and dangerous condition, and that the plaintiff continued to work at said place because he depended and relied upon the said foreman's superior knowledge, you will find for the plaintiff, unless you believe that the danger was so obvious and the risk such that a prudent man would have refused to do the work under the circumstances because of the danger, in which case you will find for defendant."

This was the only instruction given by the court, except one defining the measure of damages and telling the jury that nine jurors might find a verdict. The instruction presented the plaintiff's side of the case, but the defendant's side of the case was not presented at all. We do not find in the record that either Miller or King anywhere denied Heaps' testimony to the effect that he directed them to prop the room; although there was testimony on Miller's behalf tending to show that the slate fell next to the coal, and that if the props had been put up it would not have been prevented the slate from falling if they had been set in the usual way, nine feet from the coal bank. Under the evidence the court should have instructed the jury that if it was the duty of Miller and King to prop the roof and to keep it propped within nine feet of the bank of coal, and they failed to do so, and but for this the injury would not have occurred; or if Heaps, when Miller called his attention to the roof, told him that he must timber the roof and Miller had not timbered the room, as he was directed to do by Heaps, and but for this the injury would not have occurred; then in either of these events the jury should find for the defendant.

King was introduced as a witness for Miller. He was asked on cross-examination if he had not, at a certain time and place, made certain statements to Heaps and to Corey, the superintendent, as to the matters about which he had testified, and inconsistent with his testimony. He denied making the statements. The defendant then offered to prove by Heaps and Corey that he had made these statements. The court refused to allow the evidence, which should have been admitted, with an admonition to the jury that it was not to be considered by them as substantive evidence, but only for the purpose of contradicting King.

The court did not err in refusing to give a peremptory instruction to the jury to find for the defendant. Miller was not an experienced miner. He had only worked in the mine a short time, and had a right to rely on the superior judgment of Heaps. The case of Breckinridge Syndicate v. Murphy, 18 Ky. Law Rep., 915, is unlike this case. There Murphy was an experienced miner, and knew as much about the matter as the boss. He did not rely upon the judgment of the boss. The case turns on the facts and is not in conflict with the many other cases holding that the servant may recover where he acts under the order of his superior, relying on his judgment. There is much in the evidence to show that the accident was due to the failure of Miller and King to prop the roof as they should have done, but there is some evidence that the fall of the slate was from that part of the roof which they were not expected to prop at that time, and that the fall of the slate was from bad condition of the roof which was indicated by the horse-back to which Heaps' attention was called. But it is shown from the evidence that Miller himself had sounded the roof with his pick and found that the slate was loose. This he did not tell Heaps. Under this and other evidence in the case the court should also instruct the jury that it was incumbent

upon Miller to use ordinary care for his own safety in view of the facts known to him, and that if he failed to use such care and but for this would not have been injured, the jury should find for the defendant. This case differs from *Big Hill Coal Co. v. Abney*, 30 Ky. Law Rep., 1304. In that case there had been no assurance of safety. Here there was evidence showing that the servant relied on the assurance and superior knowledge of the foreman.

Judgment reversed and cause remanded, for a new trial.

HARRISON v. STROUD.

(Filed May 29, 1908—To be reported.)

1. Elections—Contested Elections—Irregularities—Extent—Effect—While it is the general rule that irregularities, in an election the result of which can be shown with reasonable certainty not to have been prejudicial, may be disregarded, yet where such irregularities are so widespread or general as to leave the judicial mind in doubt as to how the election did go, or would have gone but for them, then they can not be eliminated.

2. Same—Voters—Disregard of Secret Ballot—Materially Affecting Result—Election Void—Our system of government contemplates the filling of elective offices by elections held by authority of law, at which the qualified voters may fairly and by secret ballot express their choice, and when the officers of an election permit such numbers of voters to violate the secrecy of the ballot as to materially affect the result of the election, it is not a lawful election and will be held void on that account.

3. Same—Certificate of Election—Injunction Against—Jurisdiction of Courts—It is error to grant a restraining order or a temporary or permanent injunction, in an election contest, to prevent the one holding the certificate of election from qualifying pending the contest. The certificate gives to him to whom it is issued a prima facie right to the office. Courts of equity have not the inherent jurisdiction to try contests over elections to office. In the absence of statutory authority they have no jurisdiction in the matter.

4. Circuit Courts—Statutory Authority Conferred—Judgment on the Merits—The statute of this State has conferred upon the circuit court the jurisdiction to try certain election contests, but it is not given power to disturb the legal status of the claimants as fixed by law pending the decision, and the incumbency of the office should be left where the law has placed it, until such time as upon a final determination, by judgment on the merits, the court may say whether the contestant is entitled to the possession of the office.

A. G. DeJarnett, M. D. Gray, E. K. Wilson and W. E. Clay for appellant.

C. H. Beasley, Clore, Dickerson & Clayton and Overton S. Hogan for appellee.

Appeal from Grant Circuit Court.

Opinion of the court by Chief Justice O'Rear, reversing.

Appellant and appellee were rival candidates for the office of Marshal of Williamstown (a sixth class city), voted for at the November election, of 1907, to fill a vacancy in that office. The officers of the election, as well as the county canvassing board, certified that appellant had received 95 votes and appellee 94 votes at that elec-

tion. Appellant was consequently awarded the certificate of election, and executed the bond and took the oath required by law. Within ten days after the election, appellee instituted this contest in the Grant Circuit Court. He charged that the election was irregularly conducted in a number of particulars. He charged especially that the polls were not opened on time, but that the voting was delayed because the officers of election present, to gain an undue advantage in the matter, refused to appoint any one of several eligible persons present as sheriff of the election, nominated by appellant (the person originally appointed to that place being a partisan of appellant, but refusing, for business reasons, to serve); that the election was held in a room with a glass front fronting directly upon the street, where a great number of interested and curious persons were congregated and throughout the day witnessed the voting and used the intelligence so obtained in settling with floaters who it was charged voted openly upon the table in plain view of the spectators and the officers of election; that whisky and money were freely used by appellant and his partisans in influencing the result of the election; that some 50 or 60 persons, out of a total of less than 200 voters, were allowed to expose their ballots by voting or marking them openly upon the table in plain view of the election officers and others, and without having been examined under oath or otherwise as to their disability to understand or mark their ballots as required by the statute; that as many as eight, who were named in the petition, had so voted for appellant, and as many as 20 more not named also voted for him in the same manner; that the officers of election had wrongfully counted one ballot for contestee, which was marked by the voter fraudulently with a distinguishing mark, and had refused to count one ballot for contestant which was voted for him and so marked; that a number of persons not legal voters, had voted for contestee. The prayer of the petition was to have the returns purged of the illegal votes charged as above, if that were possible, and that contestant be adjudged to have been elected; or if that could not have been done that the election be declared void. Another feature of the petition will be noticed in its appropriate place further along.

The answer denied the most of the allegations of irregular proceedings in the election, but it expressly admitted that of the eight persons named in the petition as having voted for contestee openly and not by secret ballot, seven had so voted, but alleged that the other voters had voted for contestant. The answer then charged that some eight or ten persons, naming them, had been suffered by the election officers to vote openly (i. e., by marking their ballots in public and thereby disclosing their votes) for contestant, and many more not named had voted the same way. Issue was joined by the reply. The proof shows that as many as eight persons voted openly for contestant, and as many as nine so voted for contestee. All these seventeen voters were legal voters. Some of them were aged men and of unquestioned probity; some, whose characters are not at all brought in question, and about whose ability to have properly and legally marked their ballots no suggestion is made, were permitted to vote openly, whether in ignorance or by design of the election officers is not sufficiently disclosed. Some so voted, we think, from the motive to purposely disclose how they had voted so that others might act on that knowledge. In addition to the seventeen named, there is evidence that probably as many as 40 others, whose names are claimed by the officers and other witnesses to be forgotten, voted similarly. Two men are shown to have been permitted to vote who were not registered, and therefore not legal voters at that election.

The circuit court deducted 13 votes from contestee (appellant) and nine from contestant (appellee) leaving the latter winner by a

majority of three. There was but little direct evidence of bribery to sustain that charge. There was considerable drunkenness and some treating shown.

Just what conclusion we may have reached on these points is immaterial, because, without pursuing that inquiry to its end, we have become convinced that upon other grounds, coupled alone with the mildest judgment that might be reached on the charges of bribery and the other irregularities charged, the election ought not to stand. The other grounds of contest alleged were indifferently sustained by the proof or not at all. This election was one only in form. The Constitution and statutes require all elections (save that of school trustees) to be by secret ballot. Here about 80 per cent. of the voters observed the required course of voting, while the officers of election suffered about 20 per cent., far more than enough to have changed the result either way, to ignore the constitutional and statutory requirements, and to that extent conduct the election in open violation of the law. While it is the general rule, and a good one, that irregularities, the result of which upon the election can be shown with reasonable certainty to have been not prejudicial, may be disregarded, and the result of legal votes cast in the manner authorized by law to be allowed to stand; yet, when such irregularities are so widespread or general as to leave the judicial mind in doubt as to how the election did go, or would have gone but for them, then they can not be eliminated. And such is the statute of this State (sub-sec. 12, sec. 1596, Ky. Statutes), which on this subject reads:

"In case it shall appear from the whole record that there has been such fraud, intimidation, bribery, or violence in the conduct of the election that neither contestant nor contestee can be adjudged to have been fairly elected, the circuit court subject, to revision by appeal, or the Court of Appeals finally, may adjudge that there has been no election."

Our system of government contemplates the filling of elective offices by elections held by authority of law, at which the qualified electors may fairly and by secret ballot express their choice. All should be and are given the same right to vote. Officers of election, who purposely ignore the regulations made by the statutes, or who do so through gross ignorance, so that the result is so materially affected as that it can not be determined with reasonable certainty, that their irregularities did not control the result, may vitiate an election by such conduct. And when the officers permit such numbers of voters to violate the secrecy of the ballot, as was done in this case, as to materially affect the result of the election, it is not a lawful election, and will be held void on that account. (Atty. Gen'l v. Stillson, 108 Mich., 419; Sproule v. Fredericks, 69 Miss., 898.) Such an election is but a partial election. Instead of ascertaining the popular will it frustrates its legal expression; it would substitute the result of fraud or gross official ignorance and misconduct for the result of legal votes legally cast. That which is the citizen's shield and weapon of defense in popular government is set aside, and he is undone in the disregard of the law.

In the case at bar all who were permitted to vote openly as it is called, had not a bad purpose. They intended to vote. They had the legal right to vote. They attempted to exercise that right. They were misled by the officers of election so that their suffrage in this instance was destroyed. Had such voters been permitted to vote properly, the result may have been quite different from that found by the judgment of the circuit court. Or, for that matter, it may have been in accord with it. But the point is, it takes votes to make an election; not some votes, but all that are entitled and offered

to be cast, and which if cast, comply with the requirements of the law. Judgments of courts and of contest boards are not substitutes for the elector's votes. Immaterial derelictions, not influencing the result, may be and ought to be disregarded; but transgressions of the election law which practically disfranchise enough voters offering to vote, so that the result might have been different but for the illegal acts, would simply substitute an election by some, for the election contemplated by law, which is by all. The law deems it better that such elections should not stand. When it becomes known that they will not, the main incentive to those who indulge such practices is removed. When they can no longer profit by them, though otherwise unpunished, they will quit them from motives of interest.

This conclusion makes it unnecessary to determine how some three or four disputed votes should have been counted, as in no event could the decision upon this point influence the result.

In the petition in this case, contestant charged that contestee was insolvent, and was about to enter into the office in contest by virtue of the certificate issued to him, and that as the contestant was elected (as he claims) the contestee should be enjoined from discharging the duties of the office pending the hearing. A temporary restraining order was granted by the clerk, which, upon motion, the circuit court refused to dissolve, thereby converting it into a temporary injunction. And on the final hearing the injunction was perpetuated.

It was error to have granted the restraining order, as well as in granting the temporary and permanent injunctions. This writ can not be used in an election contest to prevent the one holding the certificate of election, from qualifying and discharging the duties of the office, pending the contest. The certificate gives to him to whom it is issued a prima facie right to the office. In the Law of Elections (Paine), 943, it is said:

"The title to a public office can not be tried on an application for an injunction," citing *Jones v. Commissioners*, 77 N. C., 208; *Kilpatrick v. Smith*, 77 Va., 349.

The same author, section 944, lays it down that "Courts of equity will not interfere by injunction to restrain defendants, who have no right to an office, from assuming to exercise the functions on the ground of damage occasioned to the plaintiff, by exclusion therefrom, nor on the ground of fraud in the inspectors in counting the votes and awarding the certificate of election to the defendants." (*Hartt v. Harvey*, 19 How. Pr., 245.) So the general rule is stated in 10 Am. & Eng. Ency. of Law, 761, thus:

"As in cases of contest the office ought to be filled by one of the claimants while the action is pending, it frequently becomes a matter of importance to determine what evidence is sufficient to show which one should hold the possession of the office until the question of the right is settled. * * * It is, however, well settled, that when it is made the duty of certain officers to canvass the votes, and issue a certificate of election in favor of the successful candidate, a certificate of such officers, regular upon its face, is sufficient to entitle the person holding it to the possession of the office during the action to contest the right, and is conclusive as to third parties and in collateral matters."

And such seems to us is the reason of the matter and the weight of the authorities. (*People v. Miller*, 16 Mich., 56; *State v. Churchill*, 15 Minn., 455; *Kerr v. Trego*, 47 Pa. St., 292.)

Courts of equity have not the inherent jurisdiction to try contests over elections to office. In the absence of statutory authority they have no jurisdiction at all in the matter. The statute of this State has simply conferred upon the circuit court the jurisdiction to try certain election contests. But there is no intimation in the statute

that they may go further, and in addition to such trial disturb the legal status of the claimants as fixed by law pending the decision. As that power has not been given to the courts, it should not be exercised, but the incumbency of the office should be left where the law has placed it until such time as upon a final determination by judgment on the merits the court may say, as it is then permitted to do, that the contestant is entitled to the possession of the office.

For the reasons indicated, the judgment is reversed and cause remanded, to the circuit court, with directions to dissolve the restraining order and injunction issued against contestants, and to adjudge that there was no election held on Nov. 6, 1907, to fill the vacancy in the office of marshal of Williamstown.

ZENTZSHELL v. RICHIE.

(Filed June 2, 1908—Not to be reported.)

Slander—Variance—In this case there is simply a charge that appellant uttered the slanderous words and a denial in the answer. The jury were properly instructed. The variance complained of is not material, the language being proved in substance as alleged in the petition.

Bradburn & Basham and J. H. Gilliam for appellant.

Goad & Olliver for appellee.

Appeal from Allen Circuit Court.

Opinion of the court by Judge Nunn, affirming.

Appellee recovered a judgment against appellant for \$300 in damages for slander. It was alleged in the petition that he maliciously, falsely and wickedly spoke of and concerning appellee, with the intention to injure the good name and reputation of appellee, these words:

"Capt. Moore, I want to see you a minute. Charlie Richie came to my store and got me to cash a check on R. Y. Austin for \$36. He stole the check (meaning the plaintiff) back from me and took it away. If he don't pay the money back, I am going to prosecute him in three cases—forgery, obtaining money by false pretenses and for stealing the check—and send him where George Haines is. Go and scare him (meaning this plaintiff) into paying me the \$36."

Appellant filed an answer, specifically denying every allegation in the petition, and alleged that what he did say to Captain Moore at the time and place alleged was as follows:

"Captain I want to talk to you as a Mason; these people (meaning the plaintiff's family) are in the same family you are, and I want you to help me out. Charlie Richie brought me a check for \$36. drawn by Rus Austin (meaning R. Y. Astin) and I cashed it for him, but the check has been lost, stolen or mis-laid. He then said to said Moore, Captain, Rus Austin says, he did not sign the check, but if he did not, it is the cleverest forgery I ever saw."

The words charged in the petition are per se slanderous and actionable, but the words just copied from the answer are not, and the court should have sustained appellee's motion to strike same from the answer.

This case is unlike the case of Shipp v. Patten, 29 Ky. Law Rep., 480. In that case the court said that Shipp, appellant, should have

been permitted to deny some of the alleged slanderous words that indicated malice on his part, and then plead the qualified privilege, provided he confessed enough of the slanderous words charged to give "color" to appellee's petition—that is left uncontradicted enough to give a cause of action.

In the case of *Whittaker v. McQueen*, 32 Ky. Law Rep., 1094, appellant denied the speaking of the words in one paragraph and alleged in another that they were true, and the court said this was permissible under the Code.

The issue in the case at bar, as made by the pleading, was simply a charge in the petition that appellant spoke the slanderous words, and appellant denied speaking them. This issue was tried by a jury properly instructed. Instruction number four, complained of by appellant, was not pertinent to the issue being tried, and could not have prejudiced the substantial rights of appellant.

Appellant contends that there was a variance of the proof of the charge and the words stated in the petition. Appellee's witness, Captain Moore, proved the language alleged in the petition, except the words "on R. Y. Austin." This was not a material variance. The language proved is in substance and effect the same as was alleged in the petition.

It appears from the record that appellant has had a fair trial, at least there was no substantial error committed to his prejudice.

For these reasons the judgment of the lower court is affirmed.

MAUPIN, &c. v. MAUPIN'S GUARDIAN, &c.

(Filed June 2, 1908—Not to be reported.)

1. Wills—Devise of Land to Daughter—Subject to Control of Widow—Prior Death of Daughter—Estate of Daughter—Curtesy of Husband—Where a father by his will devised a tract of land to his daughter, subject to the use and control thereof by his widow, during her life, if the mother outlived the daughter, the latter, not being seized and possessed of the land in her lifetime, her husband was not entitled to curtesy therein upon her death.

2. Parent and Child—Supplies to Infant Child—Recovery Therefor By Parent—A father is not entitled to recover a claim for board, education and clothing furnished to his daughter during her minority, as this duty is imposed on him by law.

Ed Thomas for appellants.

Shelbourne & Smith for appellees.

Appeal from Fulton Circuit Court.

Opinion of the court by Judge Nunn, affirming.

Appellee. Mary McClanahan, is a daughter of appellant, Maupin. She instituted this action against him and his tenant, Ferguson, to recover the possession of about seventy-one acres of land which she described in her petition, and alleged that they were wrongfully withholding possession of it from her, and had been in the wrongful possession of it for about seven years, and prayed for \$750 as a reasonable rental value for such time. Appellants answered; and in the first place it is alleged that Ferguson was only a tenant of his co-defendant and had no interest in the litigation, except that he had a right to the use of the place for one year. Maupin alleged

that, prior to the year 1904, he married the daughter of S. J. Little, who was the mother of appellee, Mary McClanahan; that S. J. Little departed this life in the year 1881, and left a will, which was duly probated, wherein he devised to his three children, Sallie, the wife of Maupin, being one of them, a tract of one hundred and fifty acres of land. The third and fourth clauses thereof are as follows:

"3a. I will and bequeath to my three beloved children, Sallie, Willie and Neal Little, my homestead upon which I now reside, the same being about one hundred and fifty acres of land, in Fulton county, Ky.

"4th. I wish my wife, Ann Mary Little, to have the use and control of my homestead before mentioned and bequeathed to my children, during her natural life."

He further alleged that issue was born alive to him and his wife, Sallie, before the year 1904, and that this land was "owned" by her of which she was seized and possessed, or which was in the possession of another for her, and that said Sallie Maupin owned the fee simple title and was seized of said land in her lifetime and same was held by her under the last will of S. J. Little, and that he, M. P. Maupin, thereby owns and is entitled to a life estate by curtesy under the law of Kentucky, in the whole of his deceased wife's lands and in the land sued for, and he has been occupying same as such and with the belief that he owned and held such an estate in said land. He alleged that his wife died in 1896. By another paragraph, in substance the same, he alleged that if he was not entitled to the life estate in the whole of the lands of his deceased wife, by reason of the fact that she died after the year 1894, he was entitled to an estate for life in one-third of all the real estate of which his wife was seized in fee simple, or any one for her use, at her death. By another paragraph he alleged that when this land sued for came into his possession, the fencing was down and rotten, the whole place was grown up with briars and bushes and that many gullies had been washed into it; that he rebuilt the fences, removed the briars and bushes, filled the gullies and manured the land, all at a cost of \$689, and received but a small rental for the land; that he controlled and cared for the land during the time he had it so as to greatly improve same and increase its value. He also alleged that:

"He had expended for the use of the plaintiff for her support and maintenance, education, travel and other necessary expenses, and for proper clothing all of which were suitable, proper and necessary for him to have expended on her to enable her to associate in circles proper for her, large sums of money, namely \$1,450."

He averred that after his wife died and in 1900, he expended for her \$65 in the payment of cost and attorney fees in the division of the lands, which descended from his wife, their mother, between appellee and her brother, Willis Maupin; and also expended in defense of an action, by which one, J. C. Grove, sought to establish a lien upon her land, \$50. He averred that he had no property and was unable to make these expenditures for his daughter, a part of which he still owed.

The court sustained a demurrer to appellant's pleading, and he declined to plead further, whereupon the court entered the following judgment:

"The demurrer heretofore filed and sustained as to a part and overruled as to part coming on and the court being advised, it is now sustained as to each and every paragraph of defendant's answer and counter-claim, and amended answer to which the defendants objected and excepted, and defendants declining to plead further, it is adjudged by the court that the plaintiff is entitled to the land des-

cribed in plaintiff's petition, and she is hereby awarded a writ of possession against the defendants for enough of said land to build a house at once, and to issue by the first day of November, 1907, for balance of the land, if necessary, and placed in the hands of the sheriff of Fulton county, for execution, and the plaintiff recover of the defendant her cost herein expended, for which execution may issue, to all of which the defendants objected and excepted at the time and still object and except and pray an appeal to the Court of Appeals, which is granted."

Appellant contends that this case should be reversed because it is shown by the pleadings that he is entitled to the whole of the land left by his wife for life, or at least one-third thereof by virtue of section 2132 of the Kentucky Statutes. This question is somewhat difficult to determine for the reason that it is not stated in positive terms when Mrs. Little, the widow of S. J. Little, died—that is, it is not shown whether she outlived her daughter, Sallie Maupin, or not. If she did, appellant was not entitled to any interest in the land, for the reason that his wife, Sallie, was never seized or possessed of the land. (Stewart v. Barclay, 2 Bush, 550.) In that case the court said:

"As, therefore, no one was seized of the lands of testator to the use of the wife of appellee at the time of her death, and as she only had an estate in remainder, or an estate in fee, to take effect after the death of her mother, and as her mother survived her, she did not have such seizin or actual possession as would entitle her surviving husband, the appellee, to curtesy."

The facts of that case were very similar to the facts of the case at bar. In that case, Stewart, the father of appellee's wife, left a will in which he gave to his wife the sole control, management and use of the income arising from his estate "without accountability to any one." The court said, if the provision made by Willis Stewart for his widow, giving her the income of his whole estate, was not a devise of the estate itself to her in fee, it certainly invested her with a life estate.

The will of S. J. Little expressly left to his widow the use and control of his land mentioned, during her natural life, consequently she was seized and possessed of the land in her own right while she lived. and, as stated, if she outlived her daughter, Sallie Maupin, Sallie Maupin was not seized and possessed of the land during her lifetime. and, consequently, appellant, M. P. Maupin, could not have any curtesy in it. We have arrived at the conclusion, under the facts presented in this case, that the burden rested upon appellant, M. P. Maupin, to show the state of facts entitling him to the curtesy. Appellees filed with their petition the deed from the commissioner appointed by the court to convey to her the title in the case brought to divide the land between appellee and her brother. This conveyance gave her the fee simple title with no reservation in behalf of appellant or any one. If appellant had been entitled to a life estate in the whole, or even one-third of the estate he could have presented his claims in that action and had his rights protected, and if he had such interest, the division ought not to have been made at that time, for the reason that the life use of it by appellant might so change the character of the land as to make the division unequal at his death. We are of opinion that it devolved upon appellant to allege and show that Mrs. Little died before his wife. In such state of case he would have been entitled to a life estate in the land; but he failed to do this. On the contrary he made averments which, in our opinion, show that she died after his wife. The language referred to is as follows (referring to his wife):

"In all land owned by her, or of which she was seized, and possessed or which was in the possession of others for her, and that said Sallie Maupin owned the fee, was seized of said land in her lifetime, and same was held by another for her, as by said last will of S. J. Little."

Evidently he meant that his wife was seized and possessed of this land by her mother, Mrs. Little, under the will of S. J. Little; that he only claimed the seizin and possession was by reason of the fact that her mother held it for her under the will. As before stated, under these facts, Mrs. Little was in possession of the land in her own right. (Stewart v. Barclay, supra, and Moore, &c. v. Carvert. &c., 6 Bush, 356.) In the last named case, the court said:

"As the tenant for life survived the devisee in remainder, Mr. Lindsay, her husband, could not be tenant by the curtesy, because the seizin was in the life tenant and not the husband of the devisee in remainder."

That part of the statute referring to some one holding for the use of the wife, has reference to holding by a guardian, committee or some one holding in trust for her. (Phillips v. Ditto, 2 Duvall, 549.)

Section 1, article 4, chapter 47, Revised Statutes, (2nd volume), section 1, article 4, chapter 52, of the General Statutes, and section 2132, of the Kentucky Statutes, all provide under what conditions a husband of a deceased wife may have curtesy in their lands, and upon the question at issue in this case are the same.

Upon the question of the rents claimed by appellee and the sums claimed by appellant for improvements upon the land, clothing, educating the child, &c., cost and attorney fees expended for her, the lower court did not directly pass upon, but it may be inferred from the judgment that it was the intention of the court to set-off the claims, one against the other. Construing the judgment in this way we are of the opinion that the court committed no error, for in our opinion the improvements placed upon the land by appellant, the cost and attorney fees expended by him for her would about equal the use of the land. As to his claim for board, education and clothing of her, he is not entitled to, because the law imposed upon him this duty.

For these reasons, the judgment of the lower court is affirmed.

HATCHER, &c. v. HACKNEY. &c.

(Filed June 2, 1908—Not to be reported.)

Lands—Sale Of—Redemption—Payment to Clerk—Under section 2264, Kentucky Statutes, the defendant may pay the redemption money to the clerk, if the purchaser, his agent or attorney, is not in the county. The redemption money having been so paid, the deed that appellant took to himself was properly vacated by the order of the lower court.

Yerk & Johnson for appellants.

Roscoe Vanover for appellees.

Appeal from Pike Circuit Court.

Opinion of the court by Judge Hobson, affirming.

Rolland T. Elswick recovered judgment in the Pike Circuit Court against Ephriam Hackney for the sale of a tract of land to satisfy

a lien on it for \$110; the land was sold and James Hatcher purchased it for the amount of the debt on April 16, 1906; the value of the land was about \$1,000. On April 16, 1907, Ephriam Hackney went to redeem the land which had sold for less than two-thirds of its appraised value. Hatcher was not at home so he paid the amount, \$172.62, to the circuit clerk and took his receipt, filing with the clerk the necessary affidavit. Afterwards, Hatcher had a deed made to himself for the land, and Hackney brought this suit to have the deed vacated. Hatcher demurred to the petition and his demurrer being overruled, declined to plead further. Thereupon judgment was entered as prayed, cancelling the deed to Hatcher and he appeals.

The affidavit made by Hackney shows prima facie that Hatcher was not in the county and presents a state of case authorizing the payment of the money to the clerk under section 2364, Kentucky Statutes, which among other things, provides as follows:

"The defendant may tender the redemption money to the purchaser, his agent or attorney, if in the county where the land lies, or in the county in which the judgment is obtained or order of sale made: and if the same is refused, or if the purchaser does not reside in either of said counties, the defendant may, before the expiration of the year, go to the clerk of the court in which the judgment is rendered or the order made and make affidavit of such tender and refusal or that the purchaser, his agent or attorney, does not reside in either of the said counties. Thereupon he may pay to such clerk the redemption money for the purchaser, and the clerk shall give a receipt therefor, and file said affidavit among the papers of the cause."

The clerk receipted to Hackney "in full land sale T. L. Elswick v. Eph. Hackney," and it must be presumed that this was the proper amount of the redemption money as it is presumed the officer did his duty. If the fact were otherwise, the defendant should have shown it by plea. In view of the fact that the amount of the debt was \$110 we think it may be presumed that as the money was paid to the clerk as the redemption money for the land, and he gave a receipt in full, the sum so paid, \$172.62, was sufficient to cover the amount of the purchaser's bid at the sale with interest at ten per cent. The fact that the clerk accepted a check which was afterwards paid is not material. He accepted the check as cash and is responsible on his bond for the money. Under the statute the defendant may pay the redemption money to the clerk if the purchaser, his agent or attorney is not in the county.

Judgment affirmed.

BRASHEARS v. FRAZIER.

(Filed June 2, 1908—Not to be reported.)

Malicious Prosecution—Wrongful Prosecution of Action—Action For Damages—Defective Petition—This is an action to recover damages for the alleged wrongful prosecution of action to sell a parcel of land. The petition does not state a cause of action. It fails to state that the action was maliciously prosecuted; that it was determined in appellant's favor, or against appellee, nor is the averment of probable cause sufficient. Malice should have been averred, as should want of probable cause. The demurrer to the petition was properly sustained.

R. O. Brashears for appellant.

S. B. Dishman for appellee.

Appeal from Letcher Circuit Court.

Opinion of the court by Judge Settle, affirming.

By the institution of this action, appellant attempted to recover of appellee, in the Letcher Circuit Court, damages for the alleged wrongful prosecution by appellee of an action against him in the same court to obtain a sale of a parcel of real estate in Whitesburg, claimed by appellant as a homestead.

Appellee filed a demurrer to the petition which was sustained by the lower court, and the action dismissed. Appellant complains of that judgment, hence this appeal.

The petition does not state a cause of action. It fails to allege that the action maintained by appellee, against appellant, was maliciously prosecuted by the former; that it was determined in appellant's favor, or adversely to appellee. The averment of want of probable cause found in the petition is not of itself sufficient to authorize a recovery. In order to constitute a good cause of action, the petition should have alleged malice on the part of appellee in the institution and prosecution of the action against appellant; that it was without probable cause, and that it was disposed of in the circuit court favorably to appellant.

The foregoing principles are so universally recognized and enforced by the courts, that neither argument nor authority is needed to demonstrate their applicability in the case under consideration.

In point of fact the circuit court, in the action complained of, granted the prayer of appellee's petition, by decreeing a sale of the property in question for the payment of a lien debt held against it by appellee, created by virtue of his previous purchase of it at execution sale. That if it was adjudged that neither appellant nor his wife, who was also a party to the action, had a homestead or other right to the lot as against appellee's lien debt, and the judgment thus rendered was affirmed by this court on appeal. (*Brashears v. Frazier*, 30 Ky. Law Rep., 647.) So at the time of the institution of the present action for damages, there had been a determination of the previous action in favor of appellee and adversely to appellant, which was judicially known to the court, when the demurrer to the petition was sustained, and is also judicially known to this court.

Manifestly, the circuit court did not err in sustaining the demurrer to the petition.

Wherefore, the judgment is affirmed.

KALFUS v. DAVIE, &c.

(Filed June 2, 1908—Not to be reported.)

Land--Sale For Reinvestment—Present or Vested Interest Required—Under section 491, Civil Code, providing for the sale of real estate for reinvestment, it was not contemplated that a mere assignee of a part of the rents thereof, to cease at the death of the assignor, should be allowed to maintain an action for its sale and reinvestment, as under the statutes and Code, such sale can only be had upon the petition of one having "a present or vested interest" in the estate to be sold.

W. Pratt Dale for appellant.

Chas. H. Shield and Davis W. Edwards for appellees.

Appeal from Jefferson Circuit Court, Chancery Branch, First Division.

Opinion of the court by Judge Settle, affirming.

This appeal presents for review a judgment of the court below sustaining a demurrer to the appellant's petition and dismissing her action, which was brought to obtain a decree for the sale of certain valuable real estate in the city of Louisville for the alleged purpose of re-investing its proceeds. The interest asserted by appellant in the property being an alleged life estate in one-half of the net income derived from her former husband's undivided half thereof.

The property in controversy was devised to the present owners by the will of James Kalfus, deceased. The will was construed by this court in the case of *Davie v. Davie*, 26 Ky. Law Rep., 312. According to which construction, the title to the property vested in the devisees as follows: 1st. An undivided one-half interest in James S. Kalfus for life, with remainder to his issue, if any; if none to Addie K. Davie. 2nd. A one-half interest to Addie K. Davie for life, with remainder to her issue; if none, then to James S. Kalfus.

James S. Kalfus, who is the divorced husband of the appellant, Caroline W. Kalfus, is now 65 years of age, unmarried and childless. Addie K. Davie is about 67 years of age, her children are dead, but she has two grandchildren, Jessie B. Davie, and Ada Belle Davie, who are the children of her deceased son, Southern Davie, both being infants over 13 years of age. James S. Kalfus, Addie K. Davie, her infant grandchildren, and the guardian of the latter, were all made defendants to the action.

Exhibit No. 1, filed with and made a part of her petition, shows the only interest appellant has in the property in question. Its language is as follows:

"This agreement made between James S. Kalfus and C. W. Kalfus, his wife, both of Louisville, Kentucky, Witnesseth: That for and in consideration of the sum of one dollar, cash in hand paid, and for and in consideration of the natural love and affection which I bear my said wife, I hereby assign, transfer and convey to said C. W. Kalfus, during her natural life, one-half of the net income derived from my interest in the house and lot in Louisville, on Fourth street, between Walnut and Chestnut; said lot being about 64 feet by 200 feet and being the same property owned jointly by J. S. Kalfus and Mrs. A. K. Davie. Said income hereby conveyed is to be the separate estate of the said C. W. Kalfus, and is to be paid over to her in person and her receipt therefor is to be valid to any agent who may have said property in his charge for the purpose of renting the same.

"In testimony whereof witness my hand this 8th day of October, 1885. JAMES S. KALFUS."

It is the appellant's contention that this paper conveys her an estate for life in the real estate described therein, and as the property does not afford her an income sufficient for her support, she is entitled to have it sold and the proceeds re-invested in like manner and upon the same terms. Is this contention well founded? We think not. It will be observed 1st. That James S. Kalfus does not relinquish his right to control the property. 2nd. That he in no respect divests himself of the right of occupancy. 3rd. The assignment to appellant only carries with it one-half of the net proceeds arising from his undivided half of the property. 4th. The instrument does not deprive James S. Kalfus of the right of appointing agents to control the property or his interest therein. 5th. Appellant is not liable for taxes that may be assessed against the real property, nor can it be assessed for taxation in her name as owner. 6th. The

paper simply assigns one-half of such net sum as might be collected as rents or profits upon the property as would go to James S. Kalfus after all taxes, insurance and repairs had been paid. 7th. If James S. Kalfus should die, appellant's rights to one-half of his part of the income, arising from the estate upon the happening of that event, ceases. In brief, appellant has neither possession nor control of the real estate, and no obligation is imposed upon her by the instrument in question. The only right it gives her is to receive one-fourth of the net rents from the land, and, as said by the chancellor, to hold that such an interest gives her the right under the Code to sell the entire property (which is divisible) for the purpose of increasing the income assigned to her and against the wishes of the real owners of the land, would be a clear perversion of the meaning and purpose of the Code."

All the appellees resist the sale. A sale of real estate for reinvestment must be had as required by section 491, Civil Code, which provides:

"In an equitable action by the owner of a particular estate of freehold in possession, or by his guardian or committee, if he be an infant or of unsound mind, against the owner of the reversion or remainder, though he be an infant or of unsound mind, and against the owner of the particular estate if he be an infant, or of unsound mind; or, if the remainder be contingent, against the person, if in being, in whom it would have vested if the contingency had happened before commencement of the action, though he be an infant or of unsound mind, and against the owner of the particular estate if he be an infant or of unsound mind—real property may be sold for investment of the proceeds in other real property."

It is patent that to authorize a sale under this section, the action must be brought by the owner of "a particular estate of freehold in possession." Appellant does not own an estate in the property at all. Her interest is restricted to net rents of a part of the property. Instead of owning a particular estate, she owns only an interest in the net profits of a particular estate, of which she has neither possession nor control; the entire possession and control of the property being in the life tenants, Jas. S. Kalfus and Mrs. Davie. It was not contemplated by the framers of the Code that a mere assignee of a part of the rents of real estate, to cease at the death of the assignor, a life tenant of the property, should be allowed upon the basis of such an interest to maintain an action for its sale and reinvestment. We can not agree with counsel for appellant, that she is entitled to a sale of the real estate under the case of *Scheirick v. Maxwell*, 28 Ky. Law Rep., 173, in which it was held that article 6, chapter 63, General Statutes, is still in force.

The statute in question reads as follows:

"1. Remainder and contingent interest in real estate may be sold upon petition of any person having a present or vested interest, all persons in being having any interest in such estate being made parties to the action. If the court shall be satisfied that the interests of all concerned would be subserved by such sale, it shall adjudge accordingly, which judgment and sale thereunder shall invest the purchaser with all title of the present and future contingent claimants to the said real estate.

"2. The proceedings in the case provided for in the preceding section shall be the same in all respects, as far as necessary, as those provided for in article four, of this chapter; and any defendant refusing to have the sale made may have partition according to his interest, if he so desire, unless in a case such as is provided for in section six, article five. of this chapter.

"3. The proceeds of sale shall be, by the court, reinvested in the same kind of property, to be conveyed and held in the same manner, subject to like limitation, trust and conditions, as the property, which was sold; Provided, however, That the court shall cause all just claims for taxes, or other lawful assessments for public improvements upon the property, to be first paid, and only the balance of the proceeds may be invested in suitable improvements upon the remaining land, under the direction of the court, or it shall be lawful for the court to cause the proceeds to be reinvested as provided in section two, article five, of this chapter."

Under this statute, as well as under the provisions of the Code, supra, the sale can only be had upon the petition of a person having "a present or vested interest." One having a mere interest by assignment in a part of the rents is not the owner of "a present or vested interest." The intent of the statute seems to be the same as that of the Code; neither embraces such an interest as is owned by appellant.

Moreover, it may be said that under section 2, of the statute, supra, Mrs. Davie, who has a vested interest in the property, has a right to object to the sale on the ground alone, that the property being susceptible of division, her interest should be allotted her. It is, however, sufficient to say that appellant can not maintain this action because she does not own a particular estate or a present vested interest in the property.

Judgment affirmed.

ILLINOIS CENTRAL RAILROAD CO. v. MARTIN.

(Filed June 2, 1908—Not to be reported.)

1. Railroads--Frightening Teams on Public Highway—Injury to Driver—Contributory Negligence of Driver—Where the driver of a team which he knew was easily frightened at a railroad train was injured by the running off of his team on the approach of a train, the evidence showing that the driver knew of the approach of the train, by his failure to unhitch his team, before the train came up to him which he could have done, he was guilty of contributory negligence which the court should have submitted to the jury on the question of his right to recover damages against the railroad company for his injuries caused thereby.

2. Same—Care Required of Employes—Duty to Traveler on Highway—Knowledge of Danger—Where those in charge of a railroad train see that a team is frightened on an abutting highway, they should use such care as may be usually expected of an ordinarily prudent person under the circumstances for the safety of the traveler on the highway. They are not required to watch the highway, but when they do perceive the danger of the traveler they may not recklessly disregard his safety and sound the whistle unnecessarily when they know that to do so will increase his peril.

3. Same—Negligence of Servant—Imputed to Company—In running a railroad train the servants of the railroad company are its agents and their negligence is the negligence of the company. If the servant's act is within the scope of his authority it is immaterial whether he acts negligently or wantonly.

Blue & Nunn, Trabue, Doolan & Cox and J. M. Dickinson for appellant.

A. C. Moore, Jas. A. and John A. Moore and James & James for appellee.

Appeal from Crittenden Circuit Court.

Opinion of the court by Judge Hobson, reversing.

John Martin was driving over the Blackford and Sullivan road, with a two horse wagon loaded with household goods, near the town of Sullivan, Ky. The road at this point ran along the side of the right of way of the Illinois Central Railroad Co., a wire fence being between the right of way and the road. The road was forty feet from the railroad track. Martin saw that a train was coming. He stopped his team, and dropped the traces and stood by the side of the wagon, holding the lines. He was driving a mule and a horse. The train stopped at the tipple, to take coal as it approached Sullivan. Near where Martin stopped, there was a whistling post for a public crossing. It was a heavy freight train going up grade. As the train pulled up from the tipple it made a good deal of noise and when it got near the whistling post it whistled. It also whistled after passing the whistling post for the station at Sullivan. Martin's team became frightened and ran off about the time that the engine passed them, running back in the direction the train was coming from. The team jerked him down and ran the wagon over him breaking his left arm, spraining his ankle, cutting a place in his head and bruising his legs, arms and shoulders. From the injury to the arm it became stiff. He brought this suit to recover for his injuries on the ground that the servants of the company, in charge of the locomotive, were looking at him and seeing that his team was frightened, and perceiving the danger in which he was placed, continued to blow the whistle until they made the team run off. The evidence of the defendant was to the effect, in substance, that only the usual signals were given: that the team became frightened at the train and not at the whistling of the locomotive. It also showed that the plaintiff had said that the team he was driving consisted of a young mule and a horse, which ran away every chance it got. The jury found for the plaintiff in the sum of \$1,500, and the defendant appeals from the judgment entered on the verdict.

The defendant pleaded contributory negligence on the part of the plaintiff, and at the conclusion of all the evidence asked an instruction submitting the issue to the jury. The court refused the instruction and of this it complains. We think there was some evidence that the plaintiff knew his team was liable to run off. He had stopped and asked the track walker if a train was coming, and as soon as he learned it was coming, he had gotten out of the wagon and unhitched the traces. The train had stopped at the tipple, and he had had plenty of time to take his horses out before the train reached him. It was, therefore, a question for the jury whether he exercised ordinary care under the circumstances; and instruction B, asked by the defendant on the trial, submitting this issue to the jury, should have been given. The court gave no instruction on contributory negligence. The court instructed the jury as follows:

"1. The court instructs the jury, that if they believe from the evidence that the agents and servants of the defendant in charge of its engine, saw the plaintiff and his team and saw that the team had taken fright and then negligently sounded the whistle and thereby caused the team to run away and injure and damage the plaintiff, they will find for the plaintiff.

"2. The court instructs the jury that the defendant in operating its engine has the right to make all noises usual and necessary in the operation of its engine and cars, and to make such signals with the whistle and at such times, as may be necessary, for the proper protection of the lives and property in its charge, and if the jury

believe from the evidence that the whistling, which plaintiff complains of, was usual and necessary in the operation of its trains, or such as was necessary for the protection of the lives and property in its charge you should find for defendant, unless you should further believe that, after discovering the plaintiff's team was frightened, those in charge of the engine negligently caused unusual and unnecessary whistling and thereby caused the team to run and injure plaintiff."

"3. The court instructs the jury that if they believe from the evidence, that, at the time of the whistling complained of by the plaintiff, the agents and servants of the defendant had not discovered plaintiff's team and its fright, they will find for the defendant.

"4. The court instructs the jury that the law requires the defendant to ring its bell or sound its whistle, on its engine, continually, for not less than 825 feet, just before reaching a public crossing; and if the jury believe from the evidence, that the whistling complained of by the plaintiff, was done in obedience to this law, you will find for the defendant, unless you further believe from the evidence that those in charge of the engine saw the fright of plaintiff's team and after seeing it knew, or by the exercise of ordinary care, would have known, that such whistling would cause the team to take additional or increased fright, yet negligently blew or continued to blow the whistle and thereby caused the team to run and injure the plaintiff."

As there was some evidence that the men on the engine were looking at Martin and saw the danger in which he was placed, the motion of the defendant that the jury be instructed peremptorily to find for it, was properly overruled. When those in charge of a railroad train see that a team is frightened on an abutting highway, they should use such care as may be usually expected of an ordinarily prudent person under the circumstances for the safety of the traveler on the highway. They are not required to watch the highway, but when they do perceive the danger in which a traveler has been placed, they may not recklessly disregard his safety and sound the whistle unnecessarily, when they know that to do so will increase his peril. In running the train they are the agents of the defendant, and their negligence in running the train is the negligence of the defendant. All the facts of the men in charge of the locomotive shown here were done in the line of their employment. If the servants act is within the scope of his authority, it is immaterial whether he acts negligently or wantonly. (*Licking Rolling Mills v. Fisher*, 8 Ky. Law Rep., 89; *Williams Adm'r v. Southern R. R. Co.*, 24 Ky. Law Rep., 2214, 115 Ky., 320.)

The case of *Louisville and Nashville R. R. Co. v. Smith*, 107 Ky., 178, was very similar to this case. It was there held that although the employees of the railroad company were under no obligation to look out for the team on the highway yet, if they, in fact, saw the danger in which the traveler was placed, then they should, if necessary in the exercise of ordinary care, cease blowing the whistle as a signal for the crossing and should resort to the bell as the statute provides either mode of giving warning for the crossing. In *L. & N. R. R. Co. v. McCandless*, 29 Ky. Law Rep., 653, the question was reviewed and the rule before announced was adhered to.

In Instruction 1, on another trial, after the words "negligently sounded the whistle," the court will insert the words "or negligently made noises which were not reasonably necessary in the operation of the train and could have been avoided by ordinary care."

In instruction 2, in place of the word "necessary," the court will use the words "reasonably necessary."

In lieu of instruction 3, on another trial, the court will instruct the jury that the defendant is not liable for any whistling that was done or for any noise that was made before those in charge of the train discovered plaintiff's team and its fright; and that if the plaintiff's team took fright and ran off, not because of the whistling that was done by those in charge of the engine, but because of the train and the noise that was reasonably necessary in its operation, and that those in charge of the train could not, by ordinary care, have averted the running away of the team after they perceived the team and its fright, they should find for the defendant.

In instruction 4, after the words "just before reaching a public crossing," the court will add these words "but if those in charge of the engine saw Martin's team and saw that it was frightened, then it was incumbent on them to use ordinary care for his safety and they should not have used the whistle, but should have used the bell, if in the exercise of such care this was necessary. The remainder of instruction 4 should be omitted.

On another trial the court will permit the defendant to show by its witnesses what whistling the train did and why these whistles were blown. It will also permit it to prove by its witnesses what noises the train made, and, where the witnesses are acquainted with the running of trains and know what noises are reasonably necessary in the operation of trains, they may be permitted to testify whether or not the whistling and noises which are shown were usual and reasonably necessary in the operation of the train. The court, on the trial, erred in refusing such evidence offered by the defendant.

The engineer being dead, the plaintiff can not testify as to anything the engineer did or omitted to do, as under section 606, of the Code no person may testify for himself concerning any act done or omitted to be done by one who is dead, and it has been repeatedly held that where the agent, with whom a transaction occurred, is dead, the other party may not testify for himself as to the transaction. What the status of the case would be if we leave out of view the plaintiff's testimony as to the engineer we need not consider, as there was no objection to the testimony, and if objection had been made, the plaintiff might have offered other evidence on the subject. (Mut. Life Ins. Co. v. O'Neil, 116 Ky., 742; Park Commissioner v. Merritt, 80 S. W., 166.)

Judgment reversed and cause remanded, for a new trial.

SANDERS & WALKER v. HERNDON.

(Filed June 3, 1908—Not to be reported.)

Lewis L. Walker and J. W. Alcorn for appellants.

M. C. Saufley, R. H. Tomlinson, J. M. Rothwell, C. B. Swineboard and William Herndon for appellees.

Appeal from Garrard Circuit Court.

Judge Hobson delivered the following response to petition for rehearing.

Those who were originally the promoters and stockholders in the Lancaster Oil Company, and Sanders & Walker, are all to be treated as partners in the adventure. It was in law a partnership when Sanders & Walker entered it. They simply purchased an interest in a partnership and became partners with the original members. They

are all to be treated as partners and as principals. Sanders & Walker can not be treated as the sureties of the original partners.

By section 194, of the Code, the plaintiff may take out an attachment in an action for the recovery of money. This seems to be broad enough to cover an action by one partner against another for the amount due him on a settlement. While there is some conflict of authority on the question, we agree with the reasoning of the Supreme Court of Illinois in the case of *Humphries v. Matthews*, 11 Ill., 171:

"The law was designed to furnish a creditor with means of collecting his debt, in any case where he would be unable to do so in the ordinary mode of proceeding, and we can see no reason why it should not be applicable to actions of account as to any other class of cases. The claim of a joint tenant, tenant in common or co-parcener, is just as sacred as that of any other creditor; and because he cannot resort to the more usual common law actions to enforce his rights, affords no reason why he should be deprived of the benefit of the attachment act when he presents a case that would authorize an attachment were he permitted to sue in debt or assumpsit."

In *Garrott v. Jaffray & Co.*, 10 Bush, 413, it was held that an attachment may be taken out in an action to recover money due upon an implied contract.

In every partnership there is an implied obligation on each partner to repay to each of his partners what may be justly owing by him on account of advances to the firm or money paid out for the firm. And where the plaintiff can state in an affidavit that he sought to recover at least a certain sum, we see no reason why he should not be allowed to secure his debt by an attachment, which would not apply in every other case of mutual accounts.

The opinion is extended as above indicated.

The petition for re-hearing is overruled.

STANNAFORD v. HUBBARD.

(Filed June 3, 1908—Not to be reported.)

1. Vendor and Vendee—Action by Vendee for Possession and Title—Effect of Delay—Where one buys land under a general warranty deed he is entitled not only to the possession of the land but to a good legal title. He should not be required to wait until some person with a superior title evicts him, and run the risk of his vendor's becoming insolvent or moving out of the State.

2. Same—Action Against Third Party—Recovery—Attorney's Fees and Costs—Where, upon demand, the vendor refuses to perfect the title to the property sold, or to return the purchase money, the vendee may maintain an action against a third party claiming to own the land, and, upon his eviction, may sue for the recovery of the purchase price and his attorney's fees and costs in the suit against the third party.

J. N. Sharp and M. S. Singleton for appellant.

T. Z. Morrow and E. L. Stephens for appellee.

Appeal from Whitley Circuit Court.

Opinion of the court by William Rogers Clay, Commissioner, affirming.

This is the second appeal of this case. The opinion on the former appeal may be found in 30 Ky. Law Rep., 1044.

In December, 1901, the appellant, by deed of general warranty, conveyed to appellee 11 acres of land; the consideration therefor was \$70

in cash and a conveyance by appellee to appellant of a house and lot valued at \$230. After obtaining the conveyance to the 11 acres of land, appellee sold some trees that were standing on the property. When the purchasers attempted to cut the timber the agent of the Mt. Morgan Coal Company refused to let the timber be cut and carried away, claiming that the land belonged to the coal company. Appellee then instituted an action in ejectment against the coal company, and the coal company succeeded in recovering the land. Thereafter appellee instituted this action against appellant to recover the purchase price of the land, together with his attorney's fees and costs incurred in the suit against the Mt. Morgan Coal Company.

It is the contention of appellant that appellee was not lawfully evicted; that he voluntarily surrendered possession of the land to the coal company, and that he can not, therefore, maintain this action to recover the purchase price on a breach of the covenant of warranty in the deed which appellant executed to appellee. The evidence shows that, after appellee was notified by the Mt. Morgan Coal Company that the latter claimed to own the property, he demanded that appellant make him a good title to the land. This appellant failed to do. After waiting some time on appellant, appellee filed suit in ejectment against the coal company, and notified appellant of the suit. Appellant, instead of furnishing appellee title to the land, or assisting him in the prosecution of the ejectment suit, urged appellee to dismiss the suit. In the former opinion of this court, it was held that appellee was not bound to await the pleasure of appellant in the matter; that he was entitled to a speedy settlement, and either a return of the land or the recovery of his money from appellant. The court also held that the judgment in behalf of the coal company was a sufficient eviction to authorize this action. Manifestly any other ruling would work a great hardship on the vendee of property. If he purchased the property under a general warranty deed he is entitled not only to the possession of the property, but to a good legal title. He should not be required to wait until some person with a superior title evicts him, and run the risk of the vendor's becoming insolvent or moving out of the State. When, upon demand, his vendor refuses to perfect the title to the property, or to return the purchase money, he may maintain an action against the third party claiming to own the land, and, upon his eviction, may sue for the recovery of the purchase price and his attorney's fees and costs.

On the trial of this case appellant could have defended either on the ground that the judgment of eviction was obtained by collusion and fraud, or that he had furnished to appellee a good title to the property. There is nothing in the record to show any collusion or fraud. Appellee waited a long time for appellant to perfect the title to the property. This action was instituted in the year 1903. The first trial took place in 1905; the last trial in 1907. Appellant has never yet furnished, or offered to appellee, a good title to the property in question. The evidence fails to disclose any real defense to this action on the part of appellant. We, therefore, conclude that the judgment in favor of appellee was proper.

Judgment affirmed.

FEDERAL CHEMICAL CO. v. GREEN & SONS.

(Filed June 4, 1908—Not to be reported.)

Instructions—Contracts—(30 Ky. Law Rep., 223.) It appears that the lower court tried this case upon the theory that appellees could not be required to sustain the loss unless it was shown that the fire was occasioned by their negligence. This was error in view of the contract which made appellees insurers of the property although

this was unusual, but it is not shown that any fraud or deception was practiced by appellant in obtaining the contract.

Milton Clark and James R. Duffin for appellant.

M. M. Logan and Ora E. Hazelip for appellees.

Appeal from Edmonson Circuit Court.

Opinion of the court by Judge Nunn, reversing.

This is the second appeal of this case. The opinion on the first appeal can be found in 30 Ky. Law Rep., 223. That action and this were instituted upon the same contracts, one of which was copied in the former opinion. On the return of the case appellant obtained from the clerk the original contracts, which were filed among the papers of the first suit, and instituted this action upon them. Appellees contend that it had no right to do this. It was irregular; they should have obtained copies from the clerk, or by motion in court, obtained the permission to withdraw the originals from the first suit by leaving copies therein. But this irregularity upon the part of appellant can not avail appellees, it is no defense to this action. Appellee also pleaded the former judgment in bar of this action. This can not be sustained. There was no judgment upon the merits in the first case, the question involved being whether or not the lower court properly sustained a demurrer to the petition. The material differences between the allegations of the petition in the first action and in this action are these: It is alleged in the petition in the present action, which was not in the former petition, that, by the written contract, appellee agreed to furnish free storage for the fertilizers unsold, until sold by them or removed by appellant, and agreed to be responsible for its loss for any cause. It was also alleged in the petition in this case, which was not in the other, that the building, in which appellee had the fertilizers stored, and the fertilizers, while in appellees' possession, were destroyed by fire. Appellees, in their answer to this part of the petition, in substance, denied that the fertilizers delivered to them under the contract referred to, had been destroyed or wasted to the amount of \$209.65, or any other sum, or that, under the terms of the contract, appellees were bound to appellant for the value of such fertilizers as were wasted or destroyed. This did not make an issue with appellant. By the very terms of the printed contract appellees agreed to furnish free storage for the goods and assume the responsibility for their loss for any cause. It was admitted and proven by one of the appellees that, while the goods were stored in their building, under the contract, they were destroyed by fire.

It appears from the brief of counsel that the lower court tried the case upon the theory that appellees could not be required to sustain this loss, unless it was shown that the destruction of the goods by fire was caused by want of care and diligence upon the part of appellees in protecting them from destruction. In other words, that the fire must have been caused by the negligence of appellees. This was error. The contract stated that they should be responsible for the loss of the goods for any cause. There is no exception, or reservation in it. The contract made appellees insurers of the property, and is an unusual one. Appellees did not interpose any plea of mistake, fraud or deception upon the part of appellant in obtaining these contracts. By their answer, they merely denied their responsibility under the contract, and did not plead anything showing that they were not responsible under the positive terms of their contracts.

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2. Same—Proof of Admissions by Plaintiff—Denial—Question for Jury—In an action for damages by a woman for injuries received by being struck by a train in crossing a railroad track in a buggy, evidence was admitted that she said to the physician who treated her injuries, soon after the collision, that "she heard the train whistle and undertook to cross, and it ran into her, and that she was to blame," which she denied, the question of whether she made the admission or was in such a state of mind as to know what she was at the time saying, was for the jury. <i>Idem</i>	513
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5. Same—Unusual Currents of Wind—A railroad company is responsible for such consequences as may ordinarily be anticipated, but it is not responsible for smoke, soot or cinders carried to adjoining property by unusual currents of wind. <i>Idem</i>	537
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7. Same—Obstructing Street and Alley—Measure of Damages—Removing Obstruction—In an action by the owner of a dwelling abutting a railroad for damages in obstructing a street and alley adjacent to the property, the measure of damages is the diminution of the value of the property by reason thereof, but where the obstruction is removed by putting in a proper crossing, the measure of damages is for the time the obstruction was continued. *Idem* 537
8. Changing Line of Railroad—Damages Caused Thereby—Where the line of a railroad track has been changed so as to bring it nearer to property than it was before the change, the measure of damages is the difference in the value of the property with the cinders, soot and smoke and obstruction of a street and alley, thereby, as they are, and what it would be without the increased cinders, soot or smoke or the obstruction of the street and alley, and unless such damage has thereby been increased there can be no recovery. *Idem* 537
9. Negligently Killing Engineer—Action in this State—Killing in Tennessee—Jurisdiction of Action—A railroad engineer, who was a resident of this State, was killed while running his train in the State of Tennessee, by the negligence of the defendant railroad company. His administratrix brought suit for damages in this State. There was no averment in the pleadings and no proof as to what the law of Tennessee is. At the conclusion of the evidence the court peremptorily instructed the jury to find for defendant. Held—That this was proper. *Murray's Adm'r v. L. & N. R. R. Co.* 545
10. Same—Law of Sister State—Absence of Allegation or Proof—Presumption—Until the contrary is alleged and proved, the courts of this State will presume that the common law is yet in force in a sister State. At common law a cause of action for injury to a person dies with the person, and no action can be maintained for his death. *Idem* 545
11. Same—Judicial Presumption—While it is presumed that the common law prevails in a sister State, it is not presumed that the statutes of a sister State are the same as those of this State. Judicial presumption rests on the truth as shown by the usual course of things, but they are not indulged as to matters which can not possibly be true. *Idem* 545
12. Killing of Trespasser—Lookout Duty—This case is, in its essential facts, identical with *N., C. & St. L. Ry. Co. v. Bean's Executor*, ante, which is conclusive of this. The judgment is, therefore, affirmed. *Cummins' Adm'r v. I. C. R. R. Co.* 584
13. Trial—Statement of Case to Jury—Discretion of Counsel—Review on Appeal—In making a statement of the case to a jury, the matter is to be determined by counsel, and while the court in its discretion, might direct counsel to make a statement, or a fuller statement, when the court deemed it necessary, the court's discretion in a matter of this sort will not be reviewed on appeal. *Cln., N. O. & T. P. Ry. Co. v. Evans' Adm'r* 596
14. Negligently Causing Death of Brakeman—Statement of Conductor—Part of *Res Gestae*—Competency—A brakeman who was on a freight car, in discharge of his duty, was thrown therefrom by a sudden jerk of the train by the

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- engineer, and run over by the car and killed. In an action by his administrator for damages, a witness stated that in a minute after the accident he went to the engineer and told him he had killed his brakeman, when he replied: "That is the way, whenever I get mad, I either hurt or kill somebody." Held—That the statement of the engineer to the witness was competent evidence as part of the *res gestae*. *Idem* 596
15. Same—Non-resident Railroad—Resident Conductor—Trial—Evidence Heard—Dismissal as to Conductor—Motion for Removal—Delay in Motion—In an action for damages against a non-resident railroad company and its resident conductor, by the administrator of a deceased brakeman for causing the death of the decedent, where, on the conclusion of the evidence, the court, on motion of the defendants, dismissed the action against the conductor, it was too late then for the railroad company to ask that the case be moved to the Federal court. A non-resident defendant can not answer without objection, and go through a large part of the trial and then, for the first time, make a motion for such transfer. *Idem* 596
16. Same—Defective Petition—Amending Prayer—Discretion of Court—In an action against a railroad company for damage for the alleged killing of a brakeman, where the petition contained no prayer for relief, it was in the discretion of the trial court, after the evidence was heard, on the motion of the defendant for a peremptory instruction, to allow the plaintiff to file an amended petition praying judgment for the sum sued for and all proper relief. *Idem* 596
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18. Carriers—Injury to Live Stock—Absence of Infirmity in Stock—Common Law Liability—Applicability—The common law liability of a common carrier for injury to freight applies in this State to live stock the same as to inanimate freight. Where horses were burned by a conflagration in the city of Louisville, while in charge of the carrier, the loss being one not growing out of the infirmity of the animals themselves, the carrier is liable to the owner for their value. *Stiles, &c. v. L. & N. R. R. Co.* 625
19. Negligence in the Operation of Trains—Evidence—Injury to Passenger—Extent of—The Evidence shows that the trains that collided, in which collision appellee was injured, were recklessly run by those in charge of them, showing such lack of regard for the safety of the passengers as to amount to gross negligence. In view of the extent and character of the injuries as disclosed by the evidence, and their permanent character, the verdict herein complained of can not be said to be excessive. *L. & N. R. R. Co. v. Marshall* 639

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20. Instructions—Measure of Damages—In defining the measure of damages the court, in telling the jury that they might find for her "for the loss of time, if any, which she has sustained, and for the loss of time in the future which the jury may believe from the evidence it is reasonably certain she will suffer, if any, and for the loss or impairment of her ability to earn money, if any," the court meant that they were authorized to compensate her for loss of time, when she was unable to work, but when she became able to work, and her power to earn money was impaired, she should be compensated for the difference in her earning power in her impaired condition and what it was before the injury. *Idem* 639
21. Railroads—Frightening Teams on Public Highway—Injury to Driver—Contributory Negligence of Driver—Where the driver of a team which he knew was easily frightened at a railroad train was injured by the running off of his team on the approach of a train, the evidence showing that the driver knew of the approach of the train, by his failure to unhitch his team, before the train came up to him which he could have done, he was guilty of contributory negligence which the court should have submitted to the jury on the question of his right to recover damages against the railroad company for his injuries caused thereby. *I. C. Ry. Co. v. Martin* 666
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23. Same—Negligence of Servant—Imputed to Company—In running a railroad train the servants of the railroad company are its agents and their negligence is the negligence of the company. If the servant's act is within the scope of his authority it is immaterial whether he acts negligently or wantonly. *Idem* 666

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- Act of 1906—Delinquent Taxes—Liability of Taxpayer—For Subsequent Years—Construction of Act—There can be no objection to article 3, of chapter 22, of the acts of the Kentucky Legislature of 1906, relating to revenue and taxation, on the ground that it is an ex post facto law, in so far as said article applies to the years subsequent to 1905. The delinquent's liabilities for those years are to be measured by his liabilities if he has volunteered to list and pay his taxes, and it follows that the article, in so far as it requires the payment of interest and penalties for the years 1902, 1903, 1904, 1905 and 1906, is inoperative, and the delinquent for those years would be required to pay only taxes without interest or penalties, but the elimination of the interest and penalties for those years does not affect the other provisions of the articles with respect to those years or years subsequent thereto. *Ky. Union Co. v. Commonwealth* 587

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2. Same—The fact that a country road has been opened which gives appellant another outlet, can not militate against the outlet already acquired. (104 Ky., 144.) *Idem*..... 621

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2. Same—Per Se Negligence—Intention to Alight—Notice to Conductor—Sudden Increase of Speed—Actional Negligence—It is not per se negligence for a passenger in a street car to make preparations to alight therefrom before it comes to a standstill or to get off before it actually stops. When a car has slackened its speed to enable a passenger to alight therefrom, upon notice by him of his purpose to those in charge thereof, and it is then running at a rate of speed that a reasonably prudent person, in the exercise of ordinary care for his own safety, might attempt to alight, it is negligence to suddenly and violently increase the speed of the car until the passenger has had reasonable opportunity to alight. *Idem* 518
3. Denying Passenger a Transfer Ticket—Compelled to Walk Home—Damages Recoverable—Where a little girl eleven years old, in traveling from Ludlow to Newport, a distance of several miles, had to change cars, and was entitled to a transfer in making the exchange, which she demanded, but was refused by the conductor, and by reason thereof she was compelled to walk alone to her home late in the evening for several miles through an unfrequented part of the way, she was entitled to recover damages for being refused a transfer ticket, and a verdict for \$425 was not excessive under the facts shown. *South Cov. & Cin. St. Ry. Co. v. Quinn* 534
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2. Same—Rights of Co-Sureties—Interference Therewith—There is no substantial difference between the legal effect of an obstruction of, or interference with, the rights of the surety by the creditor, and an obstruction or interference with the rights of the surety by the act of another person, who might otherwise have looked to the surety for contribution or indemnity if there had been no obstruction. *Idem* 612

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recognized the \$500 as a trust in his hands, first for the benefit of the mother, and afterwards for the daughter, amounts to an unexecuted promise which can not be enforced as a trust. *Brown v. Brown's Adm'r* 601

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3. Same—"Dying Without Children"—Estate for Life—Restriction—Where an estate is devised to one for life, with remainder to another, with the provision that if the remainderman should die without children, or issue, then to a third person, the rule is that the words "dying without children or issue," are restricted to the death of the remainderman before the determination of the particular estate. *Idem* 531

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- 5 Same—This clause was construed by this court, in 1865, in precisely the same state of case as this, in the matter of another child of Southgate, who took under the will. In that case the court held that, upon the birth of a child, the remainder then vested, and upon his death it passed to his heir-at-law; that the condition in the devise above quoted should be construed to mean that, upon her mar-

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8. Devise of Land—Subject to Control of Widow—Prior Death of Daughter—Estate of Daughter—Curtesy of Husband—Where a father by his will devised a tract of land to his daughter, subject to the use and control thereof by his widow, during her life, if the mother outlived the daughter, the latter, not being seized and possessed of the land in her lifetime, her husband was not entitled to curtesy therein upon her death. <i>Maupin, &c. v. Maupin's Gd'n, &c</i>	658
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COURT OF APPEALS OF KENTUCKY.

EWELL, &c. v. JACKSON, &c.

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1. Judgments—Unsigned by Judge—Validity—Under section 390, of Civil Code, requiring the judgments of the court to be entered in the order book and section 378, Kentucky Statutes, requiring that the proceedings of each day shall be drawn up and read by the clerk, and signed by the presiding judge, it is indispensable to the validity of a judgment that it shall be entered on the order book of the court and signed by the judge who rendered the judgment, or by his successor or by the regular judge unless he is disqualified.

2. Same—Delivery to Clerk—Entry of Record—Effect—A paper signed by a judge, although it contained the entire judgment and be delivered to the clerk of the court to enter upon the order book, is not a judgment in fact until it has been entered upon the order book of the court and signed by a judge.

3. Same—Special Judge—Failure to Sign Record—Signature by Disqualified Judge—Validity—Section 977, Kentucky Statutes providing that "upon the death of a circuit judge, or when for any cause the office is vacant or when the judge is absent, his successor, no matter how chosen, may sign any orders left unsigned by his predecessor the same as his predecessor might have done," applies to special as well as to regular judges.

If a special judge on account of death or absence from the court or retirement from the case, should fail to sign the orders in a case in which he presided they may be signed by the special judge who succeeds him in the case or by the regular judge unless he was disqualified. But if the regular judge be disqualified to preside in the case, then his signature would not validate such judgment.

4. Unsigned Judgment—Execution Thereon—Validity—The defendants to an unsigned judgment may enjoin the sheriff from seizure and selling their property under an execution issued thereon.

Ewell & Smith for appellants.

Henry C. Hazelwood and E. H. Johnson for appellees.

Appeal from Laurel Circuit Court.

Opinion of the court by Judge Carroll, affirming.

This action was brought to enjoin the collection of an execution issued upon what purported to be a judgment of the Laurel Circuit Court, in the case of *Ewell & Smith v. J. C. Jackson's Heirs*, upon two grounds, first: that the judgment was never signed on the order book by the judge who delivered it; and second, that the judgment disposed of a material question not presented by the pleadings in the action.

H. C. Faulkner, the regular judge of the Laurel Circuit Court, could not sit in the case in which the judgment was rendered, and D. K. Rawlings was selected as special judge by agreement of parties. Judge Rawlings, after hearing the case, took it under advisement, and in due time returned or had delivered to the clerk a written judgment signed by him. The clerk recorded the judgment, omitting the name of the judge; and the recorded judgment was never signed by Rawlings. The judgment rendered by Rawlings was entered upon the order book of the Laurel Circuit Court, on a day of the regular term of the court, and was recorded with the orders and judgments made and entered by the regular judge in cases pending before him. The orders of the day made by the regular judge, and which included the judgment rendered by Rawlings, were signed at the end of the day's business by the regular judge in the usual and customary manner.

Upon this condition of the record, three questions are presented: first, is it necessary to the validity of a judgment rendered by a special judge that it should be signed by him on the order book; second, if he fails to sign the judgment on the order book, can the judgment be signed by the regular judge with the same effect as if it had been signed by the special judge; and third, if the regular judge could not sit in the case, and for that reason a special judge was selected, can the regular judge sign the judgment or orders made by the special judge?

Section 390, of the Civil Code, provides:

"The judgment must be entered on the order book and specify clearly the relief granted or other determination of the action."

Section 378, of the Kentucky Statutes, relating to the duties of clerks of courts, provides that:

"The proceedings of each day shall be drawn up by the clerk from his minutes in a plain legible manner, which, after being corrected as ordered by the court, and read in an audible voice, shall be signed by the presiding judge."

It will thus be seen that, under the Code and Statute, it is indispensable to the validity of a judgment that it shall be entered upon the order book of the court and signed by the judge who rendered the judgment, or his successor in the disposal of the case or by the regular judge unless he is disqualified. These two acts must concur. In the absence of either, there is no judgment. A paper signed by a judge, although it contain the entire judgment and be delivered to the clerk of the court to enter upon the order book, is not a judgment, in fact, until it has been entered upon the order book of the court and signed by a judge. Courts of record speak only by their records duly entered and signed in the books provided for that purpose. The judgment in an action or proceeding is usually the final termination of the matter in the court in which the case is pending. By it the most valuable rights of the citizens are determined, and it is of the highest importance that it should be preserved in permanent form and be in fact signed by the very person whose authority directed its entry, unless he fails, within the meaning of section 977, of the Kentucky Statutes, to sign it. This statute provides that:

"Upon the death of a circuit judge or when from any cause the office is vacant, or when the judge is absent, his successor, no mat-

ter how chosen, may sign any orders left unsigned by his predecessor, the same as his predecessor might have done."

It sometimes happens that, after a judge has directed the entry of an order or judgment, he is prevented by absence or death or other cause creating a vacancy in the office, from signing the orders or judgments so entered. And when such a condition arises, the orders made and entered by his direction may be signed by his successor. This section applies to special as well as regular judges. If a special judge, on account of death or absence from the court or retirement from the case, should fail to sign the orders in the case in which he presided, they may be signed by the special judge who succeeds him in the case, or by the regular judge of the court unless he was disqualified from presiding in the case. And so, if the regular judge is prevented by death or absence from the court, or by a vacancy in the office, from signing the orders or judgments made and directed to be entered by him, his successor may sign them. Nor do we think it indispensable to the validity of an order or judgment entered by a special judge that it should be signed at its close by his successor in office, or by the regular judge, if the orders of the day among which it is entered are signed by the regular judge or the person acting in his place as judge. The signing of the orders of the day by the regular judge or judge acting for him will have the same force and effect as if he signed the particular order or judgment entered by the special judge, provided he was qualified to sit in the case in which the order or judgment was entered by the special judge. But, if the regular judge could not preside in the case, it would seem to follow that he should not sign the orders or judgments made in it. If the orders of the day which included this judgment had been signed by a judge other than the regular judge, or by a judge who might have presided in the case in which Rawlings was chosen to preside, or, if the particular judgment entered by Rawlings had been signed by a regular judge who was qualified to sit in the case, or by a judge who was selected in the place of Rawlings, to preside as special judge, the presumption would be indulged that Rawlings was absent, and hence the signature by such judge to the orders of the day or to the judgment rendered by Rawlings would give life and effect to his judgment.

Let us illustrate this point by the facts of this particular case: The regular judge could not sit in the case in which Judge Rawlings was selected as special judge. The record does not disclose the reason why the regular judge could not sit, but the presumption is that he was disqualified for some good cause. But, whatever the reason, as he could not sit in the case, neither could he, by signing any orders or judgments rendered by the special judge, give life or vitality to them. The same reason that prevented him from hearing and disposing of the case would necessarily preclude him from signing the orders and judgments entered in the case. It would be a most anomalous state of affairs to hold that although the regular judge could not preside in the case, nor hear or determine any of the matters at issue between the parties, that yet he might give validity and effect by his signature to the final judgment therein. The effect of this practice, if permissible, would be that although a judge could not make an order of continuance in a case, or enter an interlocutory order, or pass on some immaterial question, yet he could, by signing the judgment, determine finally the rights of the parties. We, therefore, conclude that as the regular judge could not sit in this case, the fact that he signed the orders of the day embracing the judgment, his act was not a signing of the judgment entered by the special judge, and, therefore, the record stands as if the judgment was left unsigned. An unsigned judgment is no judgment, hence,

an execution could not issue upon it. (Commonwealth v. Chambers, 1 J. J. Mar., 108; Raymond v. Smith, 1 Met., 65; Fristoe v. Gillen, 26 Ky. Law Rep., 150; Johnson v. Commonwealth, 80 Ky., 377.) As there was no judgment upon which an execution could issue, the execution defendants had the right to enjoin the sheriff from seizing and selling their property under the execution. (Knott v. Jarboe, 1 Met., 54; Robinson v. Carlton, 29 Ky. Law Rep., 876; Bramblet v. McVey, 91 Ky., 151.)

This conclusion renders it unnecessary to consider the question that the judgment disposed of matters not presented by the pleadings.

Wherefore, the judgment is affirmed.

LOUISVILLE FERTILIZER CO., &c. v. LORTON, &c.

(Filed June 4, 1908—Not to be reported.)

Homestead—Debtor and Creditor—Where a debtor is entitled to a homestead, his creditors can not have the land sold subject to the homestead right. Such a sale may be ordered after the death of the debtor, reserving the rights of his widow and children, but during his lifetime, the creditors can not demand that the land be sold subject to the homestead right. Under the evidence the lien was properly adjudged on the land in controversy.

Cress & Cress for appellants.

Harrison & Harrison and F. R. Harrison for appellees.

Appeal from Wayne Circuit Court.

Opinion of the court by Judge Hobson, affirming.

On November 22, 1900, William and Mary E. Lorton conveyed to their son, Isaac Lorton, three tracts of land in Wayne county, Kentucky, for the consideration of \$400, as stated in the deed; but it was really a part of the agreement that the son was to live with the old people and take care of them during their lives. After this William Lorton died and Isaac continued to live at the old home with his mother. Whether the place where they lived, which is called the Smith or Watts tract, was included in the conveyance to Isaac, is a matter of dispute between the parties, the calls of the deed describing the land conveyed being uncertain. Isaac Lorton mortgaged the land to secure a debt of \$470, which he owed. He was also indebted to his half-brother, John G. Leveridge in the sum of \$150, for which he had promised to execute to him a mortgage, but he had not executed it, or at least had it recorded. In this condition of affairs, Isaac Lorton and his brother, Thomas Lorton, carried on a mercantile business and became considerably in debt to the Louisville Fertilizer Co., and other persons who were their creditors. While the business was done in the name of the Lorton Brothers, Thomas Lorton carried on the business, and Isaac Lorton had little to do with it. The creditors, however, brought suit against him for their debts and obtained judgments. Before these judgments were obtained he conveyed the three tracts of land referred to to his mother, and she conveyed them to John G. Leveridge. The creditors thereupon brought this suit to set aside the deeds as fraudulent and subject the land to the payment of their claims. It was insisted for the defendants that the homestead, or Smith tract, was not conveyed to Isaac Lorton. They also insisted that in any event Isaac Lorton was entitled to a homestead in the land if the Smith tract was included in the deed,

and that to this extent the deed was not fraudulent; and that to the extent of his mortgage debts upon the land and his own debts, Leveridge was entitled to a lien on it. The circuit court held that the deed made to Isaac Lorton included the Smith tract, or homestead, but he held that Isaac Lorton was entitled to a homestead, and that this should be set apart to him, or to Mary Lorton, his mother, and that after setting apart the homestead, the remainder of the land should be sold, the mortgage debts paid and the debt due Leveridge; that then the balance should be applied to the debts of the creditors. From this judgment they appeal. We have some doubt upon the record whether the Smith tract, or homestead, was included in the deed to Isaac Lorton, but it is unnecessary for us to decide this question, as there is no cross-appeal. In any view of the case Isaac Lorton was entitled to a homestead in the land. To the extent of his homestead his deed to his mother was not fraudulent, and, therefore, the action of the court in setting apart the homestead to her was not prejudicial to the appellants. Where a debtor is entitled to a homestead, his creditors can not have the land sold subject to his homestead right. Such a sale may be ordered after the death of the debtor reserving the rights of his widow and children, but during his lifetime, the creditors can not demand that the land be sold subject to the homestead right. (Cole v. Rohr, 1 Ky. Law Rep., 62; Schmidt v. Oliges, 6 Ky. Law Rep., 297; Thompson on Homesteads, section 738.)

The mortgagees had a lien on the land for their debts and to the extent of their debts, the sale to Leveridge was not fraudulent. The deed to Leveridge is not attacked on the ground that it was made to prefer him to the other creditors. It is attacked on the sole ground that it was made to defraud the other creditors. The evidence shows that Leveridge had, in good faith, a debt against his brother, and the court did not err in adjudging him a lien on the land to the extent of his debt.

On the whole record none of the substantial rights of the appellants were prejudiced by the judgment which is as favorable to them as the facts warrant.

Judgment affirmed.

PACK v. STEPP, &c.

(Filed June 2, 1908—Not to be reported.)

Divisional Lines—Creek Changing Its Course—The proof shows that the line in controversy has existed and been acquiesced in for more than thirty years. It cannot now be disturbed; if the creek has changed its course it has been gradual, and the line has followed the thread of it. It is not a sudden change of bed as by a freshet.

C. B. Wheeler and W. G. Wells for appellant.

Wells & Wells for appellees.

Appeal from Johnson Circuit Court.

Opinion of the court by Judge Hobson, reversing.

Eliza Stepp holds a tract of land in Johnson⁴ county, which she claims under a patent issued to James Wood, in 1845. Geo. W. Pack holds an adjoining tract which he claims under a patent issued to Garland Burgess after the patent to Wood. This controversy has arisen between them as to ownership of a small piece of creek bottom on the south side of Greasy Creek, near the mouth of Two Mile creek.

The two patents do not conflict and the proof shows that the Wood patent includes the land, but the proof also shows that about fifty years ago, the parties, under whom the plaintiff and defendant claim, by agreement, made the creek the line between them, and that Pack and those under whom he claims entered then on the land in dispute and cleared it as a part of it and have since held and used the land so cleared for thirty years. By arrangement a part of the Burgess patent north of the creek fell to Wood and a part of his patent on the south side of the creek fell to those under whom Pack claims. The proof of the establishment of the agreed line and of the taking and holding possession up to is so clear and has been so long acquiesced in, that the line can not now be disturbed. (*Creech v. Abner*, 106 Ky., 239; *Amburgy v. Lumber Co.*, 90 S. W. 680; *Hughes Lumber Co. v. Valentine*, 106 S. W. 839, and cases cited.)

If the creek has changed its course, it has been a gradual change and made little by little, and the line has followed the thread of the stream. It is not a case of a sudden change of bed from a freshet or the like. (*Halcomb v. Blair*, 76 S. W. 843; *Spurrier v. Hodges*, 28 Ky. Law Rep., 805.)

On the facts shown judgment should have been entered for the defendant. Judgment reversed and cause remanded, for a judgment as above indicated.

LOCKHART, &c. v. BUCKNER, &c.

(Filed June 4, 1908—Not to be reported.)

Deeds—Cancellation of—Evidence—In this case, the evidence is examined and held that the deed was properly set aside. It was made under a misapprehension, and in view of the facts appearing, the lower court did not err in canceling it.

McMillan & Talbott and John M. Brennan for appellants.

Morton, Webb & Wilson for appellees.

Appeal from Bourbon Circuit Court.

Opinion of the court by Judge Hobson, affirming.

Mrs. F. Lockhart Clay has three daughters, Mary, Sally and Florence Lockhart, the latter being an infant. On June 15, 1904, just before Mary was to marry Aylette Buckner, her mother procured her to make a deed to James McClure to her undivided interest in the tract of land on which they lived, upon the following trust: "Said property shall be, by the second party, held in trust for the sole and separate use of the first party until she shall marry. Upon first party's marriage the second party shall reconvey the same so that it shall be owned, held and possessed as follows, to-wit: By the first party for her sole and separate use and benefit during her life, with remainder in fee at her death, to the issue of her body then living and the descendants of such of them, if any, as may be dead, such descendants taking per stirpes their parents' share. Said deed of reconveyance shall also provide that should such first party die leaving no such issue or descendants of her body, then the remainder in the aforesaid property shall pass the one-half in fee to her sisters, or should they, or either of them, be dead, then to their descendants, such descendants taking per stirpes their parent's share; should either sister be then dead leaving no descendants, her surviving sister shall take her share. The other half shall pass to first party's husband for

his life, with remainder to her sisters or their descendants, as provided above as to the one-half. Should said husband be dead at the time of the first party's death, then the whole remainder estate shall pass to her sisters, or sister, or their descendants, as provided above. Should first party not marry within a month from the date of this instrument, then it is ipso facto null and void."

The marriage took place shortly after the deed was made, and after the marriage McClure reconveyed the property back to Mrs. Buckner upon the trust specified in the deed to him. In November, 1907, Mrs. Buckner brought this suit against her sisters, McClure and her husband asking that the deeds be vacated and set aside on the ground that at the time the deed was made she knew nothing of business and was induced to make the deed by her mother, who assured her that she would have her sisters to make a similar deed; that her sister, Sally, was of age and declined to make such a deed; that her sister, Florence, was approaching her majority, and also announced her intention not to make a similar deed; that she would not have made the deed but for the assurance of her mother, and the fact that she did not understand the effect of the transaction. Defense was made for the infant by her guardian ad litem. No other defense was made to the action. The deposition of Mrs. Clay was taken, fully sustaining the allegations of the petition, and the case having been submitted on this proof, the court set aside the deeds. From this judgment the guardian ad litem appeals.

The proof leaves no doubt that Mrs. Buckner executed the deeds by the procurement of her mother relying upon her judgment and in obedience to her parental authority. If the mother's plan had been carried out, no great injustice would have been done Mrs. Buckner, as she would have taken an interest in her sisters' land like that which they took in hers, but to uphold the deeds against her when they refused to make similar deeds, would be to do her great injustice. It is evident that the scheme which the mother had in mind failed to be carried out, and that the deed made by Mrs. Buckner was made under a misapprehension in reliance upon her mother's judgment and guided by her authority. In view of her age at the time, and all the surrounding facts, we think the circuit court properly set aside the deeds.

Judgment affirmed.

CORYDON DEPOSIT BANK v. McCLURE, &c.

(Filed June 4, 1908—Not to be reported.)

Surety—Liability of Note—Valid Note—Merger in Invalid Note—Surety of Valid Note—Liability—Where a son wrongfully signed his mother's name as surety for him on a note to a bank for \$1,115.75, which included a note for \$440, which his mother had previously signed as surety, it appearing that the son believed at the time that he had the right to sign his mother's name to the larger note, he was not guilty of any moral turpitude thereby, and the fact that the larger note was invalid, did not invalidate the smaller \$440-note merged therein, as against the estate of his mother, who had subsequently died.

Vance & Heilbronner for appellant.

Thomas E. Ward for appellees.

Appeal from Henderson Circuit Court.

Opinion of the court by Judge Settle, reversing.

The appellee, H. D. McClure, executed to the appellant, Corydon Deposit Bank his note for \$1,115.75, to which he signed the name of his mother, Mary H. McClure, as surety, supposing he had authority, in writing from her, to do so; but this court, in *McClure, Ex'or v. Corydon Deposit Bank*, 32 Ky. Law Rep., 772, held that the writing relied on did not confer upon H. D. McClure authority to sign the note in question. The note of \$1,115.75 was given in renewal of three other notes held by the bank against H. D. McClure, one of which was a past due note of \$440, in which he was principal, and Mary H. McClure, surety. It is conceded that the latter's signature to the \$440 note was written by her.

After the execution of the \$1,115.75 note, Mary H. McClure died testate, and soon thereafter the appellee, H. D. McClure, as executor of her will, brought suit in the Henderson Circuit Court for a settlement of her estate. The \$1,115.75 note was filed by appellant with the commissioner of the court for allowance and payment. It was allowed by the commissioner, to whose report appellee filed exceptions. The circuit court sustained the exceptions and rejected the claim upon the ground that Mary H. McClure's estate was not liable for the note because her name had been signed thereto as surety by her son, H. D. McClure, without authority in writing from her. Subsequently appellant brought suit against the executor upon the note of \$440 attempted to be merged in the \$1,115.75 note.

An answer was filed by the executor, denying that the estate of the executrix, or that he, as executor of her will, was liable for the \$440 note, or any part thereof, and alleging that she had been relieved from such liability by the act of appellant in merging the note with others, on which she was never bound, in the \$1,115.75 note, and in accepting the latter note and marking the \$440 note on the back "paid;" and in addition, by postponing, without her knowledge or consent, the maturity and payment of the \$1,115.75 note in consideration of interest paid in advance by H. D. McClure, the principal, which acts of appellant, it was further alleged, kept from her information of the attempted merger of the \$440 note into the \$1,115.75 note, until H. D. McClure became insolvent and prevented her from taking steps to compel H. D. McClure to pay the \$440 note on which she was, or had actually been, surety.

By agreement of the parties, a trial, by jury, was waived, and the cause submitted to the court, whose findings of law and fact were adverse to appellant, and resulting in a judgment dismissing the action. Appellant asked, and was refused, a new trial; hence this appeal.

It is manifest that at the time of the execution of the \$1,115.75 note both H. D. McClure and the officers of the appellant bank believed the former had authority, under the writing from his mother, to sign her name thereto as surety; but in this they were mistaken. Such authority was not conferred by the power of attorney, and this being true, the note of \$1,115.75 was invalid; indeed, as much so as if her name appearing thereto as surety had been forged. While the act of H. D. McClure in signing his mother's name to the renewal as surety, under the circumstances, manifested no moral turpitude, it was, nevertheless, an illegal act, and as an assumption of authority, false in law and in fact. Being therefore, void ab initio, its execution by the principal, and acceptance by the bank, did not merge or discharge the \$440 note upon which Mrs. McClure was surety. As said by this court, in *McClure's Ex'or v. Corydon Deposit Bank*, supra: "If the note signed for her by her son, is invalid, the bank having accepted the renewal on the faith that the signature was valid, should be remitted to the former note which it then held and was admittedly valid."

In *Strattan v. McMakin*, 84 Ky., 641, it is said: "The verdict and judgment in the suit on the notes accepted in renewal conclusively

establish the invalidity of those notes as to McMakin, and the allegations of the petition show that appellant accepted them in ignorance of the fact. He has then, without fault on his part, and, without any consideration for so doing, surrendered the note on which McMakin was confessedly bound, and if the judgment of the court below be permitted to stand, McMakin has been released and the appellant has lost his debt without fault on his part, simply because he confided in the false statements of Hinkle, and that, too, without his having done any act, as far as appears, by which McMakin had been in anywise injured. If such be the law, all must admit that in this case at least, the law is extremely harsh. That the law is otherwise is well established by authority, though never expressly decided by this court. * * * It has been held in many cases that if a new security be void for any reason, it does not satisfy or discharge the pre-existing debt or liability."

In *Struss v. Masonic Savings Bank*, 89 Ky., 61, the creditor was induced, by a fraudulent representation, to cancel the note upon which the surety was bound. It was held that neither the surety nor any one else, should be allowed to assert rights or claim benefits, derived through the fraud of others. In *Northern Bank of Ky. v. Farmers Nat. Bank*, 23 Ky. Law Rep., 696, the same principle was applied where a preference was made by an insolvent debtor. The facts were that the debtor had deposited \$4,557.75 in the Northern Bank of Kentucky. The bank then held his note for about the same amount, which had been due three months. Shortly thereafter the bank, without his consent, applied the debtor's deposit to the payment of his note because it learned about that time that the surety in the note denied signing it. Subsequently, and within six months after the application of the deposit to the satisfaction of the note, other creditors of the debtor, by suit, attacked the transaction, and also a mortgage that he had given to secure other debts, on the ground that they were preferences made and entered into when the debtor was insolvent. They were held by this court to be preferential and made to operate as an assignment for the benefit of all the creditors; but in so holding the court declared that the doctrine announced in *Struss v. Masonic Savings Bank*, supra, should apply where a note is discharged by a payment which is afterwards adjudged within the statute against preferential transactions.

Probably no better statement of the doctrine can be found than that expressed in 7 Cyc., at page 1015, as follows: "Since an obligation can not be paid and satisfied by a new promise of a debtor, which is unfulfilled, and which he can avoid, at his pleasure, a note is not discharged by the giving of a new note in payment thereof where the new note proves invalid. Therefore, the surrender of a note, and the acceptance of a new note in payment without the knowledge that the new note is a forgery, does not discharge the original note." (*Covington Nat. Bank v. Gaines*, 87 Ky., 597; *Bowman v. Wood*, 14 Ky. Law Rep., 926; *Kibley v. Jones*, 7 Bush, 245.)

The testimony in the case before us was all to the effect that the \$1,115.75 note was accepted by the bank simply in renewal of the three other notes it held against H. D. McClure; one of them being the \$440-note, in which Mary H. McClure was surety. When, therefore, the renewal was adjudged invalid, the old liability of Mrs. McClure upon the \$440-note was revived. Of this there can be no doubt. Nor does the fact that the renewal allowed four months' time for the payment, or that interest was paid in advance for such time, or that the principal became insolvent before the date of payment named in the renewal, affect the question; because the renewal was invalid from the time of its execution and acceptance.

"An unenforcible agreement by a creditor to indulge a principal does not discharge the sureties in a note." (*Kupp v. St. Martimus*-

Ritter Verein, 21 Ky. Law Rep., 938.) In such case there is no valid extension of time. (7 Cyc., 898.)

While the question of whether H. D. McClure did or did not become insolvent, pending the four months during which the alleged renewal was to run, is not material, we think the circuit court erred in the conclusion of fact that he was solvent when the renewal was given. On the contrary, the weight of the testimony was to the effect that he was insolvent when and before the renewal was executed.

Our conclusion is that appellant was entitled to recover of the executor of Mary H. McClure the amount of the \$440, with interest, as claimed.

Wherefore, the judgment is reversed and cause remanded, for a new trial, and such other proceedings as may be consistent with the opinion.

BLODGETT v. MILLER.

(Filed June 4, 1908—Not to be reported.)

1. Contract—Action for Money Advanced—Question of Partnership—Motion to Transfer to Equity—In an action at law brought for money alleged to have been advanced for a one-third interest in a contractor's outfit, it was not error in the court to transfer the case to the equity docket when the issue to be tried was a question of fact as to whether or not there was a partnership existing between the parties. If a partnership was shown, then it should have been transferred for a settlement of the partnership.

2. Same—Trial—Admissions by Defendant—Estoppel—On the trial of an action by one for money advanced and loaned to another to secure an interest in a contractor's outfit, in which the defendant set up a partnership and moved to transfer the case to equity, where the defendant on the trial admitted that he had disposed of the whole of the outfit without notice to the plaintiff, he was thereby estopped from asserting that there was a contract of partnership between himself and the plaintiff, and plaintiff had a right to disregard the partnership contract, if there was one, and sue for his money.

3. Excluding Witness from Court Room—Discretion of Court—Infirmary of Litigant—On the trial of a case before a jury it was in the discretion of the trial court whether or not to allow a brother of one of the parties, who was a witness for him, to remain in the court room and assist him in the trial, because of the imperfect hearing of such party.

James Denton for appellant.

Pogue & Pogue and O. H. Waddle & Son for appellee.

Appeal from Pulaski Circuit Court.

Opinion of the court by Judge Nunn, affirming.

Appellee instituted this action against appellant alleging that he advanced to him the sum of \$1,500, in consideration of which appellant was to convey to him one-third interest in a certain contractor's outfit and a contract then held and owned by appellant, which contractor's outfit and contract were located on the Rochester and Eastern Transit Line, in the State of New York. It was understood that he was to pay \$4,000 for one-third interest. He paid \$1,500, which appellant received and converted to his own use, and after receiving and converting the money he failed and refused to admit appellee to said interest in said contractor's outfit and contract, as

he had agreed to do. Upon appellant's failure to admit him as a partner he demanded of appellant that he repay to him the sum of \$1,500, which he failed and refused to do. By a second paragraph of the petition he alleged that he loaned appellant \$250 on the 28th day of July, 1903, which he agreed and promised to repay to appellant, but had failed to do so. By a third paragraph he made the same allegations with reference to another \$250, which he stated he loaned to appellant on the 1st day of September, 1903, and asked judgment for \$2,000, with interest from the respective dates of the loans.

Appellant answered, denying each of the items of indebtedness set forth in the petition, and alleged that he entered into a contract with appellee whereby he sold to him a one-third interest in the contractor's outfit, and the contract mentioned in the petition, for the price of \$4,000, and that the sums of money sued for in the petition were paid to him on the contract price. He denied that he failed or refused, or that he still refuses, to admit appellee to his interest so purchased, and denies that upon such failure or refusal, appellee demanded of him that he repay the sum of money sued for. He also alleged that, at the time of the sale of the interest to appellee, he (appellant) was the sole owner of the contractor's outfit and the contract referred to. He also sold a one-third interest to his brother, D. E. Blodgett, at the same time and at the same price. He further alleged that from the time of the sale to appellee and his brother that they became equal owners in the contractor's outfit and the contract and continued to prosecute the work, as such partners, for some time, and for convenience the partnership transacted the business under the firm name and style of Frank H. Blodgett, for the reason that the contract with the railway was made in the name of Frank H. Blodgett. He also stated that the partnership sustained a loss of about \$9,000 under the contract with the railway company referred to, and that appellee had contributed nothing to help pay the loss, except the two items of \$250 each. He further alleged that it was necessary to have a full and complete settlement of the accounts arising out of the partnership before the exact status of the partnership could be determined; but the settlement would show that appellee was indebted to appellant in at least the sum of \$5,000; and that D. E. Blodgett was a partner in the business and was a necessary party to the action.

To this answer a reply was filed controverting all the affirmative matter contained therein, except he admitted that there was some loss on the contract referred to, but the amount he did not know.

The affirmative matter in the reply, by agreement, was controverted of record.

Appellant moved the court to transfer the case to the equity docket, which motion was overruled. D. E. Blodgett was never made a party to the action. A jury was empanelled to try the case. The sole question tried was, whether or not appellee was ever permitted to become a partner by becoming the owner of one-third of the contractor's outfit and one-third of the contract with the railway company. After the testimony was heard, the court gave to the jury a peremptory instruction to find for appellee, and a judgment was rendered upon the verdict of the jury giving to appellee each item claimed in the petition, with interest.

Appellant asks a reversal for the following reasons: First. Because the court erred in refusing to transfer the case to the equity docket for a settlement of the partnership. Second. Because there was a separation of the witnesses during the trial, and appellant made an affidavit that he could hear only with difficulty, and on that account he needed the presence of his brother, D. E. Blodgett, to aid him in conducting the case and the court refused to allow him to

remain in the court room while the evidence was being heard. Third. Because the court erred in giving the jury a peremptory instruction to find for appellee.

The court did not err in refusing to transfer the case to the equity docket, as the issue to be tried was a question of fact as to whether or not there was a partnership to be settled. If it had been determined that there was a partnership existing between the parties, it would have then been necessary to have transferred the case and had the partnership settled.

As to the question of refusing to allow appellant's brother, D. E. Blodgett, to be present during the hearing of the evidence in the case, it is sufficient to say that that matter was in the discretion of the court trying the case; his action thereon should not be disturbed unless it was shown that he abused his discretion in the matter, which does not appear in this case.

The evidence of the parties tended to support the theory advanced by each of them in their pleadings. When appellee paid the \$1,500 on August 3, 1903, to appellant, he expected to soon thereafter be admitted as an active partner with a one-third interest in the contractor's outfit and the contract, and that the partnership was to continue for an indefinite period, and the parties understood and expected that writings were to be drawn covering all their understandings and agreements, including the fact that appellee was to be employed as secretary of the partnership at the price of \$100 a month. Appellee left appellant with the understanding that he was to proceed to New York and take an inventory of the contractor's outfit with the promise of appellant that on his first trip to New York he would prepare writings covering their agreement. He obtained the inventory and appellant made several trips to New York, and upon each occasion appellee urged that the papers be prepared, which appellant failed to do. The contract with the New York company was completed about the middle of December, 1903, and appellee went to his home in Pennsylvania. And in the month of January, 1904, he went to appellant's home in West Virginia, and again urged that appellant prepare the contract and that he be admitted as a partner; and again in February of the same year he applied to appellant in the same place and asked that the papers be prepared and that he be permitted to become an active partner with a one-third interest in the contractor's outfit, which appellant refused to do. He then placed the matter in the hands of an attorney in West Virginia to look after his interest. Afterwards he was informed that appellant could not be found in that State and summons served upon him. He then placed the matter in the hands of attorneys in Cincinnati, Ohio, who finally located appellant in Pulaski county, this State, and instituted this action. He also stated that he had been informed that appellant had sold and disposed of all the property constituting the contractor's outfit.

Appellant testified that by the contract appellee had become a partner and owner of a one-third interest in the contractor's outfit. He admitted that he was to draw the contract of partnership and did not do it, but in a way, denied that appellee repeatedly requested him to do so. He concluded his testimony as follows:

"After the completion of the New York contract, I sold part of the property constituting the contractor's outfit in which I sold plaintiff an interest and a part of it I transferred to the F. H. Blodgett Company, which was a corporation and in which I was largely interested. I swapped the steam shovel, which was a part of the outfit, for a larger one, while the contract was going on, which shovel was probably worth five or six thousand dollars, which I transferred to the F. H. Blodgett Company. The contractor's outfit consisted of steam

shovel, engines and such property and tools as are usually employed in such railroad construction. I never consulted or conferred with plaintiff or his attorney about disposing of this property, and made no effort to do so, and the whole of it was disposed of by me shortly after the completion of the New York contract, either by sale or transfer to the F. H. Blodgett Company. The F. H. Blodgett Company, shortly after being organized as a corporation, obtained a contract in Ohio, and another contract in Indiana, and a portion of the contractor's outfit was transferred to these contracts and used by the F. H. Blodgett Company. I owned the most of the capital stock of the F. H. Blodgett Company and my brother, D. E. Blodgett, the balance, but sometime after this, I bought the stock of D. E. Blodgett and he and I made a settlement of our business so that he does not owe me any part of the \$4,000 he agreed to pay me for a one-third interest in the contractor's outfit and contract in New York. My brother, D. E. Blodgett, contracted to take one-third of the outfit and contract in New York at the same price Mr. Miller agreed to pay, but he never paid any portion of the purchase money and I never did call on him for it. I have never notified plaintiff of the losses accruing on the New York contract and never made any demand on him for any payment on account of such losses."

As stated, appellee admitted that a loss was sustained on the New York contract, but said that he expected to make up this loss on future contracts.

In view of all the facts and circumstances proven in this case, we are of the opinion that it is not necessary to consume the time that would be required to discuss the evidence and the principles of law governing the question as to whether or not there was a complete and binding contract of partnership—one which either party might have enforced; because, under the proof, it appears that appellee was never admitted as a member of the firm, nor to his rights and privileges as an owner of a one-third interest therein. The statement of appellant, copied above, shows that he disposed of the whole of the contractor's outfit without giving notice to or consulting appellee in any way; that appellant abandoned, or disregarded, the contract with appellee, if there ever was a contract, and appellant is now estopped by his conduct from asserting the claim that there was such a contract of partnership existing between himself and appellee.

Evidently, appellee, under the facts proven, had the right to disregard the partnership contract, even if there was one, and sue appellant for his money; and it is not necessary to cite authorities to support this conclusion.

For these reasons the judgment of the lower court is affirmed.

WESTERN UNION TELEGRAPH CO. v. WITT.

(Filed June 5, 1908—Not to be reported.)

1. Telegrams—Failure to Deliver—Breach of Contract—Where a telegram is delivered to a telegraph company and the price for transmission paid, a contract is entered into between the sender and the company for a delivery of the message within a reasonable time, and for a failure to do so the company is liable for a breach of the contract.

2. Same—Action for Breach of Contract—Limitation—Damages for the failure to deliver a telegram are not an injury to the person in the meaning of Kentucky Statutes, section 2516, requiring an ac-

tion for an injury to the person to be brought within a year next after the cause of action accrued, but are recoverable under section 2515, providing that an action upon a contract. * * * shall be commenced within five years next after the cause of action accrued.

3. Measure of Damages—The measure of damages recoverable for a breach of contract in failing to deliver a telegram are such as flow directly from the breach and they may be to the feelings as well as to the property.

4. Same—Duty of Plaintiff—Effort to Minimize Damages—Where one receives a delayed telegram announcing the death of a sister whose funeral he desires to attend, he should use all reasonable means to minimize the damages for the delay. He can not stand idly by and permit the damages to increase and then hold the wrongdoer liable for the loss which he might reasonably have prevented.

Richards & Quarles and Geo. H. Fearons for appellant.

C. C. Williams, R. L. Pope and T. Z. Morrow for appellee.

Appeal from Rockcastle Circuit Court.

Opinion of the court by Judge Carroll, affirming.

This appeal is prosecuted from a judgment upon a verdict rendered against the appellant company for four hundred dollars in damages. The action in which the recovery was had was based upon the ground that the appellant company negligently failed to transmit and deliver to appellee the following telegram:

“Williamsburg, Jan. 26, 1905.

“To John A. Witt,

“Livingston,

“Your sister, Martha Thompson, died this morning. Come first train.

“MARSHALL.”

Williamsburg and Livingston are on the line of the Louisville & Nashville Railroad, in Kentucky, and about sixty miles apart. The telegram in question was delivered to the operator at Williamsburg about 4.30 p. m., and in the usual and ordinary course of business should have reached Livingston before 6 o'clock on the same evening and been delivered to appellee, who lived in the town of Livingston, within a short time after its receipt. It was not in fact delivered until about 10 o'clock on the morning of the 27th. The delay in its transmission and delivery is not accounted for by the appellant company, so that, considering the time of its delivery at the place of transmission and the time of its receipt at the point of destination, and the distance between the two places, it may be assumed that the company was guilty of negligence in failing to send the telegram in seasonable time or in failing to deliver it with reasonable promptness after it reached Livingston. If the telegram had been delivered to Witt on the 26th he could have left Livingston on a train that passed through there about one o'clock on the morning of the 27th, and have reached Williamsburg about four o'clock that morning, and Witt testifies that he would have taken that train. The next train leaving Livingston for Williamsburg departed about one o'clock p. m., on the 27th, arriving at Williamsburg at four o'clock p. m. Upon receipt of the telegram, Witt without reading it carefully supposed that it had been sent that morning, and went to the depot for the purpose of taking the one o'clock train for Williamsburg; but, after arriving at the depot about eleven o'clock and again reading the telegram, he discovered that it was dated on

the 26th and not the 27th, as his first casual reading induced him to believe and he did not go to Williamsburg. His sister was buried on the morning of the 27th, about 11 o'clock. There was no train leaving Livingston on the morning of the 27th after the receipt of the telegram that appellant could have taken to Williamsburg in time to attend the funeral of his sister.

The company asks a reversal on two grounds. It is first insisted that upon the receipt of the telegram appellee should have telegraphed the family of his sister that he could not reach Williamsburg until that afternoon and have asked them to delay the funeral until his arrival. That in failing to take this action he was guilty of such contributory neglect as would defeat a recovery. It is next insisted that the action, which was not instituted until more than one year after January 27th, was barred by the statute of limitations—the appellant's contention being that section 2516, of the Kentucky Statutes, fixes the time within which an action of this character may be brought. That section reads as follows:

"An action for an injury to the person of the plaintiff, of his wife, child, ward, apprentice, or servant, or for injuries to person, * * * by any company or corporation * * * shall be commenced within one year next after the cause of action accrued, and not thereafter."

It is upon this statute that the appellant chiefly depends to exonerate it from liability to the appellee.

For the appellee it is insisted that this is an action upon a contract, and the period in which it must be brought is controlled by section 2515, of the Kentucky Statutes, providing that:

"An action upon a contract * * * shall be commenced within five years next after the cause of action accrued."

Telegraph companies are common carriers. They are engaged in a public service. In consideration of certain fees exacted, they agree to transmit and deliver messages within a reasonable time. Whenever a person delivers to a telegraph company a message to be sent to the addressee, and pays the stipulated price, a contract is entered into between the sender and the company by which the company obligates itself to transmit and deliver the message within a reasonable time. We do not mean to say that it is always a part of the contract that the message shall be delivered, and only use these expressions for the purpose of illustrating the fact that the agreement to transmit and deliver is the result of a contractual relation between the parties. The agreement has all the elements of a contract. The company holds itself out to the public as being able, ready and willing to enter into contracts for the transmission of messages in consideration of the price fixed by it. So that, it would seem to follow as a necessary consequence of these premises that an action against the company for a failure to transmit or deliver a telegram must be grounded upon the breach of the contract obligation. The measure of damages that may be recovered for a breach of the contract are those that flow directly from the breach and are the proximate result of it, and they may be to the feelings as well as to the property. (*Western Union Tel. Co. v. VanCleave*, 107 Ky., 464.) The damages for the failure to deliver a telegram are not an injury to the person in the meaning of section 2516, *supra*. This section contemplates a physical injury to the person. Ordinarily, actions brought under this section sound in tort, and are not distinctly based upon a contractual relation, although the tort may have its origin in such relation. To illustrate: when a common carrier undertakes to transport a passenger, a contract relation is entered into, and yet if the passenger is injured, a tort has also been committed that is an injury to the person. And as the injury to the person rather than

the breach of the contract is usually the foundation of the claim for damages, it has been held that this statute applies to actions to recover damages for injuries to the person, although the injury results primarily from the breach of the contract by the carrier in failing to safely transport the passenger.

A question in all respects like this was presented to the court in *Meniffee v. Alexander*, 21 Ky. Law Rep., 980. There, Meniffee brought suit against Alexander, a physician, to recover damages for alleged malpractice—the only question in the case being whether the one-year statute or the five-year statute applied to the action, it being admitted that it was barred if the former statute controlled. In considering the case the court said:

“The phrase ‘an action for an injury to the person of the plaintiff’ in section 2516 refers to those cases where the personal injury is the gist of the action, such as actions for assault and battery and the like. If a druggist should sell a man poison for a harmless medicine, a suit for damages therefor would not be an action for injury to the person although great suffering or loss of health had resulted therefrom. The limitation to an action against a physician for improperly treating his patient is the same as that in a like action against an attorney, a teacher or a mechanic, for negligence in the discharge of a duty assumed by them.”

And it was held that the cause of action had its origin in a breach of duty committed by Alexander, who, in undertaking to afford medical treatment to Meniffee, impliedly undertook that he was reasonably well qualified to perform the service and that his failure to exercise reasonable skill was a violation of a contract duty that he assumed.

It is conceded by counsel for appellant that this case is conclusive of the question under consideration if it should be adhered to. Although the reasoning of this opinion and the conclusion reached, is vigorously attacked as unsound, a re-examination of the question satisfies us of its correctness. The conclusion reached naturally follows from the well grounded assumption that the cause of action originated in a breach of duty flowing from a contract relation, and the resulting damage had its foundation in the contract rather than in the injury to the person.

In respect to the suggestion that appellee was guilty of such contributory negligence as would defeat a recovery in failing, upon receipt of the telegram, to telegraph the family of his sister requesting them to postpone the funeral until he could reach Williamsburg, we may say that although appellee's cause of action was complete when the company negligently failed in reasonable time to deliver to him the telegram, it was yet his duty to minimize the damages if he could reasonably have done so. The rule is that where an injured party finds that a wrong has been perpetrated on him, he should use all reasonable means to arrest the loss. He can not stand idly by and permit the loss to increase, and then hold the wrong-doer liable for the loss which he might have prevented. It is only incumbent upon him, however, to use reasonable exertion and reasonable expense; and the question in such cases is always whether the act was a reasonable one, having regard to all the circumstances of the particular case. (13 Cyc., 71; *Tradewater Coal Co. v. Lee*, 24 Ky. Law Rep., 215; *Illinois Central R. Co. v. Gheem*, 23 Ky. Law Rep., 1952.) And this principle applies to actions for damages against telegraph companies for the failure to deliver a telegram as well as to other actions for breach of contract. (*Western Union Tel. Co. v. Matthews*, 24 Ky. Law Rep., 3.)

If appellee, after receiving the telegram, could, by the exercise of ordinary care, have secured a postponement of the funeral, it was

his duty to have done so. This well-settled principle of law, however, is not applicable to the facts of this case. When appellee received the telegram it was too late to have sent a message requesting the postponement of the funeral, and therefore, he was not guilty of negligence in failing to take this action. It was not within his power, in the exercise of ordinary care and prudence, to have minimized the damages.

Finding no prejudicial error, the judgment of the lower court is affirmed.

C., N. O. & T. P. RY. CO. v. LORTON.

(Filed June 5, 1908—Not to be reported.)

1. Railroads—Duty of With Reference to Its Coaches, Windows and So On—Falling of Window—Injury to Passenger—It is the duty of railroad companies to keep their coaches, including its windows and doors, in proper condition. The question as to the falling of the window on appellee's hand was a simple one of fact, submitted to the jury in such manner that they could not mistake the law applicable to the case.

2. Continuance—Bill of Exceptions—The record does not disclose, except the affidavit made in connection with the motion for a new trial, that a continuance was asked because of the absence of a witness, therefore, it can not be said what error was made in this respect. But it appears that the necessary steps to procure the attendance of the witness were not taken.

O. H. Waddle & Son and John Galvin for appellant.

W. M. Catron and Morrow & Morrow for appellee.

Appeal from Pulaski Circuit Court.

Opinion of the court by Judge Carroll, affirming.

Appellee, who was a passenger upon one of appellant's trains, brought this action to recover damages sustained by reason of a window in the car, in which she was riding, falling upon her hand. The defense of the company was a traverse, and a plea of contributory neglect. Upon a trial before a jury, appellee was awarded \$325, and judgment for this amount was rendered against the company. A reversal is asked for reasons that will be noticed in the course of the opinion.

Appellee, a lady of middle age, took passage at Junction City for Burnside. She testifies that when she took a seat in the coach, the window by which she was seated, was up. After a time the window fell and was raised by a passenger in the coach. Presently it fell again, when it was again raised by appellee's son. In a short time it again fell, and appellee's hand, being under it, was seriously bruised and injured. Appellee was not an experienced traveler—indeed she testifies that she had never ridden on a train before this time, and as the day was warm and the country new to her, she desired the window kept open for her convenience and comfort, and also that she might better view the country through which the train was passing. There is a sharp conflict in the evidence as to whether the accident happened between Junction City and Somerset, or between Somerset and Burnside. The witnesses for appellant company testified that it happened before the train reached

Somerset; while appellee and her witnesses say it occurred after leaving Somerset, and between that point and Burnside. We do not, however, regard it as material whether the injury happened between Junction City and Somerset, or between Somerset and Burnside. Although counsel for appellant insist in their brief that appellee and her witnesses placed the accident between Somerset and Burnside, because the company had present at the trial the trainmen who were in charge between Junction City and Somerset, but who left the train at Somerset, when it was taken in charge by a new crew.

The amount of the verdict is not seriously complained of, although it is strenuously urged that appellee was not entitled to recover anything, because her injury was the result of such contributory negligence upon her part as that it should defeat a recovery. The plea of contributory negligence is based upon the evidence of appellee as well as other witnesses, who testified that the widow had twice fallen in the presence of appellee before her hand was injured. The fact, however, that the window had twice fallen, and that thereafter appellee had it raised and placed her hand under it, did not in our opinion, constitute such negligence per se as would deny a recovery. Whether it was negligence or not, on the part of appellee, after she discovered that the window would not remain up, to have it raised and place her hand in a position so that the window might fall upon it, was a question of fact for the jury to pass upon. It is the duty of a railway company to keep and maintain its passenger coaches, including the windows and doors, in a reasonably safe condition for the safety, convenience and comfort of passengers; and the failure upon its part to discharge this duty renders it liable in damages to any passenger who suffers injury as a direct result of such failure unless the passenger is guilty of such neglect as will defeat a recovery. Although the window had twice fallen, appellee might have believed it would not fall again—especially when her son, who raised it the second time, said that it would not again fall.

Complaint is also made that the court erred in refusing to grant a continuance on account of the absence of William Doyle, an important and material witness for appellant. The record does not disclose, except in an affidavit made in connection with the motion for a new trial, that a continuance was asked on account of the absence of this witness. Therefore, we can not say what error, if any, was committed in this particular.

If the appellant desired the presence of Doyle as a witness, it should have taken the usual and necessary steps to procure his attendance; and failing in this, have asked a continuance on account of his absence, or asked to have read an affidavit containing the statements he would make if placed upon the witness stand. We are informed in the brief of counsel for appellant, that the reason none of these preliminary steps, so well known by counsel for appellant to be necessary, were not taken is, that he was misled by some agreements made with counsel for appellee. But in the absence of anything in the record to support the statements contained in the brief, we can not assist counsel out of the difficulty in which his reliance upon the courtesy he supposed opposing counsel would extend has placed him.

Misconduct of the jury and of counsel for appellee is also relied upon, but we find nothing in the record indicating that either the jury or counsel were guilty of any misconduct.

The only exception contained in the record is in respect to the instructions of the court, and this is not well founded. The instructions informed the jury in substance, that it was the duty of appellant to keep its railway passenger coach in a reasonably safe condi-

tion, and to use ordinary care to prevent injury to its passengers—but that they should find for the company unless they believed from the evidence that the window that fell upon plaintiff's hand was defective, and known to be so by the company, or might have been known to it by the use of ordinary care. And further that they should find for it if they believed that before the window fell the plaintiff knew of its defective condition. It will thus be seen that the issues of fact as well as of law, were very simple, and the real issue in the case was submitted to the jury in such a manner that they could not mistake the law applicable to the case.

Finding no error in the record the judgment must be affirmed.

BURDETT v. MULLINS' EX'TX. .

(Filed June 4, 1908—Not to be reported.)

1. Verdicts—Instructions—Failure to Instruct—It is a rule of the Court of Appeals not to reverse a case for the failure of the lower court to give an instruction which the appellant did not ask, where the instructions which the court gave are correct as far as they go.

2. Same—Against Weight of Evidence—Credibility of Witnesses—While the verdict seems to be against the weight of the evidence, the credibility of the witnesses is peculiarly for the jury, there was some evidence to support the verdict if they believed the witnesses, and this was a question for them to determine.

J. Alexander Chiles for appellant.

Appeal from Fayette Circuit Court.

Opinion of the court by Judge Hobson, affirming.

Amy Allison was the grandmother of Joshua Burdett's wife; she lived in a house belonging to him in Lexington, Kentucky, and for the last year of her life was nursed by Anna Mullins, her health being infirm especially during the last few months of her life. She died in February, 1906. On September 15, 1906, Anna Mullins brought this suit against Joshua Burdett, charging that he had employed her to take care of Amy Allison as long as she lived and had agreed to pay her a reasonable price for her services, the agreement being made in February, 1905; that her services were reasonably worth \$200, for which she prayed judgment. The defendant by his answer, in substance alleged that he made the contract with Anna Mullins in February, 1906, and only a short time before Amy Allison died. He also alleged that after the death of Amy Allison, he had turned over her personal property to Anna Mullins and she had accepted it in full of her services. He also pleaded that Amy Allison drew a pension and had other moneys which Anna Mullins had received and which more than paid her for such services as she rendered. On the trial before a jury there was a verdict and judgment for Anna Mullins for the amount she claimed; and the defendant appeals. During the pendency of the appeal Anna Mullins died, and the case has been revived against her executrix.

The instructions which the court gave on the trial submitted to the jury the question whether Burdett had employed Anna Mullins to take care of Amy Allison and whether what she had received was of value more or less than her services. The instructions seem to be correct and our attention has not been called to any defect in

them. The defendant did not ask any other instruction on the trial. Our rule is not to reverse a case for the failure of the court to give any instruction which the appellant did not ask, where the instructions which the court gave are correct as far as they go.

The chief complaint on the appeal is that the verdict is palpably against the evidence. The verdict seems to be against the weight of the evidence; but the credibility of the witnesses is peculiarly for the jury. They saw and heard the witnesses and, on the whole case, we can not say that their finding is palpably against the evidence. There is abundant evidence in the case to support the verdict, if the jury believed the witnesses, and whether they would credit this or that witness, was peculiarly a question for them to determine.

Judgment affirmed.

McCAULEY v. TWYMAN, &c.

(Filed June 5, 1908—Not to be reported.)

1. Passway—Long Use—Presumption of Right—Where a passway has been used without interruption for a long number of years, the presumption will be indulged that its use is a matter of right.

2. Same—Adjoining Lands—Agreed Passway—Long Recognized—Effect—Where two brothers owning adjoining tracts of land, in order to straighten their lines, made a passway between them, each surrendering to the other a parcel of land on his side of the passway, and so recognized the passway as their dividing line for forty years, such passway controls, and their fences should be adjusted accordingly.

W. T. Lafferty for appellant.

J. J. Osborne for appellees.

Appeal from Harrison Circuit Court.

Opinion of the court by Judge Carroll, affirming.

The appellees in this action averred that they were entitled to a passway from their lands to the Venus turnpike, and that the appellant, McCauley, had erected a fence in the passway, the fence at some places being in the center thereof; so that the use of it was entirely obstructed. They asked a mandatory injunction requiring appellant to remove his fence to a point ten feet west of the center of the passway. Upon hearing the case, the court granted the relief sought and McCauley appeals.

The land owned by McCauley on the west side of the passway, and was formerly owned by Daniel Taylor. The land now owned by appellees lies on the east side of the passway, and was formerly owned by Jacob Taylor. Jacob Taylor and Daniel Taylor are very old men and brothers. Many years ago, and when each of them owned the land now owned by appellant and appellees, they opened a passway on the line between their lands, so that they might have access to and from the turnpike. The agreement as to the passway was not in writing, but there is ample evidence that it was used by the Taylors, and by persons going to and from the road to their places, as well as by other persons, for as much as forty years before appellant erected his fence. The passway was well defined, and the use of it in places had made a cut in the ground as much as two feet deep.

When the agreement between the Taylor brothers was made in reference to the passway, Daniel Taylor, the main body of whose land was situated on the west side of the passway, owned a few acres on the west side of it; and Jacob Taylor, the main body of whose land was on the east side of the passway, owned a few acres on the west side of it. In order that the land of each might be in one tract, and no part of it separated from the other by a road or passway, an exchange was made, by which Daniel Taylor took the small piece of land owned by Jacob Taylor that lies on the west side of the passway, and Jacob Taylor got the piece of land owned by Daniel situated on the east side of the passway. So that, after this exchange was made, all of the land of Daniel Taylor was on the west side, and all the land of Jacob Taylor on the east side of the passway, which was the line between their farms. There was no written evidence of this exchange of land between these brothers. As Jacob Taylor was 91 years old when his deposition was taken in this case, said:

"Me and Daniel Taylor never exchanged any land, but the one time, and then I owned a little piece on the west side of the road and he owned a little piece on the east side of the road, and we swapped land, and the reason why we swapped, I will tell you: This land was too little to fence up or do anything with, the land that I owned on the west side of the road; and the same way with him; and when we made that swap, he took possession of my land and I took possession of his; and the next thing we made this road the line and the outlet there, and I said, 'Daniel, I will keep everything out of the way of the road on the east side and you must keep everything out on the west side,' and we agreed to that and stood to it."

McCauley, when he bought the land formerly owned by Daniel Taylor, had notice of this agreement—the deed conveying the land to him reciting: "To have and to hold the same with all the appurtenances thereunto belonging; and the first party hereby covenants with the second party that the land so conveyed is free and unencumbered, and that they will forever warrant and defend the same against all claims whatever; except that part which lies inside of the aforesaid boundary, and on the east side of the Ridge road, which part is now in the possession of Jacob Taylor, on account of a trade or exchange of land made by said Taylor and D. Taylor." This reference in his deed is to the exchange of land made between Jacob and Daniel Taylor, before mentioned, of which there was no record; and the "ridge road" mentioned is the passway. This passway was originally opened from the Venus turnpike, at that time a dirt road, to what was known as the Reese pike, a distance of some two miles. A part of this old passway between these two roads was closed many years ago, and is not involved in this controversy.

McCauley relies, with considerable earnestness, upon a compromise made between him and one E. D. Fryman, by which, according to his contention, it was agreed he should have the right to erect his fence in the passway. That a compromise of this nature was made is vigorously disputed, and upon this controverted question of fact, we are not disposed to hold that the chancellor erred in holding that this compromise did not have the effect of authorizing McCauley to take possession of the passway. The chancellor did not in terms express an opinion about the effect of this alleged compromise, but it is manifest that he did not regard it as a serious obstacle in the way of granting the relief asked for by appellees.

There is also some evidence that after McCauley placed his fence in the passway, appellees, in going to the turnpike, traveled over the

land of Jacob Taylor; and the point is made that the fact they did this was a recognition of the existence of the compromise relied on by McCauley, but appellees, in response to this argument, say that they went over the land of Taylor by his permission, and because it was the only available route they had. It has been frequently announced by this court that, when a passway has been used without interruption for a long number of years, the presumption will be indulged that its use is a matter of right. In this case the evidence is overwhelming that this passway was used without interruption by the vendors of appellee for as much as forty years. And at the time McCauley bought from Daniel Taylor, he must have known of the existence of this road. Indeed, the language before quoted, taken from the deed conveying the land to him, leaves no room to doubt that he had actual knowledge of its existence at the time of his purchase. The evidence is not sufficient to warrant us in adjudging in opposition to the opinion of the chancellor that the compromise depended upon deprived appellees of the right to this way.

It is also pointed out that the court erred in ordering appellant to move his fence ten feet from the center of the road. The evidence is not clear as to the width of the passway, but there is evidence that in some places, appellant's fence, which was irregularly built, was nine feet east of the center of the passway, and at other places a less distance. Under the facts we can not say that it was error to require him to move his fence ten feet from the center of the road.

The judgment of the lower court must be affirmed.

SCHNEIDERHAHN'S GUARDIAN v. ZELLER, &c.

(Filed June 4, 1908—Not to be reported.)

Wills—Devise by Husband to Wife—Estate Devised—Construction—A husband by his will provided that "after my death, when all my debts are paid, I give and bequeath to my beloved wife, Catherine Zeller, all my personal, mixed and real estate of which I may be possessed at the time of my death for her sole use and benefit, to use the same for her and her children as she may see proper." Held—That the will gives the testator's wife the entire estate absolutely. The words "to use the same for her and her children as she may see proper," do not restrict the widow's interest to a life estate in the property devised, or constitute a limitation over.

C. H. Shield and Camden R. McAter for appellant.

Forcht & Field, Kohn, Baird and Sloss & Kohn for appellees.

Appeal from Jefferson Circuit Court, Chancery Branch, Second Division.

Opinion of the court by Judge Settle, affirming.

John Zeller died in the city of Louisville, testate. So much of his will as requires consideration, reads as follows:

"That after my death, when all of my just debts are paid, I give and bequeath to my beloved wife, Catherine Zeller, all my personal, mixed and real estate of which I may be possessed at the time of my death, for her sole use and benefit, to use the same for her and her children as she may see proper. And I appoint my wife, Catherine Zeller, executrix of this, my last will and testament, without security."

This action was brought to obtain a construction of the will. All the children and grandchildren of the testator were made parties. The Widow, Catherine Zeller, survived her husband several years, but from the death of her husband until her own, claimed to be the sole devisee under his will and the absolute owner in fee of all the estate left by him. She also left a will by which she undertook to dispose of the property held by her under her husband's will, except such portions as she conveyed by deed to some of her children before her death.

Appellees, Wm. Zeller, a son of John and Catherine Zeller, and the widow and children of Henry Zeller, deceased, another son, brought this action; it being their contention that the widow of John Zeller took under the will a fee simple title to all the estate devised. The other children of the testator do not seem to disagree with Wm. J. Zeller, as to the character of the estate Catherine Zeller took under the will, but one of the grandchildren, the appellant, Florence Schneiderhahn, an infant, together with her guardian, the Louisville Trust Company, by answer, counter-claim and cross-petition denied that Catherine Zeller took, under the will of John Zeller, a fee simple title to the estate devised, and alleged that at most she took only a life estate with remainder to the children of herself and John Zeller, and that her attempted disposition of the property by deed and will was unauthorized and void. She asked that the will and deed made by Catherine Zeller be set aside, and the estate divided in proper ratio among the alleged remaindermen under the will of John Zeller, of whom she claimed to be one, as heir at law of her mother, who was a daughter of John Zeller.

A demurrer was filed by appellees to the answer, counter-claim and cross-petition of appellants which the court sustained, and adjudged that Catherine Zeller took under the will of John Zeller a fee simple title to all the property devised. From the judgment sustaining the demurrer and construing the will, Florence Schneiderhahn and her guardian prosecute this appeal.

We are of opinion that the construction given the will of John Zeller by the circuit court was correct. It gives the testator's widow the entire estate absolutely and for her sole use and benefit; The words "to use the same for her and her children as she may see proper" do not restrict the widow's interest to a life estate in the property devised, or constitute a limitation over. There is no remainder and no trust, and consequently the testator's children take no interest. The will was written and the testator's death occurred before the enactment of the present statute with respect to the property rights of married women, and the language used in the will was appropriate to create a married woman's separate estate in fee. The sentence with reference to the use of the property by the sole devisee was merely the expression of the testator's expectation that she would use the property as suggested, and was therefore merely a recommendation as to the use to which it might be applied; nothing more.

"The law favors the vesting of estates. In cases of doubt, it favors a fee rather than a less estate, and an estate once given in fee will not be defeated by a subsequent provision in the same instrument limiting it to a smaller estate unless the language of the instrument or the intention of the testator requires it." (McCauley v. Dale, 108 S. W., 268; Lee v. Moore, 29 Ky. Law Rep., 495; Baxter v. Isaacs, 24 Ky. Law Rep., 1618; Moore v. Sleet, 113 Ky., 600; Wilson v. Bryan, 90 Ky., 482; McAdams v. Norton, 25 Ky. Law Rep., 1719.)

In Scott v. Scott's Adm'r., 32 Ky. Law Rep., 464, the language used by the testator with reference to a devise to his wife was "to

have, to hold, and to use as she may wish," all of the remainder of his estate after paying his debts. In construing this will the court said that under Kentucky Statutes, section 2342, words of inheritance were not necessary to pass the fee; that the language used by the testator indicated his intention that his wife was to have all of his property to do with as she pleased, and no intention to vest title to any part of the property in the children.

In *Cox v. Anderson*, 24 Ky. Law Rep., 721, the devise was to the wife of all the testator's estate "To have and to hold for her own use and benefit; when she is done with it, I give to Mt. Zion Church \$1,000." It was held by this court that the gift of the fee, precluded any limitation over, and that the bequest to the church was unenforceable.

In *Fink v. Liesman*, 18 Ky. Law Rep., 710, the testator gave to his widow all of his personal, mixed and real estate during her life, with full power and authority to sell it if she saw proper, with the proviso that what might be left at her death, should be divided among his children. It was held that the widow took the estate in fee and that a deed executed by her conveyed a good title.

In *Sale v. Thornsbury*, 86 Ky., 266, the will devised to the widow of the testator an estate in fee with the request that if she married again, she would see that the interests of their children were protected. This court's construction of the will was that the widow took an absolute estate free of any trust for herself or the children.

To the same effect are the following cases: *Enders v. Pascoe*, 89 Ky., 17; *Webster v. Wathen*, 97 Ky., 318; *Igo v. Irvine*, 24 Ky. Law Rep., 1165; *Goslee's Adm'r v. Goslee's Ex'or.*, 29 Ky. Law Rep., 654.

The most recent decision of this court on the question involved is *Wood v. Wood*, 32 Ky. Law Rep., 408, in which the provisions of the will and the intention of the testator were very similar to those in the case at bar. The court held that it was the intention of the testator to give the wife an estate in fee and that the precatory or commendatory words connected with the devise, did not amount to a command or create a trust.

Under the foregoing authorities and others that might be cited, it is manifest that the widow of John Zeller was vested with a fee simple title to the entire estate devised.

Judgment affirmed.

ASHER & HENSLEY v. HOWARD.

(Filed June 5, 1908—Not to be reported.)

This action on two notes for \$660, is affirmed on the evidence, the court holding that the instructions fairly and fully presented to the jury the issues as made by the pleadings and warranted by the proof.

Cook & Jones for appellants.

L. D. Lewis and N. J. Weller for appellee.

Appeal from Leslie Circuit Court.

Opinion of the court by Judge Lassing, affirming.

In January, 1901, appellee, E. S. Howard, sold to John Slusher certain standing timber for \$1,320. At the same time that this sale

was consummated, Slusher entered into a contract with appellants, Asher & Hensley, by which they were to pay him a certain price for this timber, when it was cut and delivered in the log at designated points on the water. Slusher executed his notes to Howard for the purchase price and Asher & Hensley became his sureties thereon. Howard became Slusher's surety to appellants on the contract whereby he agreed to cut and deliver the timber within a specified time, at the points designated. The purchase price was evidenced by two notes, one for \$300, due in three months, and one for \$1,320, due in six months. The note for \$300 was paid at maturity.

When the note for \$1,320 came due, it was not paid. Asher & Hensley called upon the bank and discussed this note with them, and an arrangement was made, by which it was agreed between the bank and Asher & Hensley, that two notes for \$660 each, should be prepared and forwarded to Slusher and Howard, appellee, with the request that they sign them as principals. Neither Slusher nor Howard was present at these conversations. The notes were prepared by the cashier of the bank, as agreed, and forwarded to Slusher, who signed them and procured the signature of appellee thereto, and returned them to the bank, where, after they had been signed by Asher & Hensley, they were received by the bank, in payment for the old note for \$1,320, and that was delivered up to Asher & Hensley. When these two notes for \$660 came due, they were paid by Asher & Hensley, who thereafter brought suit against Slusher and appellee, alleging that they were joint principals therein. In the meantime, Slusher had failed in business, taken the benefit of the bankrupt law and been discharged. His discharge was pleaded and the case was dismissed as to him. Appellee, denied liability, pleaded the original transaction, and alleged that he had signed the two notes merely as an accommodation to Asher, Hensley and Slusher, and at the request of the bank, and had not intended, as between himself and the other parties named, to be bound for the payment thereof. The reply admitted the original transaction, as alleged in the answer, denied that the two notes were renewals of the \$1,320 note, or intended as such, but were obligations on the part of Slusher and appellee, made and entered into for the purpose of securing to Slusher time within which to execute his contract and also to prevent the bank from suing appellee on his guaranty. Issue was thus joined on the question as to whether or not appellee was a joint principal with Slusher on the notes in question, or an accommodation endorser for the benefit of Slusher and Asher and Hensley. On a trial of this question before a jury, a verdict was returned in favor of appellee and to reverse this Asher & Hensley have appealed.

The evidence introduced on the trial consisted of the testimony of the parties to these contracts and that of the cashier of the bank. It was shown that at the time the note for \$1,320 fell due, Slusher had made no default in his contract with appellants for cutting and delivering the timber to them, although they testified that at that time they feared he was going to do so, and for this reason they were unwilling to pay the note, but wanted appellee, Howard, as he had guaranteed that Slusher would faithfully and in the time provided for in the contract, cut and deliver the timber in question to sign the notes as principal along with Slusher, and stated to the cashier of the bank that if this was done they would sign them as sureties. The cashier of the bank testified that, under the direction of appellants, he prepared and forwarded the two notes in suit to Slusher, and Slusher testified that he signed them and, with some difficulty, procured the signature of appellee thereto. At this time,

Slusher, not being in default with his timber, appellee was in no wise liable to appellants by reason of his suretyship on the timber contract. He testifies positively that when he signed the notes he did so believing that they were being executed for the purpose of renewing the note for \$1,320, and that in so doing he was merely accomodating Slusher and appellants by extending the date of payment. This money represented the purchase price of his own timber, and it is not reasonable to suppose that he was voluntarily obligating himself to pay for appellants and Slusher \$1,320, which they owed to him.

Appellants testified that when they signed the two notes for \$660 each, it was with the understanding that they were to become sureties merely on same, whereas appellee testified that when he signed them it was with the understanding that he was doing so as an accomodation maker for the benefit of appellants and Slusher. If presumptions are to be indulged in, the latter is more reasonable than the former, and the jury no doubt saw it in this light.

Appellants complain especially of the instructions given by the court, which are as follows:

"1. You shall find for the defendant, E. S. Howard, unless you shall believe from the evidence that the defendant, E. S. Howard, and John Slusher, as principals, and the plaintiffs, Asher & Hensley, as sureties for the said Howard and Slusher, executed the two notes named in the petition and shall further believe from the evidence that said Asher & Hensley as such sureties, if you shall believe from the evidence they were sureties, paid said notes, in which event you will find for the plaintiffs the sum of \$1,320, with interest from February 6, 1902, subject to a credit of \$24.16, August 23, 1902, and \$519.39, July 1, 1903.

"2. If, however, you shall believe from the evidence that the defendant, E. S. Howard, signed said notes as an accomodation maker for Asher & Hensley, you will find for the defendant."

These instructions are not subject to the criticisms made of them, but fairly and fully presented to the jury the issues as made by the pleadings and warranted by the proof.

Perceiving no error prejudicial to the substantial rights of appellants, the judgment is affirmed.

MILLER v. RITTER LUMBER COMPANY.

(Filed June 5, 1908—Not to be reported.)

Contracts—Action for Services—Evidence—In this action by appellant for services under his alleged contract, the evidence shows that his employment was not for a fixed length of time, but was such that might be terminated at will. Therefore, his action to recover for services after he had been discharged was properly dismissed.

J. S. Cline for appellant.

Auxier & Auxier for appellee.

Appeal from Pike Circuit Court.

Opinion of the court by Judge Lassing, affirming.

Appellant, Robert L. Miller, was employed by the appellee company to assist in abstracting titles to certain properties in Buchanan county, Virginia. After he had been engaged some three months or more

in this work, he was discharged by the company, whereupon, he filed this suit, seeking to recover of the company \$650.00 for five months' services and expenses, alleging that he had been employed by the appellee company for eight months at the agreed price of \$100.00 per month for his services and \$30.00 per month for his expenses. The company denied liability, admitted the employment but denied that it was for any specified time. Proof was taken by deposition, and the case tried by the court, by agreement, without the intervention of a jury, and the trial judge found for appellee and dismissed appellant's petition. We are asked to review his finding and judgment.

The sole question in the case is, was the employment for a fixed and definite time or was it such an employment as either could terminate at will? But two witnesses have testified, appellant and the agent of appellee, with whom the contract was made. They differ as to the terms of the contract, appellant insisting that the employment was for eight months, while appellee's agent testifies that the employment was not for any specified length of time, and that the continuance of the employment was discretionary with either party. Certain letters which passed between them are filed with their depositions. In one of these letters, written after appellant had been at work for more than a month, he makes this inquiry:

"In order that I may arrange some private affairs I would be glad if you would let me know as near as possible how long you think the company will employ me. If I will be here for a long enough time to justify it, I am thinking of bringing my wife here and keeping house, as getting board is such an item and so unsatisfactory. I can arrange to get a furnished house and would like to hear from you in order to notify the party owning same as to whether or not I will want it."

The tone and tenor of this letter is clearly against the claim and contention of appellant, but he relies upon the letter written to him in response to this inquiry, in which the following language is used:

"Replying to your letter in reference to time that the company will need your services in Grundy. It is impossible for me at this time to determine, for the reason that I can't determine how long it will take you and Mr. Litz to do the work which the company now has outlined, and when you are through this, it may be possible that some other work will be developed. It is the purpose of the company to continue investigation of all Slate Creek titles until the work is completed, and also to complete the investigation of the Knox Creek titles. &c."

The foregoing is all of the letter in question that is pertinent to the issue. We are of opinion that it does not support the theory of appellant, but, on the contrary, that it shows that at that time both appellant and appellee's agent understood his contract of employment alike, to-wit: that it was for an indefinite period, and being such, either had a right to terminate it at any time he saw fit, without notice or cause. (26 "Cyc," 981, L. & N. v. Offutt, 99 Ky., 427, and L. & N. v. Harvey, 99 Ky., 157.)

This rule is not at all in conflict with that announced in the case of Yellow Poplar Timber Co. v. Rule, 20 Ky. Law Rep., 2006. In that case appellee had sustained an injury while in the employ of appellant company, and was demanding damages for such injury, and the company, in consideration that he would not press his claim for damages, agreed to employ him at the rate of \$2.50 per day so long as it was in the saw-mill business on the Ohio river. He accepted this offer and did not sue. After he had been so employed by the company until the statute of limitation had run against his claim for damages, he was discharged, and he sued for breach of contract. A recovery was had, and upon appeal this court held that a recovery was proper as the employment, in that case, was not for an indefinite time but, within

the understanding of the parties, was for a definite length of time and was capable of being ascertained within a reasonable degree of certainty. In other words it was there held that in that class of cases where the consideration for the employment is paid either wholly or in part in advance by the relinquishment of a claim for personal injuries the contract can not be said to be indefinite, and can not be terminated at the will of the employer without cause. (Penn. Company v. Dolan., 6 Ind., 109; Harrington v. Kansas City Cable R. Company, 60 Mo., 223.) Appellant's contention in the case at bar is not supported by the case of Yellow Poplar Lumber Company v. Rule.

Appellant admits that he undertook this employment upon a month's time on trial, and that if at the end of that time his services were not satisfactory to appellee then they might be terminated; but his letter, written after the expiration of that time, shows conclusively, to our mind, that he did not then look upon his contract as one of employment for any fixed and certain length of time, and the letter written in response thereto is rather corroborative of this fact, and the trial judge properly construed this contract to be an employment which might be terminated by either at will.

The judgment is, therefore, affirmed.

THOMAS' EXECUTRIX v. THOMAS' G'D'N., &c.

(Filed June 9, 1908—Not to be reported.)

1. Wills—Recitals—Disposition of Entire Estate—Testator devised (1) his house and lot to his wife for life and at her death to descend to his three daughters jointly, or in case of the death of any without issue, to the survivor. (2.) Authorized his executor to convert into money any property, real or personal, which he owned and divide one-fifth of a \$2,000 life policy to his granddaughter and to hold the same until she marries, or in case of her death, to go to his other heirs. (3.) The executors were empowered to sell all his real estate, and his wife to have all the household furniture. (4.) That his wife and three daughters shall share equally in the distribution of his estate after the bequests made, are complied with. Held—That, by the will, testator disposed of all his estate.

2. Same—Reasonable Presumption—The natural and reasonable presumption is that when a will is made the testator intends to dispose of his whole estate, which presumption is overcome only where the intention to do otherwise is plain and unambiguous, or is necessarily implied.

Heavrin & Woodward, Leon P. Lewis and W. S. Pryor for appellant.

Hazelrigg, Chenault & Hazelrigg, J. S. Glenn and J. E. Fogle for appellees.

Appeal from Ohio Circuit Court.

Opinion of the court by William Rogers Clay, Commissioner, reversing.

James A. Thomas, of Hartford, Ohio county, Kentucky, died in February, 1902, leaving surviving him his widow, Mary C. Thomas, three unmarried daughters, Etta, Stella and Lilly, and a granddaughter, Evelyn Fair Thomas, the only child of Owen J. Thomas, who died intestate before the demise of his father, James A. Thomas. At

the time of his death, James A. Thomas was possessed of considerable personal property and various tracts of realty. He left a will, dated April 30th, 1901, which was admitted to probate in February, 1902. This will is as follows:

"Know all men, that I, James A. Thomas, of Hartford, Ky., being of sound mind and disposing memory, but mindful of my mortality, do make, ordain and publish this instrument as my last will and testament in manner and form as follows:

"I will and desire that my just debts, if any, be paid in full.

"I will and devise to my beloved wife, Mary C. Thomas, my house and lot now occupied by myself and family as a residence situated in Hartford, Kentucky, to be used and enjoyed by her for and during the period of her natural life and at her death said house and lot is to descend to and vest in my three daughters, Stelia Thomas, Etta Thomas, and Lilly Thomas, jointly, and in case of the death of either, or any of them, without issue, the survivor or survivors shall hold the same jointly, but may sell and convey one to another or to anyone else, they all agreeing to said sale.

"I will and direct that my executor shall have the power to convert into money any property, real or personal, of which I may die possessed, and divide and distribute as follows:

"To my little granddaughter, Evelyn Fair Thomas, one-fifth of a (\$2,000) two thousand dollar life policy. In case the policy should not be paid in full, then my executor shall, out of my estate, make the amount for her, four hundred (\$400) dollars and hold the same in trust by them for her until she should become of age or married, and in case of her death before arriving at the age of twenty-one years or her marriage, then this four hundred (\$400) dollars shall become an asset of my estate for my other heirs and in order to carry into effect my will, I hereby vest my executors with power to sell and convey any real estate, which I may own at my death, and make deeds to same. It is my will and desire that my wife shall have and retain all my household and kitchen furniture.

"It is my special desire that my wife, Mary C. and three daughters, Stella, Etta and Lilly, shall share equally in the distribution of my estate after the bequests already made are complied with, and in case of the death of any of them without issue, those surviving or their issue, shall hold the same.

"Having full confidence in the integrity and capacity of my wife and daughter, Etta, I hereby nominate them executors of this will, and request that no bond or surety be required of them. It is my desire that no public sale be made of my personal estate, but that my executrix make out an inventory of my personal estate not included in the foregoing bequests to my wife, and file same in the county court clerk's office within a reasonable time, but such inventory to be attested by my executors only.

"Witness my hand this April 30th. 1901.

(Signed) "JAMES A. THOMAS."

This action was instituted by the testator's granddaughter, Evelyn Fair Thomas, to obtain a construction of the foregoing will. The chancellor below held that the testator died intestate as to all of his real estate except the house and lot, in the town of Hartford, in which he resided at the time of his death, and adjudged that Evelyn Fair Thomas was entitled to one-fourth interest in the testator's realty. From that judgment, Etta Thomas and others prosecute this appeal.

The sole question before us is: Did the testator die intestate as to all his real estate, other than the house and lot in which he resided

at the time of his death? The validity of the will is not called in question, nor are we concerned with the fairness of its terms, except as an aid to the interpretation of the will. The very office of a will is to permit the testator to dispose of his property as he pleases. The fact that he did dispose of his property in a manner different from what we would have done, had we been similarly situated, can in no way effect the construction of the will where there is no ambiguity or uncertain language. Of course, there may be instances where the language of a will is susceptible of two constructions, one of which would secure fairness and equality, and the other would lead to an unequal distribution of the estate. Under such circumstances, the courts would lean to that construction which would place the devisees upon a plane of equality. But no such rule of interpretation applies where there is no ambiguity in the language of the will. Furthermore, the natural and reasonable presumption is that when so solemn and important an instrument as a will is executed, the testator intends to dispose of his whole estate, and does not intend to die intestate as to any part of his property, which presumption is overcome only where the intention of the testator to do otherwise is plain and unambiguous, or is necessarily implied. (Am. & Eng. Ency. of Law, volume 30, page 668; *Trusty v. Trusty*, 22 Ky. Law Rep., 1127; *Mayes v. Karn*, 115 Ky., 264.) In *James v. Pruden*, 14 Ohio St., 253, the rule is thus stated:

"It very seldom happens that a man who goes to the trouble of making a will, intends to die intestate as to any of the property that he may own at the time of his death." And in the case of *Boyd v. Latham*, Busb. L. (44 N. Car.) 365, the court said: "The rule, *ut res magis valeat quam pereat*, comes in aid of the general presumption that one who makes a will intends to dispose of all of his property."

With this rule of interpretation before us, let us examine the language of the will in question. We find that, after directing the payment of his debts, the testator first disposes of the family residence by giving it to his wife for life, with remainder to his three daughters. He then wills and directs that his executors shall have power to convert into money any property, real or personal, of which he may die possessed, and divide and distribute as follows: First, he gives to his granddaughter, Evelyn Fair Thomas, one-fifth of a two thousand dollar life policy, and provides that, in case the policy should not be paid in full, his executors shall, out of his estate, make the amount which she should receive equal to four hundred dollars. He then gives the household and kitchen furniture to his wife. Immediately following the last item is the clause in which he expresses the special desire that his widow, Mary C. Thomas, and his three daughters, Etta, Stella and Lilly, should share equally in the distribution of his estate after the bequests already made are complied with. The bequests referred to (the word "bequest" not being used in its strictly legal sense) consisted of the family home and the specific legacy of four hundred dollars to his grandchild. Thus it will be seen that the granddaughter was not overlooked in the distribution of the estate; that he had her in mind is shown by the provision which was made for her. Why the testator should have made this provision only, we are unable to say. It may be that she received property from other sources, or that her father had previously received assistance from the testator; but whatever may have been the testator's reason, the fact is, he made no other provision for his grandchild, and it is perfectly apparent from the language of the will that he intended that his wife and three daughters should share equally in all the remainder of his estate. The express power is given the

executors to sell any real or personal property of which the testator died possessed. It is evident that the word "any" was used in the place of the word "all," and was meant to include, besides the personal property, all of his real estate, except his residence. After giving them the power to sell, he directs his executors to divide and distribute as follows: After bequeathing the sum of four hundred dollars to his grandchild and providing that his wife should have the household and kitchen furniture, he then points out in plain and explicit terms the manner in which his estate, after the bequests already made are complied with, which language can not be construed to include anything less than all the remainder of his estate, shall be distributed. In other words, he provides for the sale and distribution of his estate, and then gives the names of those among whom it shall be distributed. The language, we think, is incapable of any other construction than that the testator intended to dispose of his whole estate, both real and personal. We are, therefore, of opinion that the court erred in adjudging that the testator died intestate as to all of his real estate, except his residence, and that his granddaughter, Evelyn Fair Thomas, was entitled to one-fourth interest in such real estate.

For the reasons given, the judgment is reversed and cause remanded, with directions to dismiss the petition.

HENDERSON, &c. v. CITY OF LEXINGTON.

(Filed June 9, 1908—To be reported.)

1. Eminent Domain—Taking Private Property for Public Use—Jurisdiction of Courts—Whenever it is attempted in the interest of a private corporation, to take private property and devote it to a public use, the question as to whether the use to which it is to be put is or not a public one, is for the court to decide, and an act of the Legislature which attempts to deprive the courts of jurisdiction in such a case would be inoperative and void.

2. Cities—Right to Close Public Ways—Public Function—Discretion of Officials—Resumption—Burden of Proof—The streets, alleys and highways of a city are public places and under the exclusive control of the city and when the properly constituted authorities of the city declare that the welfare and convenience of the public demand that public ways shall be closed, it is exercising a public function as an agent and sub-division of the State and it will be assumed that the officers of the city, as public agents, will exercise such power with wisdom and discretion for the benefit of the public and that the proceeding is not for private or individual use or advantage, and the burden of showing the contrary is upon the person who objects to such proceeding.

3. Same—Legislative Act—Constitutionality—Assumption of Court—The court will not assume that an act of the Legislature authorizing the closing of a street or alley of a city, in whole or in part, by the city council, is unconstitutional because it fails to provide that the question of public use was a matter to be judicially determined, and such act does not take from the courts the control of the subject.

4. Same—Public Purpose—Jurisdiction of Courts—The question of the necessity, expediency or propriety of exercising the right of eminent domain for a public purpose, and the extent and manner of its

exercise are questions of general public policy and belong to the Legislative department, but when the corporation that is given this power attempts to exercise it, it is for the courts to say whether or not it is exercised for a public purpose.

5. Act of City—Incidental Benefit to Others—Effect—The mere fact that a corporation or an individual might be interested or benefited by the taking of property by the city for its use, will not of itself deny the right of the city to exercise such power.

6. Closing Alley—Action—Necessary Parties—In a proceeding to close a street or alley in a city, the only persons who are necessary parties thereto are those whose property abuts upon or adjoins the street or alley proposed to be closed, but in case of a fraudulent combination between these property owners and the city to close such highway, not in the interest of the public, permit other persons not entitled to compensation to come in and resist the closing.

7. Same—Trial—Separate Trials—In the matter of allowing separate trials in a proceeding to close an alley way in a city, the discretion is largely in the trial judge. The amount of damages to which each of the parties is entitled can as well be assessed by a single jury as in separate trials by different juries.

8. Same—Measure of Damages—Loss of Business—Difference in Market Value of Property—The measure of damages to which an owner of property abutting on an alley is entitled which has been closed by the city, does not include loss occasioned to his business. He is only entitled to compensation for loss sustained to his property which is the difference in its market value by reason of closing the alley, and where such damages have been assessed by a properly instructed jury, the verdict will not be disturbed.

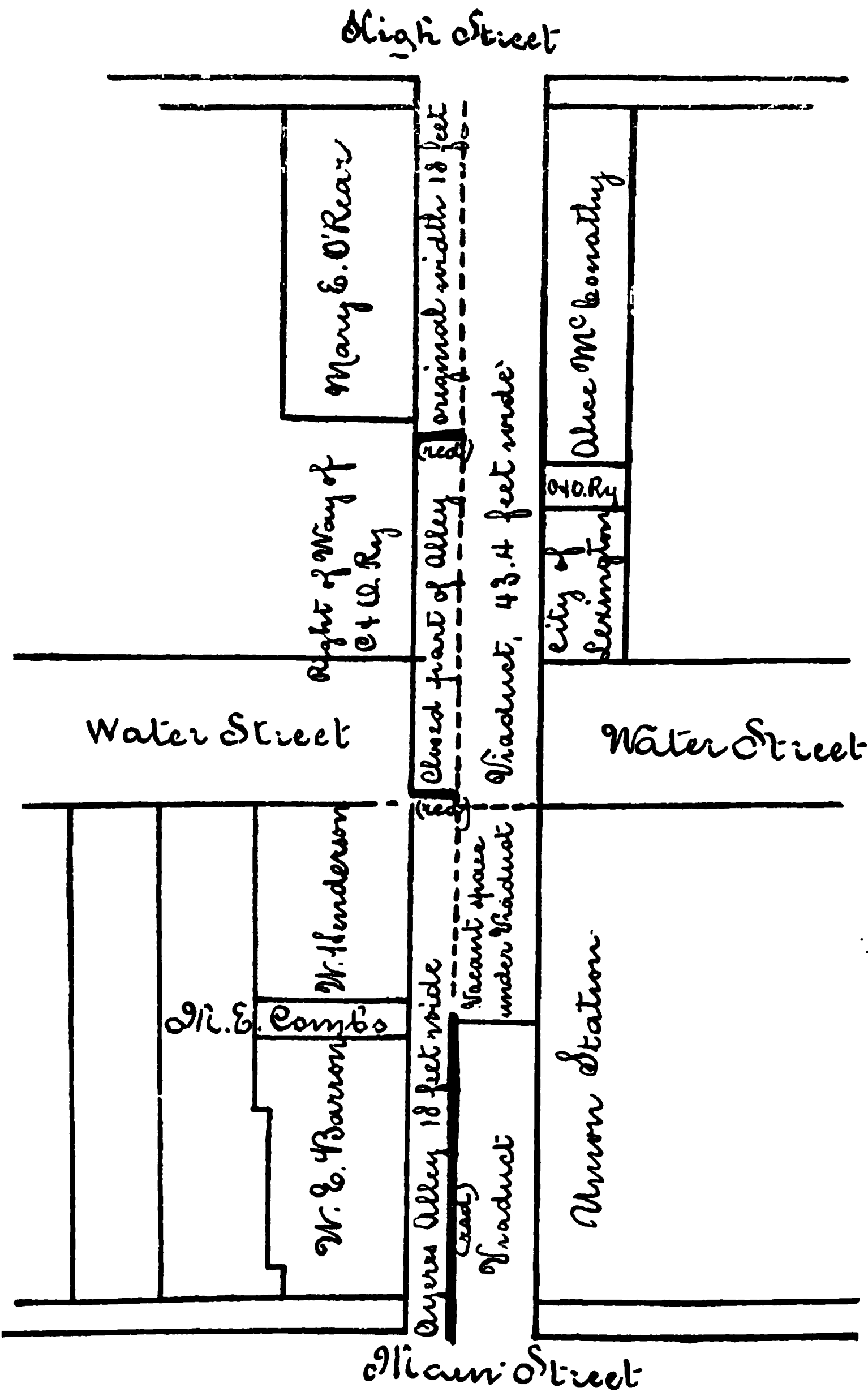
Allen & Duncan, Butler T. Southgate and Faulconer & Faulconer for appellants.

Shelby & Shelby, Morton, Webb & Morton and J. Embry Allen for appellee.

Appeal from Fayette Circuit Court.

Opinion of the court by Judge Carroll, affirming.

This controversy grows out of the attempt of the city to close an alley. The record presents a number of questions that will make it necessary to state at considerable length the respective contentions of the parties, and to afford a better understanding of the local situation, the following map has been copied from the record:



(red) means brick wall

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The alley in question is known as Ayers Alley. It was eighteen feet wide, and extended from Main street to High street (crossing Water street, which runs parallel with and about midway between Main and High streets. Water street has for some years been occupied almost entirely by the railroad tracks of the Chesapeake & Ohio Railway Company, and at the point where it crossed Ayers alley there were some four tracks. As a result of the occupation of Water street, by the railroad, and the movement of trains and engines thereon, the alley crossing was exceptionally inconvenient and dangerous for vehicles and the traveling public. Three of the railroads entering Lexington, two of them having depots and terminal facilities in different parts of the city, desired to erect a union station into which all their passenger trains might run. This movement upon the part of the railroads met with the approval of the city authorities, and the result was a proposition upon the part of the railroad companies to erect a union station fronting on Main street, west of Ayers alley, and extended back to Water street, on which street the train sheds for the accomodation of passengers in entering and leaving trains should be located. As a part of this scheme for the erection of the union station, it was contemplated that Ayers alley should be closed and a viaduct constructed from Main to High streets, immediately west of and parallel with Ayers alley. The result of the negotiations between the city and the railroad companies was the erection of an ample and attractive station at the place proposed and the viaduct. This viaduct, where it crosses Water street, is elevated so as to permit the passage of trains. It is forty-three feet wide, substantially built, and affords safe and easy passage-way, both for pedestrians and vehicles between the two streets. When the arrangement for the erection of the viaduct and the station had been perfected, the city enacted an ordinance, directing the closing of so much of Ayers alley, as lay between a point 266 feet from the curb line of Main street to a point 192½ feet from the curb line of High street. In other words, under the ordinance, the alley was closed by a wall erected to each side of Water street, so as to effectually prevent persons who used the alley, on either the Main street or High street side, from crossing Water street—the purpose being to have Water street at this point practically free for the use of the railroads that occupied it.

The ordinance recited in a preamble, the reasons for closing that part of the alley, heretofore described, and directed the city solicitor to institute an action in the Fayette Circuit Court for the purpose of closing that portion of the alley described in the ordinance. It was enacted under the authority of an act of the General Assembly, approved March 22, 1906, providing in part that:

“Upon the adoption of an ordinance by the general council authorizing and directing the closing of the whole or any portion of a street or alley or other public highway within the limits or jurisdiction of the city, it shall be the duty of the city solicitor to institute an action in the circuit court for the purpose of having the same closed, and to such action all the owners of ground in the squares or lots divided by such street, alley or highway, or the portion thereof proposed to be closed, shall be made defendants; and if all of such defendants are competent to act for themselves and fail to object to the closing prayed for, then the court shall render a decree accordingly; but if any of said defendants object, or are under disability other than coverture, the court shall empanel a jury, which shall hear evidence and determine the amount of compensation in the form of damages to be paid to each of such defendants. The court shall thereupon direct that said street, alley or other highway be closed

upon payment to each of such defendants of the amount of damages awarded to him, or, if any defendant refuses to accept such payment or be for any reason unable to do so, upon payment into court of the amount awarded such defendant or defendants."

As directed by the ordinance, the city solicitor brought this action, naming as defendants therein the railroad companies, who were equally interested with the city in its closing, and Alice McConathy, Mary E. O'Rear, W. H. Henderson, M. E. Combs, and W. E. Barron, the only persons who owned property abutting on the alley, between Main and High streets. These property owners objected to the closing of the alley, upon various grounds, some of which will be later noticed.

The case coming on for trial, a jury was empaneled to assess the damages, and awarded to Henderson, \$3,500, to O'Rear \$100—giving nothing to Barron. From the judgment upon this verdict these parties prosecute this appeal.

Pending the action, James McAllister, H. E. Wright and J. P. Wright, who owned property fronting on Main street, east of the alley, and running back to Water street, offered to file their separate petitions to be made parties defendant. Upon objection by the city, their tendered pleadings were rejected. They also appealed, but have dismissed their appeal.

Among the questions presented by counsel for appellants, are:

First. The constitutionality of the act of 1906.

Second. The right of the city to close Ayers alley.

Third. The necessary parties to the proceeding.

Fourth. The right of each of the parties to have a separate trial.

Fifth. The admission of evidence as to the amount of damages resulting to each of the parties; and the competency of other evidence rejected.

Sixth. The correctness of instructions upon the measure of damages.

Seventh. That the verdict of the jury is grossly inadequate.

Eighth. Whether or not the alley was closed to carry out an illegal agreement between the city council and the railroad companies, for the purpose of granting to the railroad companies that portion of the alley proposed to be closed.

Taking up these questions in the order named, which is also the order of their importance from a public point of view, we will first consider the act of 1906. It will be observed that under this act the council may adopt an ordinance directing the closing of a street, alley of public way, and thereupon, an action shall be instituted against the owners of ground in the squares or lots divided by the street, alley or way proposed to be closed; and if they object to the closing, the court shall empanel a jury to hear evidence and determine the amount of compensation to be paid. Under this act the city council is empowered to determine the necessity for the closing as well as the question of whether the closing is for a public use. The only matter left by the terms of the act to the courts being, to empanel a jury to ascertain the amount of compensation. The serious objection urged to the validity of this act is that it invests the city council with the sole authority to decide whether the closing is necessary for public purposes, apparently denying to the courts the right to inquire into this question.

Section 13, of the Constitution, of the State, provides in part that:

"Nor shall any man's property be taken or applied to public use without the consent of his representatives, and without just compensation being previously made to him."

And section 242 declares that:

"Municipal and other corporations and individuals invested with the privilege of taking private property for public use shall make

just compensation for property taken, injured or destroyed by them, which compensation shall be paid before such taking, or paid or secured at the election of such corporation or individual before such injury or destruction."

It is admitted that the closing of a public street, alley or highway is a taking of public property within the meaning of these constitutional provisions, and that compensation must be made to the abutting owner; and further, conceded that the closing must be necessary for public purposes. Indeed, these two principles are too well settled to need more than the mere citation of the authorities that support them. (*Transylvania University v. City of Lexington*, 3 B. Mon., 25; *Lexington & Ohio R. Co. v. Applegate*, 8 Dana, 289; *Gargan v. Louisville*, *New Albany & Chicago R. Co.*, 89 Ky., 212; *City of Louisville v. Bannon*, 99 Ky., 74; *Bannon v. Rohmeiser*, 90 Ky., 48 *Cooley's Constitutional Limitation*, page 651.) So that the question narrows down to the proposition: Is it essential to the validity of an act like the one under consideration that the courts should be given the right and discretion to pass upon the question whether or not the taking is for a public purpose when this issue is made, or can the General Assembly of the State, by a legislative act, deprive the courts of the power to inquire whether or not the taking is necessary for a public purpose? In the consideration of this question, it should not be overlooked that although public corporations can not, except for public purpose, take, without his consent, the property of the individual, yet there is a difference as we will presently point out between taking private property for the use of a private corporation, and taking property by a municipal corporation for the use of the municipality.

Whenever it is attempted in the interest of a private corporation to take private property and devote it to a public use, the question as to whether the use to which it is to be put is or not a public one rests with the court to decide. This principle is well settled in this State. In *Tracy v. Elizabethtown*, *Lexington & Big Sandy R. Co.*, 80 Ky., 259, a proceeding was instituted by a railroad company to take by condemnation for its use the land of an individual. No evidence was offered by either party relative to the character of the use or the necessity of the taking although the property owner denied that the taking was necessary for a public use. The court, after holding that, as an issue was made upon this point, the burden was upon the railroad company to show that the property desired to be taken was intended for a public use, said:

"For if the use be not public, or no necessity for the taking exists, the Legislature can not authorize the taking of private property against the will of the owner, notwithstanding compensation may be required. The courts can not control or supervise the propriety or policy of the condemnation authorized by the Legislature. But this uncontrolled power does not authorize the Legislature to so determine that the use is public as to make the determination conclusive upon the courts, * * * the existence of the public use in any class of cases is a question to be determined by the courts." (*Chesapeake Stone Co. v. Moreland*, 31 Ky. Law Rep., 1075.)

And this rule which is applicable to municipal or public corporations is not peculiar to the jurisprudence of this State, but is the one generally prevailing. Thus, it is said, in *Lewis on Eminent Domain*, section 158:

"All the courts, we believe, concur in holding that whether a particular use is public or not, within the meaning of the Constitution, is a question for the judiciary."

If, therefore, the General Assembly should undertake to enact a statute giving to a private corporation, such as a railroad, turnpike or telegraph company, invested with the power to exercise the right of eminent domain, or to a municipal corporation authority to take the private property of an individual upon the payment of compensation and deny to the courts the right to say whether the taking was necessary for a public purpose or not, we would not hesitate to declare so much of the act as undertook to deprive the courts of jurisdiction inoperative and void, upon the ground that the Legislature could not take from the courts the right to determine whether or not the property proposed to be taken was needed for a public purpose.

But municipalities and counties are agencies and subdivisions of the State. The streets, alleys, and highways of a municipality are public places. They are under the exclusive control of the municipality. And when the properly constituted authorities declare that the necessities, welfare, comfort and convenience of the public demands that private property shall be taken or that public ways shall be closed, the municipality is merely exercising a public function, such as the county courts exercise in the opening or closing of public roads. And it must be assumed that the officers of the city, as public agents, will exercise with wisdom and discretion the power lodged in their hands. They occupy towards the public a different relation from the officers and agents of private corporations. The latter, it may be assumed, are largely if not altogether influenced in the acquisition of property by the interest of the corporation they represent, and are more concerned with the private affairs entrusted to their care than they are in the welfare of the public. Therefore, when a private corporation desires to take private property, it must, if the matter is put in issue, affirmatively show by evidence that the property is needed for its use in the performance of its duties to the public. On the other hand, when a municipal corporation, invested by the Legislature with the power to close streets, alleys and highways, or to acquire property, undertakes to exercise the power, the presumption will be indulged that it is in the interest of and for the benefit of the public, and that the proceeding is not for private or individual use or advantage. And so if a municipality ordains that an alley, or highway, shall be closed, or a street opened it will be presumed that it is done in the interest of the public and necessary for public purposes, and the burden of showing to the contrary will be put upon the persons who object to the proceeding, and the court shall usually permit the defendants to make the issue and present evidence in support of it. But, in the case before us, it was so manifest from the pleadings that the closing of the alley was in the public interest that the court did not err in refusing to permit an issue of fact to be made on this point. A case might be presented where the court, after hearing the evidence, would refuse to permit a municipality to open, widen or close a street, alley or way, as if it was made to appear that the purpose was to promote private ends and that the action was not in the interests of the public, (*City of Louisville v. Bannon*, 99 Ky., 74; *Lewis on Eminent Domain*, section 134; *Am. & Eng. Ency. of Law*, volume 27, page 114.)

Nor is the act unconstitutional because it seems to deny the right of the courts to inquire into the question of public use by failing to provide for the submission of this fact to the judiciary. We will not assume that the Legislature intended to take from the courts the consideration of this question. This is not our construction of the act. It was not essential to its validity that it should expressly stipulate that the question of public use was a matter to be judicially in-

vestigated and determined, and we hold that the act does not take from the courts the control of the subject.

It is also argued that the question of the necessity for the taking should be left to the decision of a judicial tribunal. But all the authorities agree that the question of necessity is distinct from the question of public use, and that the former question is exclusively with the Legislative. The necessity, expediency or propriety of exercising the right of eminent domain for a public purpose, and the extent and manner of its exercise for such purpose are questions of general public policy, and belong to the Legislative department of the government. Thus, in Cooley's Constitutional Limitations, page 663, it is said:

"The authority to determine in any case whether it is needful to permit the exercise of this power must rest with the State itself; and the question is always one of strictly political character not requiring any hearing upon the facts or any judicial determination."

And in Lewis on Eminent Domain, it is laid down in section 238:

"Whether the power of eminent domain shall be put in motion for any particular purpose and whether the exigencies of the occasion and the public welfare require or justify its exercise are questions which rest entirely with the Legislature. When the use is public, the necessity or expediency of appropriating any particular property is not the subject of judicial cognizance. The general principle is now well settled that when the uses are in fact public, the necessity or expediency of taking private property for such uses by the exercise of the power of eminent domain, the instrumentalities to be used, and the extent to which such power shall be delegated, are questions appertaining to the political and legislative branches of the government."

The meaning of this is, that the law-making department may invest municipal and certain private corporations that perform some public service, with the right to take private property, and the courts will not inquire into the power of the Legislature to grant this authority. But, when the corporation that is invested with this power undertakes to exercise it, it is for the courts to say whether it is exercised for a public purpose or not. In other words, to determine whether or not the taking of the particular property the corporation desires to condemn is necessary for a public use. To illustrate, a telegraph, telephone or railroad company might be invested by the General Assembly of the State with the power to take the private property of individuals for its use, and the courts would not assume to say that the Legislature did not have the power to grant to the corporation this authority; but, when the corporation undertook to take private property, then the courts would have the unquestioned right to determine whether or not it was being taken for a public purpose, that is, whether or not it was in fact needed by the corporation in the performance of its duties to the public, or whether it was being taken for some other use not necessary in connection with the operation and conduct of the corporation in the performance of the duties it owed to the public.

The motives of the council in closing this alley are also assailed and the accusation is made that their action was influenced by a desire to assist the railroad companies that wanted the freer and safer use of Water street. But, we will not stop to inquire into the motives that prompted the council in the enactment of the ordinance in question. The record discloses that the only purpose they had was to subserve the public good. There is no evidence whatever indicating improper motive.

But, aside from this, when the exercise of authority by a city council is within its power, the motives that influenced it will not be inquired into, except in rare cases, where it is manifest that a flagrant wrong had been perpetrated upon the public, and valuable rights have been surrendered ostensibly for the public good but really for the benefit of private individuals. And the exceptional conditions that would authorize the courts to interfere, are not in any manner presented by this record. (Taylor v. Beckham, 21 Ky. Law Rep., 1735; Chicago & N. W. R. Co. v. Morehouse, 88 Am. St. Rep., 919; Waterloo Mfg. Co. v. Shannahan, 128 N. Y., 345; Liguire v. City of Chicago, 139 Ill., 46, 32 Am. St. Rep., 179; Farest Steel Co. v. City of Bridgeford, 60 Conn., 278; Smith v. McDowell, 148 Ill., 51; 22 L. R. A., 393; VanWitsen v. Gutman, 79 Md., 405, 24 L. R. A., 403; Horton v. Williams, 99 Mich, 423.)

The mere fact that a corporation or an individual might be interested in or benefited by the taking of property will not of itself deny to the city the right to exercise the power. It is probable that in every case where the right of eminent domain is exercised, private interests will be more or less benefited; but the existence of this fact will not be allowed to defeat the benefits that will accrue to the public. The case before us is an illustration. The railroad companies occupying Water street were benefited by the closing of this alley, its closure removed the liability of accidents at the crossing, gave the companies freer use of Water street, and diminished the cost and expense of damage suits; but, at the same time the erection of the viaduct in connection with the closing of the alley furnishes a safe and convenient passage-way for the public from Main to High streets, relieving travelers of the dangers incident to the grade crossing of the alley. So far as the general public are concerned, there is no room to doubt that the closing of the alley, and the building of the viaduct, was a benefit. The only persons injured by the closing of the alley were those whose property abutted on it between the streets closed by its obstruction. And the mere fact that the railroad companies were benefited and to secure the benefit defrayed part of the expense incident to the condemnation proceedings, will not be sufficient to defeat the right of the city to exercise its power to take the property for the public good. (Knapp v. City of St. Louis, 153 Mo., 560; Vacation of Union street, 140 Pa. St., 525; Summerfield v. Chicago, 197 Ill., 270.)

The next question is, when the city undertakes to close one of its highways, what persons are necessary parties to the proceedings? The streets and highways of a city are for the use of the public, but this does not mean that the entire public of the city must be consulted before any particular highway or part thereof is closed; or, that all property holders in the city shall be made parties to the action, or receive compensation. If this was necessary, it would be impracticable to close any street, alley or highway, or any part thereof, however essential to the comfort, convenience and health of the city the closing might be. Thus, it is said in Transylvania University v. City of Lexington, 3 B. Mon., 25:

"Every owner of ground on any street in Lexington, has a right, as inviolable as it is indisputable, to the common and unobstructed use of the contiguous highway, so far as it may be necessary for affording him certain incidental easements and services, and for a convenient outlet to other streets. * * * The extent of this appurtenant right, depending on circumstances, may not in a particular case, be easily definable with mathematical precision. * * * But it can not, as to each proprietor of ground, be co-extensive with all the streets and alleys of the city. As a private right, it must, like

that of vicinage, be limited by its own nature and end; that is, chiefly by the necessity of convenient access to, and outlet from the ground of each proprietor. Beyond some such general limit, as to highways, and subject, like other public roads, to alteration and even occlusion, by the sovereign will, for the common weal. We could not admit that there is no power to change any portion of a street in any part of the city, without the consent of every proprietor of ground in the whole city, or without making compensation in money to every such proprietor."

It is, however, difficult to determine with fairness to the public as well as the private owner, what property owners are so interested in the street, alley or highway proposed to be closed, as to render it necessary that they should be parties to the action. But, our conclusion upon this question is that the only persons who are entitled to compensation and are necessary parties to the proceeding, are those whose property abuts upon or adjoins the street, alley or highway proposed to be closed. We do not mean by this to limit the property owner entitled to compensation or who are necessary parties to the action to those who own property immediately at the point of closure. But think it should embrace all persons and all property abutting upon the street proposed to be closed. To illustrate, if it is desired to close a portion of the street, or the entire street known as "A," between "B," and "C," streets; then all the persons owning property upon "A," street between "B" and "C" streets are necessary parties to the action, and entitled to compensation. So that, in the case before us, as it was proposed to close a part of Ayers alley between High and Main streets, all persons who owned property abutting on either side of Ayers alley between High and Main streets were necessary parties to the action and entitled to compensation. But, owners of property abutting on Main or High streets, not adjoining the alley, were not necessary parties or entitled to compensation because the closing of the alley did not except indirectly, interfere with the right of ingress or egress to or from their property. In cases of this character, if it should be laid down that persons who own property not abutting on the street or alley intended to be closed as herein indicated were necessary parties or entitled to compensation, it would be difficult, if not wholly impracticable to select the persons who should be made parties and who were entitled to compensation. Property owners on adjoining streets or squares, might, with a show of reason and evidence, assert that their property was damaged by the closing, although they had ample access and outlet through other streets. Therefore, the equitable and practicable rule is to limit the persons entitled to compensation and to be made parties to the property owners abutting on the street, alley or highway proposed to be closed, between the nearest streets intersected by the street, alley or highway to be closed. Although if a case was presented in which it was made plain that there was a fraudulent arrangement between these property owners and the city to close the highway, not in the interest of the public, but for private ends, the court might permit, in the interest of the public, some other property owner, not entitled to compensation to come in and resist the closing.

It is further insisted that as Ayers alley was conveyed to and accepted by the city, under a deed, providing that "it shall always remain free and open as a public street or alley," the city had no power to close it in violation of the express conditions under which it was accepted. This argument, if sound, would in many instances impose upon municipalities unnecessary and unreasonable burdens. If a street or highway, dedicated to a city, should cease to be either

useful or convenient for the public, and yet the city be obliged to keep it open and maintain it in sufficient repair, it would be imposing upon the public a useless expense; and to so hold would be opposed to both reason and public policy. In our opinion, the correct doctrine is that the city has the same control over highways deeded to it as was Ayers alley that it does over its other public ways, whether acquired by gift, purchase or condemnation. In short, all the streets and public ways of a city, however acquired, are subject equally and alike to the control and regulation of the municipal authorities. In accepting the alley under the conveyance the city did not bind itself irrevocably to keep it open. This is not the fair meaning of the contract. The city assumed the duty of keeping it open as other streets and alleys were kept open, and the right to close it as it might close other streets and alleys.

The city made all of the appellants defendants to the action to close the alley, insisting that the damages to which each of them was entitled should be assessed by the same jury and determined in the same proceeding. The appellants objected to this procedure and demanded that they be awarded separate trials. The matter of allowing separate trials in cases of this character is largely in the discretion of the trial judge, and his discretion, we would not feel authorized to interfere with, unless it worked serious injustice to some of the defendants. The action of the trial court in the case before us was not an abuse of discretion and seems to be in accordance with the provisions of the act, which declares that all the necessary parties shall be made defendants to the action, and contemplates that the damages to be assessed shall be determined in one trial. But, aside from this, there were only three parties defendant. The amount of damages to which each one of them was entitled could as well be assessed by a single jury as in separate trials before different juries. The question involved as to each of them was identically the same, the only difference being that one might be entitled to recover more damages than the other. Separate trials would have involved the consideration by the jury of every question of fact developed upon this trial except that relating to the damages to the particular property of each individual. So that, the time of the court would have been taken up in the hearing of three cases in which the same identical question was involved, except as to the amount of damages to be awarded to each. (Ency. of Pl. & Pr., volume 7, page 503; Washburn v. Milwaukee R. Co., 59 Miss., 379; McKee & St. Louis, 17 Mo., 184; Colcough v. Nashville R. Co., 2 Head (Tenn.), 171.)

It is also complained that numerous errors were committed in the admission and rejection of evidence, and in instructing the jury as to the measure of damages. An examination of the record discloses that the evidence was allowed to take a wide range, and every material fact necessary to enable the jury to properly understand and assess the amount of recovery to which each of the appellants was entitled was brought out. Accepting as correct expositions of the law, the instructions given by the court, the jury could not have failed to understand those facts in the case necessary to enable them to properly estimate the damages in accordance with the instructions.

The court instructed the jury that:

"If they believed from the evidence that either of said property holders will be damaged by closing of Ayers alley, the jury should say in their verdict what sum of money will compensate the said property holder for such damage. In estimating the damage done to each property holder the jury will consider the value to the property owner of the property abutting on said alley and belonging to

such property holder, and if said property is of less value to the property holder, by reason of the closing of Ayers alley, than it would be if said alley were left open, the difference of value to the property holder of the property as it now is, and its value as it will be when said alley is closed, is the measure of damage done to the property holder by reason of the closing of said alley."

This instruction was more favorable to the property owners than they had the right to demand. They were entitled to the difference in the market value of the property with the alley open and its market value with the alley closed. Whereas, in the instruction given, the jury were authorized to find the damage to be the difference in the value of the property to the property owner, before and after the alley was closed. The value of the property to the property owner might, in some instances, be a great deal more than its market value, and in others less. In estimating and assessing the damages under the instruction, the jury had the right to and may have taken into consideration the personal and individual inconvenience and loss from a business standpoint that the property owner sustained. The measure of damage to which the property holder is entitled in cases of this character does not include loss occasioned by injury to his business. He is only entitled to compensation for loss sustained to his property and this loss is the difference in the market value of the property. Any other criterion of damages would enter the field of speculation and make the loss incapable of reasonable ascertainment. The market value of a thing is generally the best evidence of its worth—the fairest standard of its value. The individual whose property is taken might not be willing to surrender it for three times its market value. To him it might be associated with sentimental notions that would enlarge its value far beyond the real and substantial. Again, the owner may have established a business in a particular place or building that was more valuable to him than it would be to any one else, and as a consequence the property would have a value to him far above its market value. But these evidences or elements of value are the result of personal or individual preference, and effort. They affect the individual more than they do the property, and if allowed to enter into or control the damage, it would be virtually impossible to estimate or fix with reasonable certainty the real value of the property. It must be admitted that when the standard by which the loss is to be measured is fixed at the market value of the property that the owner in some cases will not secure what is to him its fair value, but on the other hand, the purchaser ought not to be required to pay more than the fair market value for any property that the law gives him the right to take upon the payment of just compensation, and when the owner has recovered this price, he will generally get what he is entitled to. There is some apparent conflict in the cases on this subject, largely attributable to the different states of fact presented, but in *Madisonville, Hartford & E. R. Co. v. Ross*, 31 Ky. Law Rep., 584; *City of Louisville v. Hegan*, 20 Ky. Law Rep., 1532; *L. & N. R. Co. v. Cumnock*, 25 Ky. Law Rep., 1330, the rule we have announced is fully sustained. It is also the one approved in *Lewis on Eminent Domain*, section 463; *Dillon on Municipal Corporations*, section 623; *Elliott on Streets*, section 271; 15 Cyc., 701; *Am. & Eng. Ency. of Law*, volume 10, page 1151.

In disposing of this question, we have not deemed it pertinent to the subject in hand to discuss the range the evidence may take in elucidating what is the market value of the property proposed to be taken. No fixed rule of universal application can be laid down. The relevancy and competency of evidence must be left to be con-

trolled by the facts of each case at it comes up. But generally all the facts as to the condition of the property, its surroundings, improvements and capabilities, may be shown. A full discussion of this subject will be found in Lewis on Eminent Domain, sections 478-9; Elliott on Streets and Roads, section 260.

In the case before us, the injury was to the whole property. None of it was, accurately speaking, taken. The only injury consisted in depriving the property of the full use of an adjacent alley; and while this was in the meaning of the Constitution a taking, yet the damage done was susceptible of being fairly estimated upon the basis of the injury done to the market value of the property. And what we have said upon this point must be accepted as our understanding of the law controlling cases presenting questions like the one under consideration.

The court further instructed the jury that:

"The right at present exists in the property owners on Ayers alley, as well as in all citizens of the city of Lexington, to use as a public highway the land adjoining Ayers alley, as originally constructed, on the west side, and being north of Water street, and lying under the viaduct, and being opposite W. H. Henderson's property, but this right on the part of each and every citizen is subordinate to the superior right of the Lexington union station, to use said land for the purpose of its business as it may desire."

The land mentioned in this instruction is indicated on the map by the words "vacant space under viaduct." To understand why this instruction was given, it will be necessary to relate briefly the situation of this space, and the conditions under which it exists. Henderson's property runs back with the alley, and on the east side thereof, to Water street. Under the viaduct at Water street there is an open space, some seventy feet long and about thirty feet wide, in which wagons and other vehicles can go from the alley. This open space is immediately across the alley from Henderson's building, and teams going down the alley from Main street to Henderson's building, can unload, and then go in the space under the viaduct, there turn around, and go out the alley to Main street. While it is a fact that vehicles going in the Main street mouth of the alley, can not cross Water street, they can be driven as far as Water street and turn around in the space under the viaduct and go out the way they came in. Before the alley was closed, vehicles coming from Main street could not be turned in it, but had to go out to either Water street or High street. It will thus be seen that the open space under the viaduct was a benefit to Henderson's property, and in a large measure compensated him for the obstruction of the alley. Admitting this to be true, the argument is made that Henderson's use of the vacant space under the viaduct is limited so as to impair, if not destroy its value to his property, and hence the court should not have instructed the jury upon this point. This argument is rested upon the ground that under the contract between the city and the railroads it is provided that the railroad companies, or rather the Lexington union station company standing in their place, shall be allowed to use in perpetuity, so much of this space as it may desire for its purposes; and that the right of Henderson or persons doing business at his building, to its use may be at any time taken away or so curtailed as to render the use of little importance. That the giving of this instruction exercised a weighty influence upon the jury in estimating the damage to the property of Henderson, by closing the alley, we have no doubt. And if the right of the public, as well as property owners in Ayers alley, to use this space in common with other citizens could be taken away, or so curtailed as to render it valueless,

there would be great force in the contention of counsel for the appellants, that the instruction upon this subject was misleading and prejudicial. But, neither the railroad companies nor the union station company will be permitted to deny to the public or any individual, the use of this space as a public highway; and the public generally may use and occupy it upon equal terms with its use by the Lexington union station for the purposes of its business; and this use by the Lexington union station company must be a reasonable and a necessary use. It can not arbitrarily exclude the public from or unnecessarily obstruct their use of this space.

It is also contended that the verdict of the jury is grossly inadequate, but we will not extend this opinion in discussing this question. The amount of damage was a matter entirely within the discretion of the jury. They were doubtless familiar with the location of the property, and the injury to its value that resulted from closing the alley. They saw and heard the witnesses testify, and their finding of the amount of damages will not, as we have frequently announced, be disturbed, as it was not so inadequate as to indicate that the conclusion was the result of passion or prejudice.

After a careful consideration of all the material questions presented by the record, we have reached the conclusion that the judgment should be affirmed, and it is so ordered.

WILSON, RECIEVER v. MURPHY'S ADM'R., &c

MURPHY'S ADM'R., &c. v. WILSON & MUIR, &c.

(Filed June 9, 1908—Not to be reported.)

1. Attorneys at Law—Services for Partnership—Payable Out of Partnership Funds—In this case evidence considered and held that a fee of \$750, paid to W. for his services as attorney for a distillery firm, which had been dissolved by the death of one of the firm, being for the benefit of the partnership property, was properly payable out of the partnership funds.

2. Receivers—Settling Partnership—Allowances for Services—In allowing the fee of a receiver of a distillery company, which had been dissolved by the death of one of the partners, who was more of a caretaker than any thing else, his principal business being to sign withdrawals of whisky and looking after the distillery when not in operation for several years, the witnesses fixed the value of his services at from \$5,000 to \$10,000. This trial court allowed him \$2,750 Held—That the allowance was not too small.

John S. Kelley for receiver Wilson.

Geo. S. & J. A. Fulton for Murphy's Adm'r, &c.

John D. Wickliffe for Wilson & Muir. &c.

Appeals from Nelson Circuit Court.

Opinion of the court by Williams Rogers Clay, Commissioner, affirming.

These two appeals grow out of the same transactions, and will be considered together. In the appeal of Squire Murphy's Administrator. &c. v. Wilson & Muir, &c., the question is, whether the fee of John D. Wickliffe should be paid by appellees or out of the funds be-

longing to the partnership of Murphy, Barber & Company. This question, we shall first consider.

Squire Murphy and A. M. Barber were partners engaged in the distillery business under the firm name of Murphy, Barber & Company. They resided in Nelson county, Kentucky, but their plant was located just beyond the county line, in Bullitt county, at Clermont. Squire Murphy died in August, 1893, leaving a will which was probated in Nelson county. After making some special devises, the testator directed his executor to hold the balance of his estate and operate the distillery in the firm name of Murphy, Barber & Company, until such time (not exceeding three years) as the distillery property could be sold at a fair price and the money collected; then a settlement should be made. The testator appointed his partner, A. M. Barber, as executor of his will, who qualified and entered upon his duties. At this time there was a great depression in the whisky trade. The executor, who was also the surviving partner, continued the business until September, 1896, when the three years named in the will expired. At this time there was still a depression in the whisky business. Under this condition of affairs, a contract was entered into between the executor and surviving partner, A. M. Barber, and the devisees of Squire Murphy, by which the partnership was to continue for one year longer. Before anything was done under this contract, A. M. Barber also died. Thus the partnership and contract for a continuance of the business were terminated, leaving a valuable distillery plant with about 9,000 barrels of whisky in bond in the warehouses, about one-half of which was pledged to banks for the money that had enabled the firm to make the whisky. Some of it had been sold, and was held in storage for the owners; the residue belonged to the firm..

Neither of the deceased partners had a personal representative, and this valuable property was uncared for, and unprotected. Under this state of case, a consultation was held by Wilson & Muir, the largest creditors, the devisees of Squire Murphy, and John Barber, the son of A. M. Barber and representative of the heirs of said decedent, and John D. Wickliffe, attorney for Wilson & Muir, in which it was agreed that suit should be instituted by Wilson & Muir against the devisees and heirs at law of the deceased partners, asking for the appointment of a receiver to take charge of, and sell the partnership property, pay the debts and bring about a settlement of the partnership affairs. This suit was immediately prepared, the petition filed and all parties in interest brought before the court. On November 26th, seven days after the death of A. M. Barber, the circuit judge was appealed to to appoint a receiver. At the time the application was made, a writing was filed with the judge, signed by the devisees of Squire Murphy and the adult heirs of A. M. Barber, asking for the appointment of a receiver and suggesting Eugene Wilson as a suitable person to take charge of the property. Thereupon Wilson was appointed. After that time, John D. Wickliffe continued to act as the attorney of Wilson, giving him advice in the management of the property and assisting him in the preparation of the reports which he filed as receiver.

Counsel for the Murphy and Barber estates insist that, as each of these estates was represented by attorneys, and, as the suit for a receiver was filed on behalf of one of the principal creditors, it would be unjust to charge the estates with the payment of the fee of \$750 allowed Wickliffe. It is true, the Murphy & Barber estates each had attorneys, but it appears that their time was chiefly occupied in litigating matters in dispute between these two estates. While it is true, that John D. Wickliffe was attorney for the appel-

lees, it is also true, that he was attorney for the receiver. Charles Bakrow, a wholesale liquor dealer of Louisville purchased some of the partnership whisky from the receiver, for which he failed to pay. The record shows that Wickliffe instituted the necessary proceedings to compel Bakrow to pay the money, and succeeded in getting the money. As both the parties were dead at the time the suit for a receiver was instituted, and, as there was no one to take charge of the property, it was necessary that some action be taken to protect the estate. This was done on the application of one of the principal creditors, but with the consent and co-operation of the other creditors and representatives of the two estates. We, therefore, conclude that the services rendered by John D. Wickliffe were for the benefit of the partnership property, and that his fee was properly payable out of the partnership funds.

We shall next consider the question of the allowance to the receiver, Eugene Wilson. Wilson acted as receiver for a period of 43 months. During that time he made a few visits to the distillery plant and wrote several letters. At the time he took charge the debts of the partnership, secured by lien on the whisky, amounted to about \$40,000. At the end of the receivership he turned over to the unsecured creditors and representatives of the Murphy and Barber estates about \$40,000. The receiver was the son of William Wilson, one of the stockholders in the bank of Wilson & Muir, a creditor of the partnership to the extent of about \$32,000. At the time of his appointment and throughout the term of his services as receiver, he was the cashier of the bank of Wilson & Muir. During that time, he also conducted a large insurance business. The trial court allowed the receiver a fee of \$2,750. A number of witnesses testified that Wilson's services were worth from \$5,000 to \$10,000. Counsel for the receiver insist that the large amount of money turned over by the receiver to the estates of Murphy and Barber was the result of his careful management and foresight in the performance of his duties as receiver. On the other hand, counsel for appellees insist that the sum turned over to the estates was not due to any work or foresight on the part of the receiver, but was due entirely to the natural advance in the price of whisky. In cases of this character, we necessarily rely to a large extent upon the judgment of the chancellor. The distillery was not operated. The receiver was more of a caretaker than anything else, and even the burden of taking care of the property was imposed upon others. Where his efforts consisted principally of signing withdrawals of whisky and of looking after the distillery property not in operation, and where these duties were not so exacting as to interfere with his insurance business or his work as cashier of the Wilson & Muir bank, we are unable to say that the allowance of \$2,750, made by the court below, is too small.

Wherefore, the judgment in each case is affirmed.

WRIST v. COMMONWEALTH.

(Filed June 9, 1908—Not to be reported.)

1. Malicious Shooting—Self Defense—Instruction As To—Under the evidence it appears that the accused commenced the difficulty. An instruction on self-defense was modified by telling the jury that the plea could not be relied on if accused "brought on the difficulty." While it is the better practice not to use these words, defendant's plea could not have availed him as he did not act

in self-defense, and the jury could not have been misled by the use of these words.

2. Distance of Person at The Time of Shooting—The distance of the parties, at the time of the shooting, as it bears upon the question of the intent, is a fact to be considered by the jury like any other fact proved in the case. It should not be pointed out in an instruction any more than any other fact.

Edwin P. Morrow, W. Boyd Morrow and Morrow & Morrow for appellant.

James Breathitt and Tom B. McGregor for appellee.

Appeal from Pulaski Circuit Court.

Opinion of the court by Judge Carroll, affirming.

Under an indictment charging him with the crime of willfully and maliciously shooting at, with intent to kill, C. C. Meadows, without wounding him, which is an offense described and denounced by section 1166, of the Kentucky Statutes—the appellant was found guilty and his punishment fixed at one year confinement in the State penitentiary.

The chief and in fact only reason urged for a reversal of the judgment is that the court erred in instructing the jury.

The evidence in the case is brief and simple. For the Commonwealth, the substance of it is that appellant, who seemed to be drinking, went to a store and in a bolsterous voice said he wanted a cheese box. Being told by the store-keeper, Avery, that he did not have any to sell, he made an impertinent reply, and thereupon the storekeeper and Meadows, who was in the store, cursed him and told him to get away. That when leaving for his house, which was a short distance off, he said: "I come back and get you d—— s—— b——." In a few minutes he returned with a shot gun in his hand. When about seventy-five yards from the store, he commenced cursing, and fired the gun at Meadows and the storekeeper, who were standing in the door of the store—some of the shot striking the clothes of Meadows. After the first shot was fired by appellant, Meadows and a brother of a clerk who was present, commenced shooting at him with a pistol, and he fired two or three other shots with his gun.

Appellant, in his own behalf, stated that he went to the store for the purpose of buying some articles of food, and also tried to buy a cheese box, when the storekeeper said he didn't keep boxes around to sell negroes; and after a few other remarks had been exchanged, the storekeeper and Meadows cursed him, drew a pistol, and told him to get out. That in leaving, he dropped his hat about 75 yards from the store, and went to his house to get ready to leave and go to Somerset. That he got his gun, and some shells loaded with bird shot, and went back to get his hat, not intending to have any further trouble; and about the time he reached the point where his hat was, Meadows fired at him with a pistol, when he returned the shot, and thereupon he fired several times as did Meadows, and two or three others who were shooting at him.

With the evidence in this condition, the court instructed the jury upon the charge contained in the indictment, and also touching the lesser degree of the offense, which a misdemeanor, described in section 1242, of the Statutes.

The instruction as to self-defense was modified by the statement in substance that the accused could not rely upon the plea of self-

defense, to exonerate him if he brought on the difficulty. The instruction would have been more correct if the court had said to the jury that he could not rely upon the plea of self-defense if the jury believed he brought on the difficulty by first shooting, or threatening to shoot, at Meadows, when it was not necessary, or did not appear to him to be necessary in the exercise of a reasonable judgment to protect himself from death or great bodily harm at the hands of Meadows, or the persons who were with him. But the failure to so word the instruction could not under the facts of this case have been prejudicial to the accused. If the statements of the witnesses for the Commonwealth are true, the accused, without excuse or provocation, commenced the difficulty by shooting at them. In other words, he brought all the trouble, he has suffered upon himself. On the other hand, if his story is true, he did not commence or bring on the difficulty, was entirely without blame, fired only in self-defense and should have been acquitted. It is manifest that the jury accepted as true the statements of the prosecuting witnesses, and reached the conclusion, as they well might have done, that the accused after leaving the store, went to his house, and returned with his shot gun for the purpose of doing some harm to the men who were at the store. Taking this view of the case, appellant's plea of self-defense could not have availed him as he did not act in self-defense.

The safer and better practice, is not to use the words "brought on the difficulty" in an instruction, but if they are used, the court should define their meaning, and there are many cases in which it would be prejudicial error to fail to define what was meant by the expression "bringing on, or brought on, the difficulty." (*Greer v. Commonwealth*, 27 Ky. Law Rep., 333; *Calhoun v. Commonwealth*, 23 Ky. Law Rep., 1188; *Riley v. Commonwealth*, 94 Ky. 268; *Brown v. Commonwealth*, 21 Ky. Law Rep., 245; *Arnold v. Commonwealth*, 21 Ky. Law Rep., 1566; *Allen v. Commonwealth*, 86 Ky., 642.) But in this case, there were only two views that the jury could reasonably have adopted. One, that appellant came back towards the store with his shot gun for the purpose of shooting or wounding the men at the store, and with this purpose in view, commenced firing at them; the other, that he only stopped to get his hat on his way to leave the country, when without provocation he was fired upon.

Under the facts the jury could not have been misled by the use of the words "brought on the difficulty." If it was brought on at all by appellant, it was by his conduct in returning to the store to attack Avery and Meadows, or in first shooting at them. And if it was brought on in this way, the appellant forfeited his right of self-defense.

The argument is also made that the indictment should have charged, and the evidence have shown, that appellant when he fired was at such a distance that death or serious bodily harm could have resulted from his shooting; and that the jury should have been so instructed. The offense for which appellant was indicted is a statutory one, fully described in the statute. It is complete when a person shoots at another with the intention of killing him, although he may not wound him. Whether the person shooting is close enough to the person shot at to wound or kill him, is a question for the jury. If a person fired an ordinary shot gun, loaded with ordinary bird shot, at a person five hundred yards off, and there was evidence to show that the shot gun would not carry over a hundred yards, there could not well be a conviction under this statute, as the distance of the parties would preclude the idea that the shooting was done with the intention of wounding or kill-

ing. But the distance of the parties, as it bears upon the question of intent, is a fact to be considered like any other fact proven in the case. It should not be pointed out in an instruction any more than any other fact, or given any more prominence than any other fact necessary to constitute the guilt of the accused. Nor is it necessary that it should be charged in the indictment.

Upon a consideration of the whole case, we do not find that any error of law, prejudicial to the substantial rights of the accused, was committed, and the judgment must be affirmed.

LOUISVILLE & NASHVILLE RAILROAD COMPANY v. SCALF.

(Filed June 9, 1908—Not to be reported.)

Railroads—Going With State Guards to Inauguration—Volunteer—Illness from Filthy Car—Action for Damages—Grounds for Recovery—One not a member of the State Guards who volunteered to go with a company of State Guards to the inauguration of the Governor is not entitled to damages against the railroad company for illness alleged to have been caused by being compelled to ride in a car that was not properly lighted or heated or not furnished with drinking water or by reason of the noisome and filthy condition of the car, as he was not a member of the guards he had the right at any time to leave the car and go into another without being subjected to military discipline therefor.

James D. Black and Benj. D. Warfield for appellant.

John H. Wilson and B. B. Golden for appellee.

Appeal from Knox Circuit Court.

Opinion of the court by William Rogers Clay, Commissioner, reversing.

Appellee, Lee Scalf, went with the Barbourville State Guards to the inauguration of Governor Beckham, in December, 1900. Complaining that the coach in which he went to, and returned from Frankfort, was not properly heated or lighted, and was not furnished with sufficient water for drinking purposes; that the stoves and lamps smoked, and that the car was permitted to become in a noisome and filthy condition, and that by reason thereof he experienced great physical and mental suffering and caught severe cold, he instituted this action for damages against the appellant, Louisville & Nashville Railroad Company. He recovered a verdict for \$500.00, and the railroad company appeals.

It appears from the record that appellee never enlisted in the State Guards by taking the obligation required by law. The captain of the company simply requested him to accompany the guards for the purpose of filling out the quota of the company. He thereupon volunteered, and did go with the company. According to appellee's contention, the bad conditions prevailing in the car were due to the negligence of the employees of the appellant company, while the latter insists that those conditions were due entirely to the acts of appellee and his companions, in raising the windows of the car, in attempting to put coal in the fires, in punching the fires with their bayonets, and in scattering lunches over, and vomiting on the floor of the car. Appellant asks a reversal on the ground of the admission of incompetent testimony, and also because of error in refusing and giving instructions.

It appears that the trial court permitted several witnesses to testify to the fact that the members of the guard complained of the cold and other conditions of the car, and expressed these complaints to each other. As these complaints were not made to the employees of the railroad, they were manifestly incompetent, and all such evidence should have been excluded by the court.

Appellant asked the following instruction:

"If you shall believe from the evidence that the plaintiff, Lee Scalf, was not a member of the military company on the trip to, or return from, Frankfort, on the occasion mentioned in the evidence, but that he voluntarily undertook to and did make said trips, and that he could, without subjecting himself to any military discipline, or penalty, have left the coach which was occupied by said company on said trip, after discovering that said coach was dirty or filthy, or gave out offensive odors, or was insufficiently heated, or the lamps gave insufficient light, or emitted foul or offensive odors, or the stoves in said coach gave out smoke, to the discomfort of plaintiff, if any such conditions existed, and could have taken a passage on said trips in another coach, free from such conditions and failed to do so, you should find for the defendant."

We think the court erred in failing to give this, or a similar instruction. Indeed, as there was no proof that appellee was a member of the military company, he could have left the car without subjecting himself to any military discipline or penalty. The statutes do not provide a punishment, except for enlisted men. No power is given to discipline those who go as mere volunteers, and who have not enlisted in the service by taking the obligation required by law. Upon the next trial, the court should give the following instruction:

"The court instructs you that the plaintiff, Lee Scalf, was not a member of the military company on the trip to and from Frankfort, on the occasion mentioned in the evidence, and that he could, without subjecting himself to any military discipline or penalty, have left the coach, which was occupied by him on said trips. And if you believe from the evidence that said coach was dirty or filthy, or gave out offensive odors, or was not sufficiently heated, or the lamps gave insufficient light or emitted foul and offensive odors, or that the stoves in said coaches gave out smoke, to the discomfort of the plaintiff, if any such conditions existed, and that the plaintiff on said trip could have taken passage in another coach, free from such conditions, and failed to do so, you should find for the defendant."

Appellee complains of the fact that he contracted a severe cold by reason of the cars being insufficiently heated. It appears, however, that, after his arrival in Frankfort, he marched and stood around for several hours in the cold without any overcoat on. It was, therefore, impossible to tell whether the cold he contracted resulted from the insufficient heat of the car or from the exposure to the severe weather then prevailing at Frankfort. Upon the next trial, unless there be some evidence that the cold complained of was the proximate result of the condition of the car, all evidence of the cold should be excluded, and the court should omit from its instructions the right to recover on that ground. (*Louisville & Nashville Railroad Co. v. Wathen*, 22 Ky. Law Rep., 82; *Groves v. Louisville & Nashville Railroad Co.*, 29 Ky. Law Rep., 725, 1291; *Louisville Gas Co. v. Kaufman Straus & Co., &c.*, 105 Ky., 131.)

For the reasons given, the judgment is reversed and cause remanded, for a new trial consistent with this opinion.

SINDER v. CONRAD, &c.

(Filed June 10, 1908—Not to be reported.)

Exceptions—Time of Filing—The exceptions to the report of sale herein, aside from being insufficient, were not filed in time. The lower court being one of continuous session has control over its orders for 60 days after they are entered, and within that time may correct them or set them aside, but the power to do so can not be exercised after that time.

E. E. McKay for appellant.

Johnson & Hieatt for appellees.

Appeal from Jefferson Circuit Court, Chancery Branch, Second Division.

Opinion of the court by Judge Settle, affirming.

In an action in equity, styled Florence Conrad and others v. A. B. Drovo and others, instituted in the court below, a decree was rendered, directing the sale of certain real estate in the city of Louisville, formerly owned by Fanny R. Barnes, for distribution of its proceeds among her heirs at law, parties to the action.

The real estate described in the decree was sold July 16th, 1906. Included in the sale were lots one and two, situated on what is known as the "Point" in the city of Louisville. Lot 1 was purchased by the Progress Land Company, and lot 2, by the appellant, Fred Sinder, the latter's bid being \$435. In accordance with a requirement of the decree, Sinder, at the time of the sale, paid to the commissioner \$25, but failed to execute bond with approved security for the remainder of the purchase money, as directed by a further provision of the decree.

The commissioner filed this report of sale on October 6th, 1906, and under a rule of the court it was, by proper order, laid over one week for exceptions. On February 9th, 1907, exceptions to the report of sale were filed by the Progress Land Company, but were not passed on by the court until March 4th, at which time an order was entered overruling the exceptions, and on motion of the plaintiffs, then made, the report of sale as a whole was confirmed.

On March 30th, 1907, at the plaintiff's instance, a rule was issued against the other purchaser, Sinder, requiring him to execute bond for the amount he was owing upon the purchase price of lot No. 2. The rule was made returnable April 6th, 1907, but upon his motion, was, from time to time, respited to May 1st, 1907. On that day he filed a response which the court, on May 6th, 1907, adjudged insufficient, and made the rule absolute; at the same time issuing an attachment against Sinder, requiring him to comply with the terms of sale, under penalty of being dealt with for contempt. The latter entered his appearance to the attachment and was given a week within which to comply therewith. Instead of complying with the attachment, Sinder, on May 13th, 1907, tendered and offered to file an affidavit and exceptions to the report of sale. On June 1st, 1907, his motion to file them was overruled and the attachment again awarded. From the judgment last mentioned, Sinder has appealed.

The response filed by appellant in substance, set forth the claim that another to whom he assigned his bid and right to the lot, No. 2, failed, on account of an alleged defect in the title to accept the as-

signment, did not file it in court, and refused to pay the purchase price or execute in appellant's stead a bond for the purchase money; and that following appellant's purchase of the lot, it was so flooded and injured by high water, from the Ohio river, as to diminish its value and prevent him from selling it. His exceptions offered to be filed to the report of sale were to the effect that the lot purchased by him contained one-half of a double cottage, and that the partition wall, supposed to divide his half of the cottage, from the other half, was a foot and a half west of the true line of the lot.

The matters set forth in the response did not excuse appellant's failure to comply with the terms of the sale, or show cause for discharging the rule; and had the exceptions to the report of sale been offered to be filed in time, they failed to state that the owner of the adjoining lot was making complaint as to the alleged encroachment upon his lot; such complaint being necessary to authorize action upon the part of the court looking to the granting of relief as to that matter. (*Tepper v. Niemer*, 32 Ky. Law Rep., 407.)

But consideration of the grounds of exceptions to the report of sale would be unprofitable; as the exceptions were not filed or offered to be filed in time. Although the report of sale was filed October 6th, 1906, and not confirmed until March 4th, 1907, no exceptions were filed thereto by appellant during the nearly five months thus intervening, and as before indicated, none were offered to be filed by him until May 13th, 1907, more than sixty days after the confirmation of the sale by the circuit court.

The Jefferson Circuit Court, being one of continuous session, has control of its judgments and orders for sixty days after they are rendered or entered, and within that time may correct them or set them aside, for cause, at the instance of a person aggrieved. But the power to do so can not be exercised by that court after the expiration of the sixty days. The order confirming the sale to appellant of the lot in question became final in sixty days from March 4th, 1907, and after that time had elapsed, the lower court was powerless to permit appellant to file exceptions to the report of sale, hence its refusal to allow the exceptions to be filed was proper.

Wherefore, the judgment complained of is affirmed.

LEE V. WHEAT.

(Filed June 10, 1908—Not to be reported.)

Lands—Processioners—Report of—Prima Facie Evidence—Section 2374, Ky. Stats., provides that the report of processioners shall be prima facie evidence against and between the parties, and the report in this action would have been sufficient to defeat appellant's claim if there had been no other evidence introduced, but the proof shows that she owns the land in controversy, and that the length of the lines stated in the deed were made by oversight, resulting in the controversy.

2. Same—Under the provisions of section 2128, Ky. Stats., the husband can not deprive the wife of her land or any interest therein by a conveyance made by him, and appellant did not sign the agreement upon which the report of the processioners was based.

Goad & Oliver for appellant.

Bradburn & Basham and J. H. Gilliam for appellee.

Appeal from Allen Circuit Court.

Opinion of the court by Judge Nunn, reversing.

In the year, 1883, a colored woman, Cary Hughes, being then old and feeble, gave her daughter, Sarah Calvert, a small tract of land which she carved out of a tract of one hundred acres that she owned. She had a surveyor to run it out in the shape of a square, mark the lines and plant a stone at each of the four corners. This was proven without contradiction. She placed her daughter, Sarah Calvert, and her husband in possession of the land, and they occupied and claimed to these lines and corners for about twelve years, when it was sold under a mortgage executed to Dr. W. B. Ray. Dr. Ray purchased the land at the decretal sale and kept it for about one year with a tenant in possession, he then sold and conveyed it to appellant, Annie Lee, who, with her husband, has been in possession of it ever since. Appellee, Wheat, purchased the remainder of the land owned by Cary Hughes about one year before the institution of this action, in 1907. He crossed the line and began to cut timber and appellant instituted this action against him for trespass. He answered denying that appellant was the owner of that part of the land on which he entered, and alleged that appellee only owned about four acres, and that, after he bought, a dispute arise between Annie Lee and himself as to the correct location of the lines and corners, and thereupon she had the county proccessioners to run out and establish her corners and lines, and they agreed in writing at that time as to where her line and corners were, giving her a fraction over eight acres. The proccessioners based their report upon this agreement, filed and had it recorded in the county court clerk's office, and appellee pleaded it in bar of her right to maintain this action.

It appears that the deed from Cary Hughes to her daughter, Sarah Calvert, and the deed from Dr. Ray to appellant calls for the length of each line as only twenty-five poles, which would enclose a fraction less than four acres. These calls did not follow any marked lines, nor reach any established corners. It appears that at the time the proccessioners were called there had been cleared and enclosed by fences, within the Sarah Calvert survey, about eight acres, and this enclosed land was given to appellant by the agreement referred to and which the proccessioners reported. It appears that there are near sixteen acres within the boundary established by Cary Hughes which she gave to her daughter and placed her in possession of. It appears from the proof that the person who made the survey of this land did not write the deed to Sarah Calvert, and from the facts and circumstances appearing in the record we are convinced that the draftsman of the deed made the calls "twenty-five poles" instead of twenty-five chains, or fifty poles. The witnesses stated that the measurement was made with a chain two poles long. The testimony shows that Cary Hughes, while she owned the remainder of the survey, and those who owned it after her death, did not claim beyond these lines and the stone corners, and regarded it as the Sarah Calvert survey. Dr. Ray did not testify, but it is evident that he knew nothing in particular about the boundary. He only held a small claim which was a lien upon the land. His deed only called for about four acres.

It is proven, without contradiction, that appellee, Wheat, was shown at the time he purchased, these lines and stone corners, claimed by appellant, as the true lines between the surveys, and that he only purchased to these lines and corners.

In view of these facts, in our opinion, appellee's claim beyond these lines was an after-thought, and he asserted this claim when he discovered that the calls in the deed of appellant only covered about four acres of land.

It is evident, under the proof in this case, that appellee does not own any part of the land in controversy. In our opinion, the length of the lines stated in the deed was made by oversight. But whether this is true or not, Sarah Calvert was placed in possession of the boundary actually allotted to her, and she, as well as those owning it after her, claimed to these lines and corners and were in the actual possession thereof claiming it as their own for more than twenty years, and they were never disturbed in their possession until appellee became the owner of the adjoining land.

Appellee's counsel contends that the processioners report bars appellant from claiming any part of the land, other than that fixed by the report. This is not correct. Section 2374, of the Kentucky Statutes, provides that the report of processioners shall be prima facie evidence against and between the parties * * * interested and others claiming through or under them. The report of the processioners was sufficient to defeat appellant in the action, if there had been no other evidence introduced. But counsel say that the agreement between the parties made and signed, and upon which the report of the processioners was based, is binding upon the parties. The difficulty in the way of this contention is that appellant did not sign the agreement, her husband, Henry Lee, alone signed it, and under the provisions of section 2128, of the Kentucky Statutes, the husband cannot deprive the wife of her land or any interest therein by a conveyance made by him. The testimony was about equally divided upon the question as to whether she gave her consent to the agreement establishing the lines so as to include only the enclosed land; but if her consent had been shown without contradiction, it was only oral, and by this she did not part with her title. If she, by such consent, had induced some person to invest their money in her land excluded by this compromise agreement, then she would be estopped from asserting title to the land; but appellee did not part with anything by reason thereof. His situation is the same as when he purchased the land to the lines and stone corners.

For these reasons the judgment of the lower court is reversed and remanded, with directions to the lower court to render judgment in behalf of appellant for the land in controversy, and to ascertain the value of the timber taken by appellee, if any, and give judgment in behalf of appellant therefor.

BIBB v. COMMONWEALTH.

(Filed June 10, 1908—Not to be reported.)

1. Bill of Exceptions—Errors of court on the trial of a case must be shown in the bill of exceptions, not by the affidavits filed on the motion for a new trial.

2. Robbery—Petty Larceny—The evidence shows that appellant's offense was simply stealing by stealth, and she should only have been convicted of petty larceny and not robbery. There was no force used, and no putting in fear.

Louis I. Ingleheart for appellant.

James Breathitt and Tom B. McGregor for appellee.

Appeal from Daviess Circuit Court.

Opinion of the court by Judge Hobson, reversing.

Ella Bibb was indicted for robbery. She was convicted and her punishment fixed at four years confinement in the penitentiary.

She was charged with robbing D. E. Lester, by forcibly and feloniously taking from his person his pocket-book or purse, containing money of the United States. The proof showed that the man's name was B. E. Lester, but this was not a material variance, under section 128, of the Criminal Code, as the offense was in other respects described with sufficient certainty to identify the act. Section 128, is as follows:

"If an offense involves the commission of, or an attempt to commit an injury to person or property, or the taking of property, and be described in other respects with sufficient certainty to identify the act, an erroneous allegation as to the person injured or attempted to be injured or as to the owner of the property, taken or injured or attempted to be injured, is not material."

Complaint is made of the argument of the Commonwealth attorney in his concluding speech to the jury; but nothing of this is contained in the bill of exceptions. A matter of this sort can only be brought to this court by the bill of exceptions. It can not be brought here upon the affidavits filed on the motion for new trial. The errors of the court on the trial of the case must be shown in the bill of exceptions, not by the affidavits filed on the motion for new trial.

The facts shown on the trial were that Lester and another negro named Scott Driscoll, were in Owensboro, and while there went into a house where there were two negro women, one of whom was Ella Bibb. Lester's statement as to what occurred after he got in, is as follows:

"But when we got in there, I did not see anything but these two women, and I says to my friend, 'We have no business in here,' and one of the women came around where I was and I guess she saw the print of my pocket-book on the outside of my pants, and she came up and made a dive at my pocket and ran her hand in and got the pocket-book before I could take hold of her, and I felt in my pocket and found that the pocket-book was gone, and I says to her, 'you have got my pocket-book,' and she says, 'No, I haven't' and I says, 'Yes, you have.'"

He said that there was \$6.10 in the pocket-book; that he went down and got a policeman who came up and arrested the woman and got his money back for him.

He said in his cross-examination that when he felt her hand in his pocket, he grabbed at her arm, but that he did not catch her arm; that she then had his pocket-book; that she stepped up by the side of him, ran her hand in his pocket and got the pocket-book out before he could grab her arm.

In *Jones v. Commonwealth*, 115 Ky., 592, Tilton, the prosecuting witness, had ten dollars in his vest pocket. The defendant was standing in front of him with his back to him, while he was looking at a bulletin. While in that position he felt something touch his breast. He immediately grabbed and gave a look down, when he saw defendant's hand, which he had grabbed, a foot from his vest pocket; the defendant pulled and slipped the money to his other hand. It was held that the defendant was not guilty of robbery but of stealing from Tilton by stealth. In *Dawson v. Commonwealth*, 74 S. W., 701, the defendant, a woman, was talking with a man at the gate of the house where she lived. She put her hand in his pocket, when he grabbed her hand and said, "Don't play with

my money in that way." She said, "I haven't got your money." He replied, "Yes, you have." Then she laughed. He let her take her hand out and said to her. "Give me my money now." She refused to do it and threatened to shoot him. It was held that the facts showed that the accused was guilty of petty larceny, and not robbery. These cases are conclusive here. There was no putting of Lester in fear. There was no force used upon his person; the woman simply stealthily put her hand in his pocket and took out his money before he knew what she was doing. There are cases where force is used to push a person or to pull him about so as to distract his attention and in this way rob him. (*Snyder v. Commonwealth*, 21 Ky. Law Rep., 1538.) But in these cases there is force applied to the person. In the case at bar, it was simply a stealing by stealth, and under the facts, the defendant should only have been convicted of petty larceny.

Judgment reversed and cause remanded, for further proceedings consistent herewith.

MAJORS v. CONTINENTAL CASUALTY CO.

(Filed June 10, 1908—Not to be reported.)

Bill of Exceptions—Striking from Record—Presumption That Evidence Supported Pleadings—The bill of exceptions and transcript of evidence having been stricken from the record, the presumption must be indulged that the evidence supported the pleadings. The refusal of the lower court to re-docket the case and sign the bill of exceptions was not a final order from which an appeal may be taken.

W. P. McClain and Vance & Lockett for appellant.

Manton Maverick, Dorsey & Stanley, J. Morgan Chinn and Yeaman & Yeaman for appellee.

Appeal from Henderson Circuit Court.

Opinion of the court by Judge Nunn, affirming.

Section 745, of the Civil Code, provides:

"An appeal shall not be granted except within two years next after the right to appeal first accrued, unless the party applying therefor was then a defendant in the action, and an infant, &c."

The judgment appealed from in this case was rendered on October 19, 1905. Appellant, on the 16th day of October, 1907, filed with the clerk of the Court of Appeals, a statement of the parties appellant and appellees, and also a copy of the judgment appealed from and was granted the appeal by the clerk of this court.

Section 738, of the Civil Code, provides:

"The appellant shall file the transcript in the office of the clerk of the Court of Appeals, at least twenty days before the first day of the second term of said court, next after the granting of the appeal, unless the court extend the time; as, for cause shown, the court may do."

Appellant filed the transcript on the 21st day of March, 1908, which was twenty-three days before the second term of this court, after the appeal was granted. On the 20th day of May, 1908, appellee moved this court to strike the bill of exceptions and transcript of evidence from the record. First, because neither the bill of ex-

ceptions nor the transcript of evidence had been signed, approved or certified by the judge of the lower court, or by any one. Second, because the unsigned bill of exceptions and unsigned transcript of evidence were no part of the record in this case. This motion was sustained by this court on May 21st, 1908. Consequently, there is not anything in the record to consider except the pleadings; and the presumption is that the evidence introduced on the trial supported the pleadings of appellee, to the effect that the policy sued on was obtained by fraud upon the part of appellee.

It appears that at the first or second term of the Henderson Circuit Court, after judgment, appellant tendered to that court a bill of exceptions, but it was not signed by the judge of the court; and at the next term, upon motion of appellant, the case was stricken from the docket, and in about twelve months thereafter appellant notified appellee that at the next succeeding term of the court, he would move the court to re-docket the case, and have the bill of exceptions signed by the court. The motion was entered, but the court refused to re-docket the case or sign the bill of exceptions; and appellant asks a reversal of this order. This is not a final judgment from which an appeal can be taken. The proper course for appellant to have pursued was, when he filed the transcript March 21, 1908, to have asked this court for time in which to have the transcript prepared and signed, and then, by proper procedure, to have had the record made up in the lower court and signed by the judge.

For these reasons the judgment of the lower court is affirmed.

MARTIN, &c. v. STEWART, &c.

Filed June 10, 1908—Not to be reported.)

Deeds—Undue Influence—Evidence—Presumption of Law—There is an utter failure to show any undue influence or fraud in the execution of the deed. The law does not presume incapacity, fraud or undue influence, and when the deed has stood as long as this one (14 years) and has been acquiesced in by the grantor, the presumption in favor of the deed can only be overcome by clear and satisfactory evidence.

W. H. Holt and W. S. Harkins for appellants.

Hazelrigg, Chenault & Hazelrigg and James Goble for appellees.

Appeal from Floyd Circuit Court.

Opinion of the court by Judge Hobson, affirming.

Simpson Martin died in the year 1901, a resident of Floyd county. He left surviving him eight children. Two of them, James and John, brought this suit in the year 1906, alleging that he owned, at his death, a tract of land on which he resided, containing about 500 acres. They prayed a division of it among the eight children. The defendants filed an answer in which they pleaded that their father did not own the tract of land at his death, but that he had, in the year 1887, conveyed it to the other six children. By their reply the plaintiffs pleaded that the deed referred to was obtained from Simpson Martin when he was incompetent to make a deed, by undue influence. On their rejoinder the plaintiffs pleaded limitation in bar of so much of the action as sought to set aside the deed.

A sur-rejoinder was filed controverting the plea of limitation; proof was taken and on final hearing the court dismissed the plaintiffs' petition, reserving all other questions made in the case, the defendants having made their answer a counterclaim and cross-petition, and asked a division of the land under the deed, alleging that the plaintiffs had the interest of one of the six children to whom the deed was made.

The deed contains this clause: "The said Simpson Martin reserves the right to have full control of said land during his and his wife's lifetime. This deed is to take effect and be in force after Simpson Martin and Elizabeth Martin's death. Elizabeth Martin died in the year 1906, before this suit was brought. The words quoted merely created a life estate in Simpson Martin and Elizabeth Martin, the title to the land vesting in the grantees, subject to this life estate. The effect of the clause quoted was only to postpone the right of possession. (Hunt v. Hunt, 26 Ky. Law Rep. 973, 119 Ky., 39.)

There is an utter failure of proof to show a want of capacity on the part of Simpson Martin at the time the deed was made, in May, 1887. It was acknowledged on the day it was made and recorded a few months later. He lived about fourteen years after the deed was made. When he died he was something over eighty years of age. During all of these years he attended to his business, and held possession of his property. He was a man of natural good sense, and while it is shown that his memory was bad, especially in the latter years of his life, there is an utter failure to show that he had not capacity to make the deed and the evidence leaves no doubt that he understood well what he had done and acquiesced in it, saying that James and John had gotten their part of the estate; that the girls had worked hard and got nothing, and that it was right that the other six children should have this land. There is also an utter failure to show any undue influence or fraud inducing the execution of the deed. The law does not presume incapacity, fraud or undue influence and when the deed has stood as long as this one, and has been acquiesced in by the grantor, the presumption in favor of the deed can only be overcome by clear and satisfactory evidence.

This conclusion makes it unnecessary for us to consider the question of limitation. The judgment of the court does not deprive the plaintiffs of any interest they take in the land under the deed; it only determines that the land passed by the deed in the year 1887. The rights of the parties under the deed are reserved in the judgment and are yet to be determined by the circuit court.

Judgment affirmed.

CUMBERLAND TELEPHONE AND TELEGRAPH CO. v. CITY OF HICKMAN.

SAME v. DAVIDSON, &c.

(Filed June 10, 1908—To be reported.)

1. Cities Enacting Ordinances—Constitutional Requirements—Applicability—Kentucky Constitution, section 46, requiring three readings of a bill on three separate days in each house of the Legislature before its passage, and, on its final passage, to receive the votes of at least two-fifths of the members elected to each house, applies only to an act of the State Legislature, and is not applicable to an ordinance enacted by a city council.

2. Telephone Franchise—Granted by City Council—Authority Conferred—A franchise to operate a telephone exchange in a city, which the city may grant, is not the same thing as a franchise granted by the State. As to the latter, the right to exist as a corporate being, to exercise eminent domain, to carry on a business of a quasi public nature which is conferrable by sovereignty only, may be said to constitute a franchise, but none of these rights can be given by a municipal corporation.

3. Franchise—Ordinance Granting—Installing Telephone—Validity—Under Kentucky Statutes, section 3636, part of charter of cities of the fifth class, providing that no ordinance granting any franchise for any purpose shall be passed by the city council on the day of its introduction, nor within five days thereafter, nor at any other than a regular meeting, "an ordinance of a city defining a franchise for the installing of a telephone therein, providing for competitive bids introduced at a regular meeting of the council held more than five days before the passage of the ordinance, conferred a valid franchise on the bidder."

4. Action—Relief Demanded—Alternative Prayer—Under section 90, Civil Code, providing "if no defense be made the plaintiff can not have judgment for any relief not specifically demanded," where, in an action by a city against a telephone company for a violation of its franchise, the city asked that the company be required to remove its poles and wires from the streets, or if this could not be done, then that it be enjoined from charging its customers more than the amount fixed in the franchise, the defendant is not taken unawares if it confesses the petition when the court decides to grant either alternative of the prayer.

5. Same—Action—Who May Sue—Remedy—In an action by a city against a telephone company for a failure to comply with its contract to build and operate a telephone therein, thereby connecting it with other cities, the city may sue for the enforcement of the contract made in its behalf, or one or more of its citizens may sue, but the remedy at law in behalf of the citizen is inadequate. The appropriate remedy was an action for its specific performance.

Wheeler, Hughes & Berry and Wm. L. Granberry for appellant.

Robbins & Thomas and A. M. Tyler for appellees.

Appeals from Fulton Circuit Court.

Opinion of the court by Chief Justice O'Rear, affirming.

Hickman, a city of the fifth class in this Commonwealth, was asked by promoters of the scheme to be permitted to install a public telephone exchange within the corporation. In order to comply with the requirements of the law, the town council was duly called in extra session on August 16, 1894, when the proposition was regularly presented to the city. The council determined to grant the franchise. It directed the city clerk to advertise for the public sale of the franchise on September 3, 1894, which was the date of the next regular meeting of the council. At this August 16 meeting, there was introduced an ordinance detailing the privilege or franchise to be granted, its term, 20 years, and the conditions on which it was to be granted. The ordinance was laid over till the September 3 meeting. The terms, conditions, &c., mentioned in it, were identical with those directed to be advertised, and which were advertised by the clerk for sale. The sale was made, as advertised, and the bid reported to the council for action on September 3, 1894. The bid

being acceptable, was approved by the council, which thereupon unanimously adopted the ordinance introduced on August 16, preceding, granting the franchise. Among the conditions contained in the ordinance, were these two: (1) That work should be begun within six months to install the telephone plant, and be finished within one year from the passage of the ordinance; (2) that the rate charged each subscriber within the city should not exceed \$2.50 per month. There were other conditions not involved in this consideration, save one clause, which was relied on by the plaintiffs below as a condition of the grant, and which will be noticed more particularly in its appropriate place in this opinion. The successful and accepted bidder styled himself J. J. Downey, trustee. Subsequently he sold his holdings to Chowning & Wright, who assumed the obligations imposed upon Downey, trustee. The owners of the franchise were about to let it lapse, by their failure to begin work upon the plant within the time specified in the ordinance, when they besought the city council to grant them an extension. This the council did on March 11, 1895, but on the condition that the maximum charges to subscribers to the system in the city should not exceed \$1.50 a month for residences, \$2.50 for business houses, and where one subscriber had a phone in his residence and one in his business house also, the maximum charge for the two should not exceed \$3.50 a month. This condition was accepted by Chowning & Wright, and the plant was thereafter duly installed and set in operation. Later on, the plant was sold to appellant, and the franchise assigned to it. After running the system for some time on the basis fixed in the ordinance of September 3, 1894, as amended by the one of March 11, 1895, appellant increased its charges to its subscribers above the maximum fixed in the latter ordinance. Whereupon, the city brought an action in equity against appellant, setting out the sale and the granting of the franchise, and the terms and conditions thereof, alleging the breach of the terms by appellant, to the oppression of the citizens of the plaintiff city, and couched the prayer of its petition in the following language: "Wherefore, the plaintiff prays that it be adjudged that the defendant has violated its franchise and no longer has the right to do business in the city of Hickman, and that it be required to remove its poles and wires from the streets and passways of the city, and enjoined from continuing in business in the city, if this can be done; but if it can not be done, then it prays that the defendant be enjoined and restrained from charging its customers more than the amounts fixed in the franchise and amendments thereto, and that it be required to fix reasonable and uniform rates for all citizens served by it, and it prays for all necessary and proper relief."

The defendant failing to answer, the allegations of the petition were taken as confessed, and the case was submitted to the court for judgment. The court adjudged that, by the terms of the ordinance granting the franchise being operated by appellant, the franchise was to continue for twenty years from September 3, 1894; that appellant was restricted to a charge not exceeding \$1.50 a month for residences, or \$2.50 a month for business houses, or \$3.50 a month where both were supplied with phones to the same subscriber; and that appellant had exceeded these charges. It was thereupon adjudged, as relief, that appellant be enjoined from charging more than the prices above named and as fixed by the amended ordinance of March 11, 1895. When this judgment was entered, appellant closed its exchange and attempted to abandon its franchise.

At this juncture appellees Davidson and others filed their suit in equity, on their own behalf, and on behalf of all other citizens of Hickman, setting out the foregoing facts, and asked a relief, that

the defendant (appellant) company, be enjoined and restrained from discontinuing its service to the citizens who were subscribers and would be during the remainder of the contract period of twenty years, and that the company be required to carry out its contract in that behalf. The result of this last suit was a judgment in favor of the plaintiffs, enjoining the removal of the poles, wires, &c., by the defendant, and requiring it to continue for the remainder of the twenty years' service to the citizens of Hickman at a uniform charge of not exceeding that fixed in the amended ordinance of March 11, 1895.

The appellant has prosecuted appeals from each of the judgments above recited.

Appellant's contentions against the judgments are, that the ordinance granting the franchise was passed on September 3, 1894, was void because, (a) it was not passed in conformity to section 46, of the Constitution; (b) that it was passed at the same session at which it was introduced, thereby coming in conflict with section 3636, Kentucky Statutes.

It also contends that the judgment by default was not authorized by the prayer of the petition, and was void, or at least erroneous.

As to the last judgment it contends, in addition, that a court of equity has not the power to compel a telephone company to exercise its franchise by operating the plant, but that the only remedy is to forfeit the franchise.

These questions will be discussed in the order in which they are presented.

Appellant's first contention is based upon the analogy between ordinances of a public and political nature, enacted by municipalities in virtue of the power conferred upon them by the Legislature, and similar laws, when passed by the Legislature itself. Therefore, it reasons, these prosecutions deemed essential to protect the public from improvident action by the Legislature, and which the Constitution has instituted as checks upon such legislation when attempted by the General Assembly, must, by the force of the same public consideration, be applied to town councils when they come to legislate. Section 46, of the Constitution, invoked by appellant under this head, provides that all bills must first be printed; reported upon by a committee; read at length on three different days in each house, and shall, on their final passage, receive the votes of at least two-fifths of the members elected to each house, &c. The particular point sought to be applied here is, that the ordinance should have had three readings, on as many different days, before it could pass. There is no reason why, if one of the features of section 46 applies to town council proceedings, all would not. It would seem to be a sufficient answer to appellant's contention to say that the section is part of the sub-division devoted to the legislative department, the General Assembly. The section is not only inapplicable to the extent of being impossible of application to town councils, but it shows that it was not intended to apply to any legislative body but the General Assembly of the Commonwealth. Town councils of several of the classes of cities have not two bodies. Nor does there seem to be the same ground for interposing such elaborate safeguards in the procedure of these minor bodies which are composed of but few members, sitting in public session in the midst of their constituents also comparatively few in number. But let that be as it may, we find no language in section 46 indicating that the convention intended it to apply to proceedings in municipal legislative bodies. Interpretations of constitutions by rules of implication, is most hazardous, and if ever employed at all it ought to be done

in those instances only where the subject-matter and language leave no doubt that the intended meaning of the clause which may be under investigation, may be reached in that way only, and be reached in that way with approximate certainty. This section has never been treated by the courts, the Legislature, or the town councils as applying to the latter. We have no doubt that it was not intended to apply to them.

The other argument of the appellant as to the regularity of the passage of the ordinance is, that as the ordinance granting the franchise was passed the same day that the franchise was sold (after it was sold), it was passed on the same day as of its introduction. To establish a basis for this argument it is necessary for appellant to also establish its assumption that until an ordinance (or resolution) is passed defining or creating a franchise, such franchise can not be offered for sale; and, therefore, that the action of the council on August 16, directing the advertisement of the franchise for sale, in advance of an ordinance or resolution creating or setting apart, the franchise which it was proposed to sell, was void. It will be conceded that, but for the action taken at the meeting of August 16, the action taken on September 3, would have been void, because of section 3636, Kentucky Statutes, which provides: "No ordinance, and no resolution granting any franchise for any purpose, shall be passed by the city council on the day of its introduction, nor within five days thereafter, nor at any other than a regular meeting."

* * *

September 3 was the date of the regular meeting. To get a proper survey of the question we need to go back a step. What is the franchise which the section of the statute treats of, and which is the subject of all this legislation? And why the necessity for its public sale?

The franchise to operate a telephone exchange in a city, which franchise the city may grant, is not the same thing as the franchise to do the thing when granted by the State. As to the latter, the right to exist as a corporate being, to exercise eminent domain, to carry on a business of a quasi public nature—these attributes and rights, conferrable by sovereignty only may be said to constitute a franchise. But none of these can be given by a municipal corporation. Its powers are limited. Its most complete, exclusive authority may be said to be over its streets and other public ways. It may grant privileges with respect to the proper occupancy of such places not inconsistent with their enjoyment for the primal uses to which they were dedicated. The municipality may say whether it will allow telephone wires to be stretched over its streets, and if so, at which height, and on which side of the street, or whether to be confined in conduits beneath or along the surface. This right, which is most akin to a right of way, is the subject of grant, which partakes in turn of the nature of a contract. Formerly municipalities granted such easements and privileges inconsiderately, or made them the subject sometimes of questionable jobbing. The people of the municipalities were thereby frequently imposed upon. To mitigate such evils, the Constitution of 1891 provided (section 164): "No county, city, town, taxing district or other municipality shall be authorized or permitted to grant any franchise or privilege, or make any contract in reference thereto, for a term exceeding twenty years. Before granting such franchise or privilege for a term of years, such municipality shall first, after due advertisement, receive bids therefor publicly, and award the same to the highest and best bidder; but it shall have the right to reject any or all bids. This section shall not apply to a trunk railway."

This section, though self-operative (*Nicholasville v. Board of Council*, 18 Ky. Law Rep., 592), was the basis, it may be supposed, for the adoption of section 3636, Kentucky Statutes, *supra*, the latter section providing a more secure method of doing what the Constitution mandatorily required. Reading the two sections together, in view of their purpose, we find that it is not essential to the granting of a franchise by the city that it should, before offering it for sale, first "create" the franchise. On the contrary, the Constitution (section 164) indicates that the city should first advertise for bids, which includes the necessity of setting forth the nature of the proposed franchise, and the terms on which it is to be exercised; then expose the proposed franchise for sale publicly to the highest and best bidder; then, if the bids are acceptable, and one is accepted, grant the franchise to the accepted bidder. The statute amplifying the procedure (the details of which are not touched upon at this point by the Constitution) requires the ordinance or resolution granting the franchise to be accepted only at a regular meeting of the council, after it shall have been introduced and laid over for at least five days. The procedure in the case at bar measures exactly up to these requirements. The proposed ordinance defining the franchise which the city intended to grant, should acceptable bids be received therefor, was introduced at a meeting held more than five days before the regular meeting at which it was passed; the city directed the proposed franchise to be advertised for public, competitive sale, which was done; the bids were acceptable, and when the bids were canvassed and one was accepted, the council in regular session adopted, by the vote of more than three of the members, the ordinance granting the franchise.

We do not mean to intimate that if the city had pursued the course of defining or "creating" the franchise by an ordinance adopted before the advertisement and sale that such procedure would have been irregular. Strictly, a franchise could not be "granted" until there was a grantee to take it. Such an ordinance would be merely declaratory of the municipal purpose, but could confer no rights on anybody until there was a sale of the franchise, as required by section 164, of the Constitution. Rights, mere incorporeal things, can not be carved out and set apart as a log might be hewn. But they will depend upon the power of the grantor to create, and of the consent and capacity of the grantee to take. When so granted, they may then be regarded as separated from the general body from which they were taken, and as having become the absolute or qualified property of the grantee.

We conclude that the granting of the franchise in the manner done in this case was regular, and in strict conformity with the requirements of the Constitution (section 164) and statute (section 3636, Kentucky Statutes).

Appellant contends that the ordinance of March 11, 1895, was void, because it was also the granting of a franchise without sale, and because the ordinance was passed on the same day it was introduced. If the ordinance granted any additional privilege in the streets and public places of the city, there would be no irresistible force in appellant's contention here, or, even if there was some material change in the terms of the grant, so as that the city was, or might have been, prejudiced by the fact, a very grave question would arise whether such an ordinance was not, in effect, the granting of a franchise without a sale. But we do not find such to be the case here. The grantee had agreed to certain conditions as part consideration for this grant. One of them, the rate of tolls, was of particular interest to the public, in other words, the city. The other condition was as to the time within which work on the

plant was to be begun. The latter was not of so much importance to the city, except as a kind of security that the bid was in good faith. It was a condition which the city might have been justified in not exacting the penalty for its breach, if the delay had not been material. Still, it was a matter of importance to the grantee, as it weakened his hold upon its franchise. We think it was competent for the city to waive the forfeiture of the franchise because the work had not been begun within six months, in consideration of a reduction of the rates by the owner of the franchise. There was a sufficient consideration moving to the city, to support its waiver of the forfeiture; likewise a sufficient consideration moving to the grantee of the franchise to support his agreement to charge patrons within the city, and for whose benefit and welfare the contract had been entered into, a less rate than was originally agreed upon. In doing this, the city granted no new or different right in the use of its streets, nor did it abate any of the original consideration. On the contrary, it gave only what it had originally agreed to grant, and got in exchange, a better consideration. What it had given up was a right to claim a forfeiture—the giving up of which is not the granting of a franchise.

The first suit—the one brought by the city—contained a prayer of alternative relief, it will be remembered. Section 90, Civil Code, contains this provision: "If no defense be made, the plaintiff can not have judgment for any relief not specifically demanded."

It of course does not follow that he would be entitled to any relief he prayed for specifically in such case. The prayer for relief serves a two-fold purpose: (1) It defines specifically the legal right claimed by the plaintiff, by which the court will be guided in granting or refusing the relief; for while it may not be granted, as not being warranted, supposing the plaintiff has mistaken his right, the court will not voluntarily grant him some other relief which the facts might have entitled him to, but which the plaintiff may not desire, and the court would not, in such case, be warranted in thrusting it upon him. (2) The other feature of the prayer is to apprise the defendant of what is demanded of him. For the same facts may authorize any of several remedies. If the defendant is informed that only a particular remedy is asked, he may be willing to concede that. Hence, he may make no defense. It would be most unjust to allow the plaintiff to subsequently have, or the court to grant, an unclaimed remedy to the defendant's great surprise. But, as more than one remedy may be authorized by the same facts, and as, particularly in equity, it rests in the sound discretion of the court, sometimes, as to which of them shall be granted, the plaintiff ought not to be put to the jeopardy of losing his case because he misjudges the temper of the judge. Hence, the Code allows, as the common law did, a prayer for alternative relief. (Newman's Pl. & Pr., section 356.)

In such a prayer the court and defendant are advised of the plaintiff's claim of right, and of the specific redress he asks. The defendant is not taken unawares if he confesses the petition, when the court decides to grant either alternative of the prayer, as he was informed such was specifically demanded. It was not for the plaintiff, either, to clip the range of the chancellor's discretion in dispensing equity. In this case, the chancellor did grant an alternative of the plaintiff's prayer—the one doubtless which appealed to his judicial sense of right upon the admitted facts. We think there was not error in his action.

Appellant contends that as it had bought a franchise—a mere right to occupy certain public streets with its poles and wires—it could not be compelled to use its right, i. e., to occupy the streets; that a court of chancery will not enjoin a man from abandoning his right, or incorporeal property. We might grant so much, yet it is a suf-

ficient response, we think, that notwithstanding, the court will compel him who bought a right to pay for it, although he may choose to abandon it. In this instance, the pay, the consideration, is the furnishing of a service, not the personal services of the contracting party, but the use of his property and of the time and labors of his employes. In this case as part of the consideration for the grant of the franchise, there is the contract of the grantee to furnish certain classes of persons certain valuable privileges. The contract was made for their benefit, and based upon a valuable consideration. They may sue for the enforcement of the contract made in their behalf, and one or more may sue for all. Or, the city might have maintained the suit, as it was the party with whom the contract was made. (Section 21, Civil Code of Practice.) The remedy at law in behalf of the citizens for the breach of the contract by the telephone company is inadequate. The appropriate remedy was an action in equity for its specific performance. This view the circuit court took.

In the ordinance granting the franchise in question there is a preamble setting forth the extent of the use of the streets contemplated in the establishment of the telephone plant in the city, which clause concludes thus:

"And are to set up poles, string wires, and make necessary excavations therefor, and thus connect said central exchange, and thereby each subscriber's instrument, with such other cities and towns, to-wit: Paducah, Mayfield, Fulton and Union City, and to such other neighboring towns to which this system can be extended, for the full term of twenty years upon the following terms and conditions:
* * *

"Fifth. The rate for use of said telephone shall not exceed \$1.50 per month for each telephone, and \$1 per month for exchange service for each subscriber."

The language of the ordinance of March 11, 1895, except as to the amount, is substantially the same as above.

The circuit court held that the patrons were entitled to have telephone service furnished them to Paducah, Mayfield, Fulton and Union City, without any additional charge over \$1.50 a month for residence phones, \$2.50 a month for phones in business houses, and \$3.50 a month where one subscriber uses both. The parties had never so construed the terms of the ordinance. Nor is such construction consistent with the common usage or based upon the probabilities. We think it was the intention of the parties to express by the language quoted "that subscribers to the Hickman Exchange should have the privilege of using its long distance connections from the place where their phones were, in the city, without having to go to a pay station; but in fixing rates, the parties dealt only with the service which was to be completely performed within the city of Hickman. To the extent indicated the judgment in the case of Davidson and others was erroneous and is reversed, and remanded, for the entry of a judgment in conformity herewith. But the judgment in the case of the city of Hickman, is affirmed.

UNITED STATES FIDELITY & GUARANTY CO. v. JONES, &c.

(Filed June 10, 1908—Not to be reported.)

1. Actions—Injunction Bonds—Supersedeas—The plaintiff in the action for an injunction having superseded the judgment and taken an appeal to the Court of Appeals, the action on the bond should

have been continued until the appeal was heard and determined by this court.

2. Damages—Injunctions—The ground upon which damages are sought to be recovered on the injunction bond is that plaintiff's mules remained idle from the time it was executed until the injunction was discharged. In this class of cases there can be no recovery if the damages alleged to have been incurred could have been avoided by ordinary care. If he could have gotten work by ordinary diligence, he can not recover for remaining idle.

Lewis McQuown, W. L. Brown and Eli H. Brown for appellant.

Sam C. Hardin for appellees.

Appeal from Laurel Circuit Court.

Opinion of the court by Judge Hobson, reversing.

M. A. Miller brought a suit in the Laurel Circuit Court against Cy Jones and Green Jones, asking that her title to a half interest in a certain tract of land, be quieted. She obtained an injunction restraining the defendants from removing the timber from the land during the pendency of the action, and executed an injunction bond with the United States Fidelity and Guaranty Company as her surety. On the trial of the action, her petition was dismissed and the injunction dissolved. Thereupon this suit was brought by Cy Jones and Green Jones against the United States Fidelity and Guaranty Company, upon the injunction bond, to recover the damages they had sustained, by reason of the injunction. The defendant filed an answer controverting the allegations of the petition as to the damages sustained. Afterwards it filed an amended answer pleading that M. A. Miller had taken an appeal to this court from the judgment dismissing her petition and dissolving her injunction; that she had executed a supersedeas bond; that a supersedeas had issued superseding the judgment of the circuit court, and that the case was pending in this court. The defendant thereupon entered a motion that the action be continued until the appeal was heard and determined in this court. The circuit court overruled the motion and the case being tried, the plaintiff recovered a judgment for \$425; the defendant appeals.

In *Gardner v. Continental Insurance Co.*, 31 Ky. Law Rep., 69, it was held by this court that a supersedeas suspends the judgment but does not annul it or undo what is already done. It has no retroactive effect; whatever is done under the judgment while it is superseded is done without authority from the judgment as it is then powerless. Other authorities are collected in that opinion. (*Durham v. Strait*, 119 Ky., 222, 2 Cyc., 910.) In *Johnson v. Williams*, 82 Ky., 45, it was held that, after the judgment was superseded, the plaintiff could not bring an action upon the judgment and take out an attachment against the defendant's property. As the judgment had not been superseded at the time the action was brought, it was properly instituted; but the subsequent supersedeas took away from the judgment all efficacy while the supersedeas remained in force; and the action should have been continued until the appeal was determined in this court or the supersedeas was discharged. As the supersedeas does not undo what has been done. Where it is given pending an action it does not operate to abate the action, for this might seriously prejudice the plaintiff, where he had obtained a lien by his action or where he had the parties before the court and might be unable in a second action to get his process served. But the condition of the bond is that the surety will pay the defendant such

damages as he may sustain by reason of the injunction if it is finally decided that the injunction ought not to have been granted. When the judgment dissolving the injunction is superseded, it has not been finally determined that the injunction ought not to have been granted; for that is the question to be determined on the appeal. When a judgment dissolving an injunction is not suspended, as provided in section 748, of the Civil Code, the injunction is no longer in force. The provisions of that section were not complied with, and so the dissolution of the injunction took effect; the injunction being no longer in force, the defendants were at liberty to proceed with the cutting of the timber on the land. This right in them was not affected by the subsequent supersedeas of the judgment; and if the condition of the bond had been that the surety would pay the damages sustained if the injunction was dissolved, then the supersedeas would have been no defense to this action. But the condition of the bond is that the surety will pay the damages sustained if it is finally decided that the injunction ought not to have been granted; and no judgment can be entered against the surety when there is no final decision in force to this effect. The court therefore should have sustained the defendants' motion to continue the case while the supersedeas was in force.

The chief ground upon which damages were sought was that the plaintiff in the action had five mules which remained idle from the time the injunction was obtained until it was discharged. The rule in this class of cases is that the plaintiff can not recover any damages which he might have avoided by ordinary care and that if he could get other work to do by ordinary diligence, he can not recover for remaining idle. The plaintiff testified in effect that the mules remained idle because his time was taken up in taking proof in the action and looking after it as he had no time to look around and get work for his mules or to put them at something else. The proof taken in the action related to the title to the land. If no injunction had been taken out, it would have been just as necessary for the plaintiff to look after the taking of the proof as it was. The fact that the plaintiff was unable to work his mules was therefore due to the fact that he had to attend to the defense of the law suit. Such damages as these are not covered by injunction bond. If the plaintiff could not attend to the law suit and work his mules, he should have gotten somebody else to work the mules, and if the work could have been obtained for the mules by ordinary diligence, no recovery can be had upon the bond for their remaining idle. (Lewis v. Scott, 95 Ky., 486; Miller v. Smith, 29 Ky. Law Rep., 242.) In the latter case the court pointed out what damages might be recovered upon an injunction bond in a case like this under proper allegations.

Judgment reversed and cause remanded, for a new trial.

TRUSTEES OF WHITE SCHOOL DISTRICT, NO. 15. OF LYON
COUNTY, &c. v. CUMMINS, &c.

(Filed June 10, 1908—Not to be reported.)

Schools—Levy of Taxes to Build Schoolhouse—Power of Trustees—Any indebtedness in excess of the income and revenue for any year is void under section 157, Constitution, but the county superintendent, having made the levy to build the schoolhouse, the trustees of the school district had the right to make the levy and allow the fund to accumulate until it amounted to a sufficient sum

to warrant them in undertaking the building of the schoolhouse. They had a right to make a levy in 1903, another in 1904. and then wait until 1905 to make another levy to build the school house.

Newton W. Utley for appellants.

R. W. Lisanby for appellees.

Appeal from Lyon Circuit Court.

Opinion of the court by Judge Hobson, reversing.

On Dec. 27, 1902, the county school superintendent condemned the schoolhouse in District No. 15, for repair or building. In June, 1903, he again condemned the house and ordered a new house to be erected. A similar order was given on July 1, 1904, and July 3, 1905. Each of these orders was in writing and served on the trustees. On July 6, 1903, the trustees regularly levied a poll tax of one dollar on each white, male and an ad valorem tax of twenty five cents on each \$100 worth of property for the purpose of carrying out the order of the county superintendent. On Aug. 20, 1904, they made a similar levy for the same purpose, and on Aug. 5, 1905, they made a third levy. In the year, 1905, they set about building the schoolhouse, the old one being in a wretched condition and having been, three times, condemned by the county superintendent. They built the house at a cost of something like \$400. The taxes levied would not yield this amount; and their intention was to raise the balance among themselves or by private subscription. They made themselves personally responsible for the debt, and placed the taxes in the hands of the sheriff for collection. After all this had been done, this suit was brought by certain tax-payers of the district enjoining the sheriff from collecting the taxes on the ground that the taxes were levied to pay a debt contracted in violation of section 157, of the Constitution. The circuit court sustained the injunction and the defendants appeal.

The tax levies for the three years will amount to less than \$300 and the money realized from the tax levies, with the other resources in the hands of the trustees will not be sufficient to pay the debts incurred for the building of the schoolhouse; and there will be a balance which they themselves will have to pay or raise by private subscription. But this is no reason why the tax-payers should not pay the taxes which have been levied. The county superintendent having condemned the schoolhouse, the trustees had authority to make the levy which they made. Having made the levy, they could allow the fund to accumulate until it amounted to a sufficient sum to warrant them in undertaking the schoolhouse. Any indebtedness contracted in excess of the income and revenue provided for the year and other assets on hand, is void under section 157, of the Constitution, and the municipality can not be authorized to assume it. That which is void under this section is the indebtedness in excess of what the trustees may lawfully create. In other words it is the balance due on the building of the schoolhouse over and above the levies and assets in hand. But the trustees had authority to make a levy for the year 1905, and were authorized to use the assets on hand in building the schoolhouse. They had a perfect right to make a levy in 1903 and another in 1904, and then wait to 1905 to make another levy and build the schoolhouse. This whole question was carefully considered in the case of Overall v.

Madisonville, 102 S. W., 279. The opinion in that case fully sustained the action of the trustees here.

Judgment reversed and cause remanded, for a judgment dismissing the petition.

COMMONWEALTH, FOR USE, &c. v. TEEL, &c.

(Filed June 10, 1908—Not to be reported.)

1. Office and Officer—Action on Bond of Town Marshal—Unlawful Arrest—Necessary Parties—In an action on the official bond of a town marshal for damages for an unlawful arrest, the town is not a necessary party and is not liable for the wrongful acts of such officer, and can not protect such officer by refusing to join in an action with and for the benefit of a person injured by the wrongful acts of its officials.

2. Same—Necessary Allegations—Penalty Recoverable—In an action on the official bond of a town marshal for damages for an unlawful arrest it is not necessary to allege in the petition that the city council had, by an ordinance, fixed a penal sum to be named in the bond, for, if the plaintiff recovers he is not limited by the amount of the penalty named in the bond.

3. Same—Approval of Bond by City Council—In an action on the official bond of a town marshal for damages for an unlawful arrest, the petition is not demurrable because it fails to allege that the bond was approved by the city council, nor it is demurrable because there is no averment that the plaintiff had not committed any offense authorizing his arrest.

4. Damages—Recoverable Against Sureties—In an action against a town marshal and his sureties on his official bond for damages for an unlawful arrest, the plaintiff should not be permitted to recover against the sureties anything more than compensatory damages.

Allen D. Cole and W. A. Byron for appellants.

Geo. Doniphan and Geo. B. Kinney for appellees.

Appeal from Bracken Circuit Court.

Opinion of the court by Judge Nunn, reversing.

Appellant, J. I. Rosenthal, instituted this action in his own name and in the name of the Commonwealth of Kentucky for his use and benefit against appellee, Lake Teel and his co-appellees who were sureties on Teel's bond as marshal of the city of Augusta. The bond is as follows:

"Whereas Lake Teel has been appointed marshal of the city of Augusta, Ky., by the city council of said city and bond is required of him as such marshal for the faithful performance of the duties of the said office, also his duties as tax collector and the duties of all offices of which by virtue of said chapter 250, of the General Assembly of Kentucky, approved July 3d, 1893, and of section 3628, chapter 89, of the Kentucky Statutes, he is ex-officio incumbent. Now we, Lake Peel, principal, and James A. Thomas, John Riley and M. T. Flannery, his sureties, of Bracken county, Kentucky, do covenant with the Commonwealth of Kentucky for the use of the city of Augusta, Kentucky, in the penal sum of (\$3,000) three thousand dollars, that the said Lake Teel as marshal of the said city will faithfully perform all the duties required of him as such mar-

shal and tax collector and the duties of all offices of which he is made by the aforesaid chapter and section of the Kentucky Statutes ex-officio incumbent, and all such other duties as may be by ordinance or law required of him and that he will faithfully discharge all such duties and deport himself according to law.

"Witness our hands this January 8, 1906.

"LAKE TEEL,
"JAMES A. THOMPSON,
"JOHN RILEY,
"M. T. FLANNERY.

Attest, "W. C. WITTMEIER,
"City Clerk."

The defendants, appellees, filed the following special demurrer to the petition:

"The defendants specially demur to the petition herein because the petition shows on its face that no right of action enures upon the bond set out in the petition, in the name of the Commonwealth of Ky. or the Commonwealth of Kentucky, for the use of J. I. Rosenthal or in the name of J. I. Rosenthal. The bond was executed under section 3621, of the Kentucky Statutes."

The court sustained this demurrer, and thereupon appellant presented and offered to file an amended petition making the city of Augusta a party defendant to the action, alleging that it refused to join in the action for his benefit. Objections were made to the filing of this amendment which the court sustained, but made it a part of the record in the case. If the city was a necessary party to the action the court erred in refusing to allow the amended petition to be filed. But, in our opinion, the city was not a necessary party. It is not the law that cities and towns can save their officials from having to respond in damages by refusing to join in actions with and for the benefit of persons injured and damaged by the unlawful and wrongful acts of their officials. (Scott v. Commonwealth, For Use, &c., 29 Ky. Law Rep., 571, and Connelly v. American Bonding & Trust Co., 24 Ky. Law Rep., 714.). In the last named case the bond was executed for the marshal of the city of Newport, and in that case the court said:

"It is thought that this bond does not indemnify any person other than the city of Newport because the undertaking is to the said city alone. We are, however, of the opinion that the bond is controlled by the following sections of the Kentucky Statutes, and must be read in connection therewith, and that under the provisions of these sections, the informality of not naming the Commonwealth of Kentucky as the obligee of the bond will not prevent a recovery thereon by the person aggrieved. Said sections are as follows:

"Section 3751. The obligation required by law for the discharge or performance of any public or fiducial office, trust or employment, shall be a covenant to the Commonwealth of Kentucky from the person and his sureties that the principal shall faithfully discharge the duties of the office, trust or employment; but a bond or obligation taken in any other form shall be binding on the parties thereto according to its terms.

"Section 3752. Actions may be brought from time to time on any such covenant or bond in the name of the Commonwealth, for her benefit, or for that of any county, corporation or person injured by a breach of the covenant or condition, at the proper cost of the party suing, against the parties jointly or severally, together with the personal representative, heirs and devisees or distributees of such of them as may be dead; and the recovery against principal and surety shall not be limited by the amount of the penalty named in such

bond. Nor shall the recovery be restricted only to such duties or responsibilities as belong to the office, post, trust or employment at the date of the covenant or bond, but may include any duties or responsibilities thereafter imposed by law or lawfully assumed."

"The bond is broad enough to cover an unlawful arrest or unnecessary and illegal punishment by the officer. (Johnson v. Williams' Adm'r., 23 Ky. Law Rep., 658.)"

These authorities and the sections of the statutes quoted show conclusively that the special demurrer was improperly sustained.

What we have said disposes of the only issue on this appeal; but appellees' counsel present in their brief several matters showing that the allegations of the petition are not sufficient to sustain a cause of action. First, the petition does not show that the penal sum required to be fixed by the city council by ordinance was done as required in section 3621, of the Kentucky Statutes. Second, the petition does not show that the bond was ever approved by the city council. Third, the petition does not show that Lake Teel committed a wrong, nor were any facts alleged which negatived the presumption of innocence of the officer. Fourth, The petition shows that it is sought to recover exemplary damages, rather than compensation. Conceding that the allegations of the petition are insufficient to support a cause of action, we can not affirm the judgment for that reason, because no general demurrer was filed. If the lower court had sustained a general demurrer to the petition appellant would have had the right to file an amended petition curing the defects therein. As the judgment will have to be reversed for the reasons stated we will express our opinion on the questions presented, so that on the return of the case a trial may be had according to law. With reference to the first proposition, our opinion is that it was not necessary to allege in the petition that the council, by ordinance, had fixed a penal sum to be named in the bond. for if appellant recovers anything in the action he is not limited by the amount of the penalty named in the bond. (Section 3752, Kentucky Statutes.) The question, as to whether the petition was defective in failing to allege that the bond was approved by the city council, is settled by the case of Growbarger, &c. v. U. S. Fidelity & Gauranty Co., &c., 31 Ky. Law Rep., 555. In that case this court said:

"It is further contended by counsel for appellee that the judgment of the lower court, sustaining the demurrer and dismissing the petition as to appellee, was authorized, because of the admission in the petition, that the council or other authorities of the town of McHenry, had neither made nor kept a record of the execution of the marshal's official bond, or of its acceptance by that body."

It is true that the petition contains in substance, the admission that the records of the council fail to show the execution or acceptance of the bond, but it also contains the averments in substance that the bond was required of the marshal by the council, that it was duly executed by him, as principal, and appellee as surety. and also that it was duly approved and accepted by the town council, and in addition, an attested copy of the bond, obtained of the proper authorities of the town, was filed with and made a part of the petition.

These averments being confessed by the demurrer, constitute a sufficient statement of the facts showing the proper execution and acceptance of the bond. If no such bond was required of the marshal, or it was not executed by him, or signed by appellee as surety, or accepted at all, as alleged in the answer filed by appellee, without waiving its demurrer to the petition, such matters of defense or

any of them, if sustained by sufficient evidence, on the trial, would prevent a recovery as to it, though the mere failure of the council to make the record of the execution or acceptance of the bond. would not do so, if in fact it was executed and accepted.

In executing an official bond only a substantial compliance with the requirements of the statute is necessary. If statutes compelling the giving of bonds prescribe what they shall express, it is to subserve a two-fold purpose: First. Uniformity in the terms and conditions. Second. The best protection possible from the bond to the public and those dealing with the officer. But as said in *Mechem on Public officers*, section 268, such statutes are usually directory.

"And inasmuch as the substance is ordinarily more to be regarded than the form, it is quite generally held that unless the statute expressly declares that a bond not executed in form prescribed shall be void, the statute will be construed to be directory only and a substantial compliance with it will suffice."

In section 269, the author mentions informalities which would not invalidate an official bond:

"Thus that the bond is not taken by the proper persons or in the prescribed manner, or that it was not approved, by the designated officer, or that it was not signed or acknowledged in the presence of a particular officer, or that it was given before the time specified, or not until the time fixed had expired, or was not stamped as required, or that the officer who gave it had not been sworn, is immaterial, and the bond, if otherwise perfect, will be enforced."

Again, in section 270, it is said:

"So the fact that the officers charged with the duty of approving or filing the bond, had not performed it, will not defeat the validity of the bond, or release the sureties from it."

Also in section 313, it is declared:

"Approval being thus for the protection of the public only, it is well settled that where, by virtue of the bond, the officer has been inducted into office, his sureties can not escape liability for his defaults because the bond was not approved by the proper officer or was not approved at all."

"Applying to the facts alleged in the petition the law is announced by *Mechem* in the several sections, *supra*, it is patent that the lower court erred in sustaining the demurrer to the petition upon the ground last indicated. Indeed, our consideration of all the questions raised by the demurrer to the petition has constrained us to disagree with the conclusions reached by the learned judge of the circuit court, for we are of the opinion that the demurrer should have been overruled."

The allegations of the petition are not sufficient to sustain a cause of action for the reason that it does not negative, sufficiently, the alleged presumption of the officer's innocence of wrong doing. It should have been alleged, specifically, that appellant was not committing any offense in the presence of the officer, and that he had not committed any felony for which he was subject to be arrested. These allegations were necessary to show that the officer had no right to arrest him without a warrant. If the petition were not defective in the particular mentioned, then it was not necessary to allege that appellant was not trying to escape from the officer after his arrest, or that he did not first assault the officer, for if the arrest were unlawful, the presumption is against the officer: that is it will be presumed that his beating and bruising of appellant, was without authority of law. On the other hand, if the arrest of appellant were lawful and he sought to recover damages for the unlawful and unnecessary beating and bruising while under

arrest, then it would have been necessary for appellant to have alleged that he was not trying to escape from the officer, and that he did not first assault him. If the arrest were lawful, and appellant endeavored to make his escape, and in doing so made an attack upon appellant and put him in danger of bodily harm, the officer was not bound to retreat, but in such case, had the right to use any means for his self-defense and for the keeping of the prisoner that were necessary and reasonable. (Connolly v. American Bonding Co., &c., supra.)

With reference to the fourth proposition, it is sufficient to say that the petition is not defective, and that, if appellant recovers anything, he should not be permitted to recover against the sureties of the officer anything more than compensation. (Johnson &c. v. Williams' Adm'r, 111 Ky., 289, and Scott v. Commonwealth, For Use, &c., 29 Ky. Law Rep., 571.)

For these reasons the judgment of the lower court is reversed and remanded, for further proceedings consistent herewith.

NOLAN'S ADM'R v. STANDARD SANITARY MF'G. CO.

(Filed June 10, 1908—Not to be reported.)

1. Master and Servant—Injury to Servant—Negligence of Master—Safe Place to Work—Verdict—New Trial—Appeal—John E. Nolan, in a trial before a jury, was given a verdict for \$1,085 damages for personal injuries caused by the negligence of his employer in not furnishing him a safe place in which to work. The trial court set aside the verdict and granted defendant a new trial on the ground that the verdict was excessive, to which he excepted and prayed for an appeal. Before the second trial he died. The action was revived in the name of his administrator and on the second trial, a verdict was rendered for the defendant. This appeal is prosecuted by the administrator to review the first verdict and judgment granting the defendant a new trial.

2. Same—Excessive Verdict—Burning by Molten Metal—Cripple for Life—Pain and Suffering—Lost Time—Where, on the trial of an action, by a servant, against his master for an injury caused by not furnishing him a safe place to work, made so by the negligence of the foreman, in causing another laborer to dig a trench near where the plaintiff was at work, in doing which he struck a ladle containing molten metal, which the plaintiff was carrying, causing it to splash upon his leg and foot, burning both severely, causing him great suffering and pain and the loss of three months time from his work, and making him a partial cripple for life, a verdict of \$1,085 was not excessive.

3. New Trials—Discretion in Granting—Review—While the circuit court has a broad discretion in granting new trials, its exercise is subject to review and where it is made manifest that it erred in the exercise of such discretion, it is the duty of this court to correct the error. It is with great reluctance that this court will interfere with a verdict on the ground that it is excessive and the circuit court should be equally reluctant to do so.

4. Reversing First Judgment—Entry of First Verdict Ordered—Wherefore, the judgment is reversed and cause remanded, with directions to the lower court to set aside the last verdict and judgment, and in lieu thereof, to enter of record the first verdict returned by the jury and enter judgment in conformity therewith.

Baird & Underwood for appellant.

O'Neal & O'Neal for appellee.

Appeal from Jefferson Circuit Court, Common Pleas Branch, First Division.

Opinion of the court by Judge Settle, reversing.

This action was instituted by John H. Nolan to recover of appellee damages for personal injuries alleged to have been caused by its negligence.

There were two trials of the case in the court below. The first trial resulted in a verdict and judgment in Nolan's favor for \$1,085 damages. Upon appellee's motion, the lower court set aside the verdict and judgment and granted it a new trial, to which Nolan at the time excepted, and prayed an appeal, which was granted. Thereafter, and before the second trial, Nolan died, intestate, from a cause in no way resulting from the injury complained of. Andrew M. Sea, by appointment of the Jefferson County Court, duly qualified as the administrator of his estate and was made a party to the action, which was revived and thereafter prosecuted in his name as such administrator.

The second trial of the case resulted in a verdict and judgment for appellee.

The purpose of the administrator in prosecuting this appeal is to obtain a review of the action of the circuit court in setting aside the first verdict and judgment and granting appellant a new trial.

It appears from the averments of the petition, as amended, that Nolan was in the employ of the appellee as a molder and that while engaged in its service, in that capacity, he was injured by molten iron being thrown upon his leg and foot, whereby both were badly burned and injured. The particulars of the accident, as alleged, were that Nolan, acting immediately under an order from appellee's foreman, was engaged in catching with a ladle the molten metal from a cupola furnace when the foreman ordered a negro laborer to dig a trench in the sand, about the base of the furnace, in doing which he struck Nolan's ladle, containing the hot metal, causing it to splash upon his leg and foot. That his injuries were caused by the unsafeness of the place where he was required to work, made so by the negligence of the foreman in directing the negro, without notice to Nolan, to dig the trench under his ladle, while he was in the act of drawing off the molten metal, and in failing to furnish a sufficient number of hands to carry on the work of drawing the metal from the cupola; the digging of the trench being as claimed by Nolan, intended as a substitute for an assistant to aid in removing the metal.

While the testimony as to the manner of Nolan's receiving his injuries was conflicting, that introduced in his behalf strongly conduced to prove that he was injured by the negligence of appellee's foreman as claimed, and the case was manifestly one for the decision of a jury. This seemed to be fully recognized by the lower court, notwithstanding its action in granting the new trial following the return of the first verdict.

It appears from the record that the new trial was granted solely upon the ground that the damages awarded Nolan, by the verdict of the jury were, in the opinion of the trial judge, excessive, this conclusion being based, as stated by the court, upon the fact that Nolan, upon becoming able to resume his occupation, earned about the same wages that he received before the accident. As

to the character and extent of Nolan's injuries there was little, if any, contrariety of evidence. It showed that his leg was badly burned by the molten iron metal below the calf and that his foot was also so badly burned as to make him, at least, a partial cripple; and when his deposition was taken, which was a year after the accident, Nolan testified that he was still lame, and to use his own expression, this lameness was then so marked as to cause him, when walking, to throw the injured foot "like a stringhalted horse." His statement that the injuries to his leg and foot compelled him to remain in his room and refrain from work for a period of three months was not contradicted by any witness; and if he failed to testify in respect to his physical and mental sufferings during that time, the burns themselves, as well as the character of the red hot liquid metal, by which they were inflicted furnished indisputable evidence of the pain and suffering, both physical and mental, they must necessarily have caused. Leaving out of estimate the question of whether his injuries were permanent, and the three months loss of time from his work, we would be loath to say that Nolan's mental and physical suffering, caused by the injuries in question, did not entitle him to the \$1,085 allowed by the verdict; certainly it can not justly be claimed that this amount was excessive, if, in addition to his mental and physical suffering and the loss of time from his work, any impairment of his ability to earn money from the date of the accident to the time of his death, caused by his injuries, should also have been considered by the jury in estimating the damages to which he was entitled.

The evidence as to the three months' loss of time resulting from Nolan's injuries was as positive as was that with respect to his physical and mental suffering, but the evidence as to any impairment of his ability to earn money was not as convincing. There was, however, some evidence as to such impairment and it was for the jury to say, from all the evidence, whether his capacity to earn money, between the date of the accident and his death, was to any appreciable extent thereby lessened. If so, his estate should have been compensated for the loss. The fact that it was shown he was at one time earning, after the accident, the same wages as a molder he had received before, while competent as evidence on the question of whether any impairment of his earning capacity had resulted from the injuries sustained, was not, as the trial court seemed to think, conclusive of the absence of any impairment. If, as there was some evidence to show, Nolan was permanently lamed by the burns he received, and it rendered him less skillful in his occupation as a molder, and thereby prevented him from obtaining such wages as persons of ordinary skill in the same occupation would ordinarily receive, then such lameness amounted to an impairment of his ability to earn money, and constituted a proper element of damages. Obviously, a lame man, whatever may be his occupation, has not the same capacity to earn money as a man sound in body. And it is the loss of capacity the law compensates.

While the circuit court has a broad discretion in the matter of granting new trials, its exercise is subject to review, and when it is made manifest that it has erred in the exercise of such discretion, it is the duty of this court to correct the error. The discretion, thus lodged in the circuit court, should be exercised with great caution in determining whether a new trial should be granted on the ground that a verdict is excessive in amount. It is with great reluctance that this court will interfere with a verdict upon

that ground, and the circuit court should be equally reluctant to do so.

In expressing its mind in regard to its right to interfere on account of an alleged excessive verdict, this court, in *Louisville & Nashville Railroad Company v. Mitchell*, 87 Ky., 327, said:

"We are not acting as a jury, and it is only when it is glaringly excessive and appearing at first blush to have resulted from passion or prejudice, that we can interfere. The power should be sparingly exercised and only in extreme cases. This is the policy of the law, reasonably and necessarily so. It is difficult, indeed, impossible, to measure, with mathematical certainty the extent of some of the elements of compensatory damages. The law has confided the duty to the opinion of the jury as the best means of arriving at their extent, even approximately, and their verdict should be regarded *prima facie*, as the result of an exercise of an honest judgment upon their part."

In *Mud River Coal Co. v. Tipton*, 12 Ky. Law Rep., 940, it was held that a verdict for \$1,725 damages, for injuries which confined the plaintiff to his bed several months and made of him a cripple, was not excessive. In *Adams Express Co. v. Smith*, 24 Ky. Law Rep., 1915, a verdict of \$1,000 damages, for breaking the plaintiff's leg, was held not excessive.

In *Bowling Green Stone Co. v. Capshaw*, 23 Ky. Law Rep., 945, the plaintiff recovered \$2,000 for an injury to his foot, which made him a slight cripple. The verdict was held not excessive.

In *C. & O. Ry. Co. v. Wiley*, 28 Ky. Law Rep., 770, 90 S. W., 557, a verdict of \$1,500 recovered by Wiley against the railroad, for the breaking of two bones in and an injury to the nerves of the hand, was held not excessive.

In *City of Louisville v. Hall*, 28 Ky. Law Rep., 1064, 91 S. W., 1133, for a "serious injury" to his ankle, a boy, 17 years of age, was allowed \$800. This court said the verdict was not excessive. In *Louisville Gas Co. v. Page*, 27 Ky. Law Rep., 885, 86 S. W., 1112, a woman recovered a verdict for \$2,000, for injuries sustained to her elbow, by falling over a gas box. This court held that the verdict was not excessive, and in doing so, in part said:

"In a case like this, where there has been a serious injury, and much physical pain and suffering, and there being some evidence from which the jury might conclude that the injury may be permanent, it is difficult, if not impossible, for a jury or court to determine with exactness the proper compensation. The mere fact that the court would not have fixed the compensation so high as a jury has done, is no reason for setting the verdict aside, and granting a new trial. To justify the court in doing so, the verdict must be so excessive as to induce the belief that it was caused by passion or prejudice of the jury."

The right of this court to correct an erroneous ruling of the circuit court in granting a new trial, has been declared in numerous cases. Thus in *Week v. Patton*, 12 Ky. Law Rep., 776, it is said:

"While appellate courts are slow to disturb the action of the lower court, in granting a new trial, they will do so when it plainly appears, as it does in this case, that there is no good reason why a new trial should have been granted."

In *Anderson v. Republic Iron and Steel Co.*, 107 S. W., 220, it is said:

"The trial court erred in holding as a matter of law, that appellant ought to have known of the defective condition of the roof, and in setting aside the verdict and awarding a new trial. At the

time of granting the new trial, the trial court indicated his purpose to give a peremptory instruction for appellee on the second trial, and upon the same evidence did instruct the jury to find for appellee. Under the authority of *Richards v. Louisville & Nashville Railroad Company*, 20 Ky. Law Rep., 1478. we are of opinion that the order granting a new trial should be set aside, and that judgment should be entered upon the verdict rendered at the first trial."

(*Richards v. L. & N. R. R. Co.*, 20 Ky. Law Rep., 1478; *Curry v. Fetter*, 15 Ky. Law Rep., 494; *L. & N. R. R. Co. v. Ricketts*, 21 Ky. Law Rep., 662; *Crowley v. L. & N. R. R. Co.*, 21 Ky. Law Rep., 1434.)

The record in this case shows no error in the admission or rejection of evidence, or in giving or refusing instructions. The single error was in the action of the circuit court in setting aside the first verdict and granting appellee a new trial. This should not have been done.

Wherefore, the judgment is reversed and cause remanded, with directions to the lower court to set aside the last verdict and judgment and in lieu thereof to enter of record the first verdict returned by the jury, and to enter judgment in conformity therewith.

EWING v. COMMONWEALTH.

(Filed June 11, 1908—To be reported.)

1. Homicide—Killing Woman on Street—Apparent Friendliness—Proof of Previous Threats—Circumstances Indicating Malice—On the trial of one for murder, who shot and killed a woman with whom he was walking on the street, although the parties were then apparently friendly, it was not error to allow proof that on the Saturday prior to the killing the accused when informed that the deceased had had a fight with another girl with whom he was intimate he said: "I wish I had been there," and also that he said on the day of the killing, "I would as soon kill this bitch as not," the jury was to judge whether the friendliness was apparent or real, and the proof, taken in connection with his buying a pistol and other circumstances, should go to the jury on the question of malice.

2. Same—Malice Must Be Proven—Question for Jury—The doctrine of implied malice does not obtain in Kentucky, and when we reject the doctrine of implied malice, the existence of malice is a question for the jury, and the offense which would otherwise be murder becomes voluntary manslaughter where, under the evidence, the jury find, as a fact, that the killing was not done with malice aforethought.

3. Same—Question of Malice—Reckless Shooting—Indifference to Consequences—When we do not apply the doctrine of implied malice and submit the question of malice to the jury, it must follow that if the jury find the act was done without previous malice, they may find that the act was voluntary where it was done so recklessly or carelessly as to show an indifference to consequences. He who puts a loaded pistol at the head of another and pulls the trigger, knowing the danger attending the act, can not be heard to say he intended no harm.

4. Pointing Pistol at Another—Unlawful Act—Homicide Resulting—Offense Committed—The pointing of a pistol at another whether loaded or unloaded, is unlawful under the statute, and where a homicide is committed by the doing of an unlawful act, the offense is

involuntary manslaughter, if the facts are not sufficient to constitute murder or voluntary manslaughter.

Nat. A. Porter and J. M. Simmons for appellant.

N. B. Hays and C. H. Morris for appellee.

Appeal from Warren Circuit Court.

Opinion of the court by Judge Hobson, reversing.

Charles Ewing was indicted in the Warren Circuit Court for the murder of Carrie Shields. He was found guilty, as charged, and his punishment fixed at imprisonment in the penitentiary for life, and from this judgment he appeals.

Carrie Shields was sixteen years old. According to the proof for the Commonwealth, a girl named Girtie Ray was intimate with Charles Ewing. The killing occurred on Monday. On the previous Monday Carrie Shields had a fight with Girtie Ray, Charles Ewing being away at the time. On the following Saturday when he returned, Girtie Ray told Charles Ewing that Carrie Shields had jumped upon her and beat her up while she was drunk, and he said "I wish I had seen her," or "I will see her," the witness did not remember which. He bought a pistol, and on the following Monday morning the two women, Charles Ewing, and a man named Sam Chambers, all the parties being negroes, were at a saloon near the landing below Bowling Green. They drank in the saloon, and took whisky away with them. While they were there, Ewing was heard to say, with an oath, "I would just as soon kill this bitch as not." The saloon-keeper told him not to raise any racket there, and he said "all right." They got into a boat and went across the river, and then to a man's house. As they were returning from the man's house to the river, when the party were walking quietly along the turnpike and apparently in a good humor, Ewing suddenly raised his pistol, and without stopping, fired it, striking Carrie Shields, with whom he was walking, in the head and instantly killed her. Sam Chambers and Girtie Ray were walking behind him, and witnessed the shooting.

On the other hand, the proof for the defendant is, that Sam Chambers had given his pistol to Carrie Shields, and as they were walking along she held it in his face, saying "Don't you believe I'll shoot you." He said "No." She repeated this three or four times, and he each time said "No." They didn't stop walking. He pulled out his pistol, and threw it in her face, and said as he testified: "No, I don't believe you will shoot me; and I bore too hard on my trigger, and it went off and killed her. She had her pistol in my face, and I had mine in hers; we both were walking along with our pistols in each other faces, and my pistol went off."

"Q. Did you pull it purposely?"

"A. No, sir."

"Q. Did you think she was meaning to shoot you?"

"A. No, sir."

"Q. What was her manner?"

"A. She was laughing, and I thought she was playing."

"Q. And when you pulled your pistol, what was your intention?"

"A. I was playing myself when I pulled mine."

"Q. Did you mean to shoot her?"

"A. No, sir."

The defendant's testimony is in some measure corroborated by other witnesses.

The court did not err in allowing the proof as to what the defendant had said when he heard that Carrie Shields had beaten up Girtie Ray when she was drunk, or in allowing proof of what he said at

the saloon that morning. Although the parties were then apparently friendly, the jury were to judge whether the friendliness was apparent or real; and the proof taken in connection with his buying the pistol and the other circumstances in the case were sufficient to go to the jury on the question of malice.

The court instructed the jury as to murder, involuntary manslaughter, and shooting by misadventure. He also gave an instruction on self-defense, but he gave no instruction on voluntary manslaughter, his view of the case being that the shooting was either murder or involuntary manslaughter.

There is no doubt that at common law it would have been a question for the court, and not the jury, whether this shooting was done with malice or not; and that at common law it would have been held murder. In 1727, the Chief Justice delivered the unanimous opinion of all the judges (in the case of *Rex v. Oneby*, 2 Stra., 766), as follows: "The judges are to determine what is malice, or what is a reasonable time to cool; and they must do so upon the circumstances of the case; the jury are judges only of the fact, and we must determine whether it be deliberate or not. Hence it is, that in summing up the evidence, the judges direct the jury if you believe such a fact, it is so; if not, it is otherwise; and they find either a general or a special verdict upon it. There is no instance where the jury ever find that the act was done by malice, or that the party had or had not time to cool; but that must be left to the judges upon the circumstances of the case."

In 2 Bishop on Criminal Law, section 376, it is said: "An actual intent to take life is not a necessary ingredient in murder, any more than it is in manslaughter."

Again, in section 680, it is said: "Ordinarily when one without legal excuse so uses a deadly weapon that the death of a human being results therefrom, the law either conclusively or as a violent presumption of fact, infers malice aforethought, and adjudges the act of the murder."

Under these authorities, it is manifest that at common law the killing in this case would be held to be murder upon the ground that malice was implied from the use of a deadly weapon under the circumstances shown. But the doctrine of implied malice does not obtain in Kentucky. (*Farris v. Commonwealth*, 14 Bush, 362; *Buckner v. Commonwealth*, 14 Bush, 601; *Trimble v. Commonwealth*, 78 Ky., 176.) Yet it does not follow that because the doctrine of implied malice does not obtain in Kentucky, the shooting here, which would be murder at common law, is involuntary manslaughter. When we reject the doctrine of implied malice, the existence of malice is a question for the jury, and the offense which would otherwise be murder becomes voluntary manslaughter, where under the evidence the jury find as a fact that the killing was not done with malice aforethought. Accordingly, it has been held in Kentucky, in a long line of cases, that, where one kills another by the wanton, reckless or grossly careless use of fire arms, the offense, if without malice aforethought, is voluntary manslaughter, although he had no intention to kill. (*Sparks v. Commonwealth*, 3 Bush, 111; *Chrystal v. Commonwealth*, 9 Bush, 669; *York v. Commonwealth*, 82 Ky., 360; *Smith v. Commonwealth*, 93 Ky., 318; *Montgomery v. Commonwealth*, 26 Ky. Law Rep., 356; *Brown v. Commonwealth*, 28 Ky. Law Rep., 1335.) These opinions rest on the common law principle that a man must be held to intend the necessary consequence of his act.

In 1 Bishop on Criminal Law, section 313, it is said: "There is little distinction except in degree between the will to do a wrongful thing and an indifference, whether it is done or not. Therefore, carelessness is criminal, and within limits supplies the place of affirmative criminal intent."

When we do not apply the doctrine of implied malice, and submit the question of malice to the jury, it must follow that if the jury find the act was done without previous malice, they may find that the act was voluntary where it was done so recklessly or carelessly as to show an indifference to consequences. To hold otherwise, would be to ignore the rule that he who acts recklessly is in law presumed to intend the consequences of his act. He who puts a loaded pistol at the head of another and pulls the trigger, knowing the danger attending the act, can not be heard to say he intended no harm. (1 Greenleaf on Evidence, section 18.) At common law the offense was not involuntary manslaughter where the act amounted to a felony, or was likely to endanger life, although done without intention to kill. (Roberson's Crim. Law, section 198, and cases cited.) As the reckless killing of another with a deadly weapon was not involuntary manslaughter at common law, when we hold that such a killing is not necessarily murder, the offense which was not involuntary manslaughter at common law, does not become involuntary manslaughter; but when the jury finds that the homicide is not with malice aforethought, it is a voluntary killing without malice, the recklessness of the act supplying the intent to harm the person shot.

This case is on all fours with *Messer v. Commonwealth*, 25 Ky. Law Rep., 700; 27 Ky. Law Rep., 527; 28 Ky. Law Rep., 821. On the first appeal of the case, the judgment was reversed because the court failed to give an instruction on involuntary manslaughter. On the second appeal it was reversed because the court by oversight omitted an instruction on accidental killing. On the third appeal, the judgment was affirmed. But, on each trial, the court gave an instruction on voluntary manslaughter.

On another trial, the court will, by its instructions, submit to the jury these propositions:

1. If the defendant willfully, feloniously and with malice aforethought, shot and killed Carrie Shields, he was guilty of murder.

2. If he shot and killed her, without malice aforethought, by the reckless or grossly careless handling or shooting of the pistol, when he knew the pistol was dangerous to life if used in the way he used it, they should find him guilty of voluntary manslaughter, although he did not intend to shoot her.

3. If he was not reckless or grossly careless in using the pistol, but intentionally pointed it at her, although believing it would not go off, not intending to shoot her and not having reason to apprehend that it would go off, he was guilty of involuntary manslaughter.

4. If the shot that killed her was accidental and unintentional on the part of the defendant, and not willful, and with malice aforethought, as defined in number one; or the result of his recklessness and carelessness, as defined in number two; or of his intentionally pointing the pistol at her, as defined in number three; he should be acquitted.

There was proof introduced by the defendant to the effect that the defendant paid fifty cents for the pistol; that it was old and that he had repeatedly snapped it, and thought it would not go off; and it would appear from his evidence that the firing of the pistol was due to his pulling the trigger harder than he intended.

There was nothing in the case upon which to base an instruction on self-defense; and this on another trial will be omitted. There were witnesses to the homicide, and, therefore, the case does not fall within the rule that an instruction on self-defense should always be given where the proof is exclusively circumstantial. Section 1308. Kentucky Statutes, is as follows: "If any person shall draw a deadly weapon upon another, or shall point any deadly weapon at another, or shall hold or flourish or use in a threatening or boisterous manner, or shall, on a public highway, or at any school assembly, place of

public worship or business, or in going to or from any place of public worship, fire or discharge at random any deadly weapon, he shall be deemed guilty of a misdemeanor, whether said weapon be loaded or unloaded, and, upon conviction, shall be fined not less than fifty nor more than one hundred dollars, or imprisoned not less than ten nor more than fifteen days, or both."

The pistol was a deadly weapon for the woman was killed. It was unlawful for defendant to point it at her, whether it was loaded or unloaded. Where a homicide is committed in the doing of an unlawful act, the offense is involuntary manslaughter, if the facts are not sufficient to constitute murder or voluntary manslaughter. (Roberson's Crim. Law, section 198.) If, therefore, the defendant willfully pointed the pistol at the woman, and thus killed her, he is at least guilty of involuntary manslaughter.

The court will also give to the jury this instruction. "If there is a reasonable doubt of the defendant being proven guilty, he should be acquitted. If there is a reasonable doubt of the degree of the offense which the defendant has committed, he should only be convicted of the lower degree. Voluntary manslaughter is a lower degree of the offense than murder; and involuntary manslaughter is a lower degree than voluntary manslaughter."

Instructions 1 and 7, given by the court, are correct. In lieu of instruction 9 this court will instruct the jury that the word "feloniously" means proceeding from an evil heart or purpose; and that the words "malice aforethought" means a pre-determination to do the act of killing without legal excuse; and it is immaterial how suddenly or recently before the killing, such determination was formed. The instructions indicated and above referred to, constitute the whole law of the case.

Judgment reversed and cause remanded, for a new trial.

Judge Barker dissents.

The whole court sitting.

WALKER, &c. v. FIRST NATIONAL BANK.

(Filed June 10, 1908—Not to be reported)

Fraudulent Conveyances—Affirmed on the Evidence—The case is affirmed on the evidence, which shows that appellant W., to avoid paying a judgment, fraudulently conveyed to his father-in-law, S., his farm and all his personal property for the recited consideration of \$5,150, when in fact nothing was paid, which deed was set aside as fraudulent and without consideration and the property held subject to the judgment.

Spelght & Dean for appellants.

Herschel T. Smith for appellee.

Appeal from Hickman Circuit Court.

Opinion of the court by Judge Nunn, affirming.

On the 17th day of May 1906, appellee recovered in the Fulton Circuit Court a judgment against appellant, J. K. Walker, in the sum of \$202.13, with interest thereon from the date of the judgment, and \$12 as cost of the action. On the 17th day of September, 1906, it had issued from the clerk's office an execution on the judgment for the amount thereof and placed in the hands of the sheriff of Hickman county for execution. The execution was returned to the office

from which it issued endorsed "no property found." On May 17, 1906, the day on which the judgment was rendered, appellant Walker was in the town of Fulton, and on learning that the judgment had been rendered, he went to the telephone office and tried to call up his father-in-law, W. H. Stephens, one of the appellants, but failed to get him. When he returned to his home near Beelerton, he went to Beelerton, about eight or nine o'clock at night, and there again telephoned his father-in-law, and requested him to come to his home the next morning, which is about twenty-three miles from Mayfield, where his father-in-law lived. Both of appellants testified that there was not anything said in this conversation over the telephone as to the purpose for which appellant, Stephens, was wanted at the home of Walker. The next morning Stephens arrived at Walker's home about nine o'clock; but before that hour Walker went to a nearby neighbor, Mr. Elliott, who was a deputy county court clerk, and had him to go to his house and write a deed of conveyance of Walker's farm to appellant, Stephens. Elliott had nearly completed the writing of the deed when Stephens arrived. The consideration named in the deed was "4,000 cash in hand paid." Elliott took the acknowledgement of Walker and his wife, Stephens paid him the recording fee and directed him to take it to the county clerk's office in Clinton and have it recorded, which was done that day, May 18, 1906. Elliott left immediately after completing the deed and did not see any money pass from Stephens to Walker.

This action was instituted by appellee to set aside this deed, upon the ground that it was made for the fraudulent purpose of defeating appellee in the collection of its judgment, and that there was no consideration paid for the land. The proof shows, without contradiction, that such was the purpose of appellant, Walker, in making the conveyance; for it is shown, without construction, that some time before appellee instituted the action to recover a judgment on the note, he was in appellee's bank in Fulton and asserted that he would never pay the note, and that he would use all means in his power to avoid the payment of it; and upon being told that he had plenty of property and could be made to pay it he said to the officers of the bank, "crack your whip and collect it if you can." This, coupled with the fact that upon the same afternoon, he heard the judgment was rendered, he tried to get into communication with his father-in-law in Mayfield, and that night did get into communication with him and asked him to come to his house the next morning early, and before he arrived had obtained the services of a deputy county court clerk, and was having the deed prepared when his father-in-law arrived, and had the deed recorded that day. And, in addition to this, he, on the same day he conveyed the land, also conveyed by a separate writing several horses, mules, cows and calves, all his farming implements and growing crops to his father-in-law for the recited consideration of \$1,150 cash in hand paid. These facts show conclusively that appellant Walker's purpose was to prevent appellee from collecting its judgment. But appellants say that there is no allegation in the pleadings, and there was no proof, that appellant Stephens had notice of the fraudulent purpose of his son-in-law, Walker, and that the proof shows that he paid a valuable consideration for the land.

Walker testified that his co-plaintiff did pay him \$4,000 in cash for the land, and \$1,150 for the stock, crop and farming implements soon after he arrived at his house, on May 18, 1906, and Stephens testified to the same. They both testified that the sale of the land had been under consideration by both of them for several months prior to that date; that Walker desired to go west on account of his wife's health. But they did not state that there had been anything

previously said with reference to the sale and purchase of the crop, stock and farming implements.

It is a little remarkable that when Walker requested, by telephone, that his father-in-law, who was twenty-three miles away, to come to his house early the next morning, that there was nothing said why he wanted him to come so quickly and that Stephens failed to inquire why he wanted him to make such a trip under the circumstances, and more remarkable why Stephens would get up early enough to drive in a buggy, twenty-three miles, by nine o'clock, and carry with him, loose in his pockets, \$1,000 in gold, and enough paper money to make the sum of \$5,150, and without any knowledge or information that he would have any use for it. It is true that he anticipated the land deal would be made; but why carry with him \$1,150 extra? It seems that he had enough paper money to purchase the land, and it is strange that he would burden himself with \$1,000 in gold. It does appear that Walker took a trip west and remained a month or so, but his wife remained at home. It further appears that Walker had been in possession of this farm and all the personal property since the alleged sales. Stephens testified that he had had most of this gold for eight or ten years, and had owned most of the paper money several years before the trade. It also appears from the testimony that he had owed from three to five thousand for several years, on some of which he had been paying eight per cent. interest. It is strange that he owned all this money and had it in his possession, deriving no benefit from it, and at the same time owing debts upon which he was paying eight per cent. interest.

In our opinion, the lower court had grounds to believe that these transactions took place with the knowledge, upon the part of Stephens, of the fraudulent purpose of his son-in-law in making the sales; and also for believing that no real consideration passed from Stephens to Walker, for the land or the personal property, in which case, the sale was void as to appellee's judgment, whether Stephens had notice of the fraudulent purpose of Walker or not. (Sections 1906 and 1907, Kentucky Statutes.)

For these reasons the judgment of the lower court is affirmed.

STERNS COAL CO v. EVANS' ADM'R.

(Filed June 11, 1908—Not to be reported.)

1. Actions—Continuances—Correcting Error in Name of Party—where the real defendant to an action is before the court, a verbal error in the name of the defendant and correction thereof, whether it be a corporation or an individual, will not of itself be grounds for a continuance.

2. Mines and Mining—Foul Air—Death of Miner—Action for Damages—Evidence—Competency—Statutory Provision—Under Ky. Statutes, section 2731, providing for keeping fresh air in coal mines, on the trial of an action against a coal company for damages for negligently causing the death of a miner by reason of the explosion of foul air therein, evidence was competent, that a fan located on the outside, near the mouth, used to furnish pure and fresh air in the mine, was often, before the explosion, stopped and not in running order, and that the mine boss knew of this condition of the fan.

3. Same—This statute (section 2731), and every statute intended for the protection of laborers engaged in the hazardous business of

coal mining, should be rigidly enforced and mine owners held to a strict accountability in the performance of these statutory duties.

J. N. Sharp and M. S. Singleton for appellant.

H. H. Tye and I. N. Steely for appellee.

Appeal from Whitley Circuit Court.

Opinion of the court by Judge Carroll, affirming.

In 1904 this action was brought against the Sterns Coal Company, limited, averred to be a Michigan corporation, by the administrator of William Evans, deceased, to recover damages for the loss of his life, which occurred as alleged in a coal mine owned and operated by the defendant. It was alleged that the death of Evans was caused by the negligence of the company in failing to perform its statutory duties in respect to the mine, and that this failure caused an explosion that resulted in his death.

Afterwards, upon motion of the defendant, stating that it was a citizen of the State of Michigan, the case was transferred to the Federal court, but upon motion was remanded to the State court. In March, 1907, the Sterns Coal Company, limited, filed its answer, in which, after denying all the averments of the petition, it pleaded in one paragraph the contributory negligence of Evans, and in another that his death was the result of the negligence of his fellow servants. A reply completed the pleadings.

Upon the trial of the case, and at the conclusion of the testimony in chief for the plaintiff, he offered an amended petition striking out the word "Limited," in the name of the Sterns Coal Company, limited, discontinued the action against the Sterns Coal Company, limited, and asked that the cause proceed against the Stern Coal Company. Thereupon the Sterns Coal Company, by its attorney, J. N. Sharp, who was also the attorney engaged in conducting the defense for the Sterns Coal Company, limited, filed his affidavit in which he said in substance that the amendment was a surprise to the Sterns Coal Company, and it was not ready to proceed with the trial, as it had no witnesses present to testify in its behalf, and had no opportunity to summon witnesses. The affidavit further set out that the Sterns Coal Company was a corporation organized and existing under the laws of Tennessee, and did not own, control or manage the mine in which Evans lost his life. And further, that Evans was not in its employment at any time or at the time of his death.

The same attorney, on behalf of the Sterns Coal Company, offered to file its answer, in which it is averred that it was a Tennessee corporation, had never been served with process, had no connection with the mine in which Evans was employed, or anything to do with the causes that brought about his death.

The trial judge refused to permit the answer of the Sterns Coal Company to be filed, and also refused to continue the case. The defendant, declining to introduce any evidence, the jury, after being instructed, returned a verdict in favor of plaintiff, now appellee, for the sum of \$1,350.00. Upon this verdict a judgment was rendered against the Sterns Coal Company for the amount thereof.

Counsel for appellant insists that serious error was committed by the lower court in failing to continue the case on behalf of the Sterns Coal Company, and in rendering judgment against it. This argument is based upon the proposition that the judgment against the Sterns Coal Company, a Tennessee corporation, when the cause of action accrued against, and the action was instituted and prosecuted against, the Sterns Coal Company, limited, or the Sterns Coal Company, a Michigan corporation.

The apprehensions of counsel that a judgment was rendered against

a Tennessee corporation or that a Tennessee corporation operating under the name of the Sterns Coal Company will be obliged to pay any part of the judgment, are not well founded. The action was instituted and prosecuted against a Michigan corporation, and the judgment was rendered against that corporation. If there is no Michigan corporation known as the Sterns Coal Company, then the judgment is a nullity. The trial court, in permitting the amendment to be filed, and in declining to continue the case at the instance of the Tennessee corporation, and in refusing to permit an answer in its behalf to be filed, was evidently acting upon the theory that the real defendant was before the court, represented by counsel, defending the action, and resisting a recovery, and that the only effect of the amendment was to correct an error in its name. And if in fact the Sterns Coal Company, a Michigan corporation, did own or manage and control the mine in which Evans lost his life, and if in fact this corporation was represented by counsel in defending the suit, the action of the trial judge in permitting a verbal correction in its name did not prejudice its rights or entitle it to a continuance. If the real defendant is in fact before the court, a verbal error in the name and the correction thereof, whether it be a corporation or an individual, will not of itself be grounds for a continuance. And so, in this case, if the real name of the Michigan corporation, that was the owner and manager and operator of the mine in which Evans lost his life, was the Sterns Coal Company, it was not entitled to a continuance because the court struck out of its name the word "Limited." On the other hand, unless the Michigan corporation, operating under the name of the Sterns Coal Company, owned, operated and managed the mine, and was guilty of the negligence that resulted in the death of Evans, the judgment is a nullity.

And in this connection, it may be remarked that in its petition for a removal of the case to the Federal court, the Sterns Coal Company, limited, without disclosing whether it was a corporation or partnership averred that "it was a citizen and resident of the State of Michigan, and had its principal place of business at the city of Ludington, in that State." This petition was subscribed and sworn to by Robert L. Sterns, who averred that he was the treasurer of the company, and its chief agent and officer in this State.

In June, 1902, the Sterns Coal Company filed in the office of the Secretary of State, as provided in the statute, a statement setting out that the Sterns Coal Company, of Ludington, Michigan, was a corporation, and designating William Kinney, of Sterns, Ky., as its agent upon whom process might be served; but we will not further pursue the inquiry as to whether the appellant is a Tennessee or Michigan corporation. As if it was a Tennessee corporation, the judgment is void; if a Michigan corporation, valid. On the record before us, it appears that appellant is a Michigan corporation, and that it was properly proceeded against to recover the damages sustained.

We do not deem it necessary to go into a detailed statement of the evidence. It clearly establishes that the life of Evans was lost by the negligence of the mining company, and its agents and servants superior in authority to Evans. This negligence consisted in permitting large quantities of coal dust to remain in the mine and in failing to keep it properly ventilated. The failure to perform these duties resulted in what is known as a coal dust explosion.

During the examination of a witness for appellee, he was permitted to state, over the objection of appellant, that several people were killed in the explosion that resulted in the death of Evans. In our opinion this evidence was competent for the purpose of illustrating the force and deadly character of the explosion, and as a circumstance tending to establish the negligence of the appellant company. It was in fact a part of the *res gestae*.

It is also insisted that the court erred in allowing testimony that the electric fan, located on the outside of the mine, near its mouth, and used for the purpose of furnishing pure and fresh air in the mine, was often, before the explosion occurred, stopped because not in running order. It was not attempted to show that this condition existed after the explosion. We think evidence of the condition of this fan before the explosion and the fact that it frequently stopped furnishing fresh air, was competent for the purpose of bringing home to the appellant company knowledge that this machine so essential to the safety of the miners, was not in reasonably good working order. The evidence tended to establish that the air in the mine on the day of the explosion, and at other times previous thereto, was very bad, and that this resulted from the failure to keep this electric fan in operation, and that the mine boss knew of this condition, and also that the fan was not in good working order.

The statute, section 2731, provides in part that:

"The owner, agent or lessee of every coal mine * * * shall provide and maintain for every such mine an amount of ventilation of not less than one hundred cubic feet of air per minute per person employed in such mine, which shall be circulated and distributed throughout the mine in such a manner as to dilute and render harmless and expel the poisonous and noxious gases from each and every working place in the mines."

This, and every statute intended for the protection of laborers engaged in the hazardous business of coal mining, should be rigidly enforced, and mine owners held to the strictest accountability in the performance of these statutory duties. As said in *Godfrey v. Beattyville Coal Co.*, 101 Ky., 339:

"The statute requires each owner, or lessee, of a coal mine, under a penalty, to provide and maintain by appliances and means therein described, a prescribed amount of ventilation throughout its mine. And all that was necessary for appellant to make out his case *prima facie* was to show the injury was caused by an explosion, and that appellee had not complied with the statute; and thus would have been shifted the burden upon appellee to show the injury was caused not by explosion of accumulated gases of a noxious or inflammable character, but instead, by the imprudent and negligent manner in which the blasting was done by appellant." To the same effect is *Andricus v. Pineville Coal Co.*, 28 Ky. Law Rep., 704.

The judgment of the lower court is affirmed.

MODERN WOODMEN OF AMERICA v. NEELEY.

(Filed June 4, 1908—Not to be reported.)

Insurance, Life—Suicide—Evidence—This action was upon a policy of insurance which provided that if insured died by his own hand within three years, whether sane or insane, it should be void. Within three years the insured took his life. Under the rule announced in the cases referred to in the opinion herein, it is held that, under a policy of this sort, there may be a recovery although the insured took his own life, if at the time he had not sufficient mind to know that he was taking his life, and the evidence brings the case within the rule above stated.

Moorman & Warren and Truman Plantz for appellant.

Lee & Hester for appellee.

Appeal from Graves Circuit Court.

Opinion of the court by Judge Hobson, affirming.

The Modern Woodmen of America issued to John B. Neeley a certificate, insuring his life in the sum of \$1,000 for the benefit of his wife, Jennie M. Neeley. The certificate was issued on June 1, 1904. It provided, among other things, that if he died within three years, by his own hand, whether sane or insane, the certificate should be void. On April 24, 1907, he took his own life, and this suit was brought by his wife against the order to recover on the policy, charging at the time he took his life he had not sufficient mind to understand that he was taking his life. In the circuit court, judgment was entered in her favor, and the defendant appeals.

In *Manhattan Life Insurance Co. v. Beard*, 112 Ky., 445; *Metropolitan Insurance Co. v. Thomas*, 106 S. W., 1175, it was held by this court that, under a policy of this sort, there might be a recovery, although the insured took his own life, if at the time he had not sufficient mind to know that he was taking his life. The proof on the trial showed that several weeks before his death, the insured became of unsound mind. He thought that his business was bad, although it was in good shape. When a person would be talking to him he would run off fifteen or twenty feet, get down on his hands and bore his head in the ground, making a curious noise, between a groan and a scream. He would be that way for fifteen or twenty minutes, and then would be alright again for a while. The spells became more frequent and more violent as the days went by. He was living on the land of a Mr. Cayce. He was taken to a physician, and this did no good, and finally Mr. Cayce was sent for. At the sight of Mr. Cayce he seemed to get very much excited, and seemed to be trying to get away. Finally they managed to get him up to the house. Two or three men stayed there to watch him that night. He was very restless. He would get up and try to go out or walk out every few minutes; but one of them would watch him. Between twelve and one o'clock two of the men went to sleep, and about two thirty, when he seemed to be quiet in bed, the other man fell asleep. Toward daybreak he was aroused by hearing somebody go out of the house. He missed Neeley and went in search of him. About an hour afterward he found him hanging to a tree, where he had hung himself with a rope, about half a mile from the house. About three days before he died, he told one of the men with him that when one of these spells came on him something would commence to go around in his head, and it seemed to revolve and get faster and faster until it would get to where he didn't know what he was doing. Toward the last, the spells came every half hour; and from the evidence of a number of witnesses, he had no mind at all. We think the proof brings the case within the rule laid down in the cases cited. The court aptly submitted the question to the jury by instructions under which the verdict of the jury for the plaintiff is necessarily a finding by the jury that at the time that he took his own life he did not have sufficient mind to understand that he was taking his life, and that he did not have mind enough to know that the act would probably result in his death, or to inflict it with the intention of taking his own life. Among other things, the court told the jury that, "if the insured had mind enough to know that if he tied a rope around his neck it would likely produce death and that he tied the rope with that intention, there could be no recovery unless his mind was so far gone as to render him unconscious that he was taking his own life."

Appellant complains that the court did not require the jury to find a separate-general verdict, as asked by it, but the finding of the jury under the instructions which the court gave, is necessarily a negative answer to the question which the defendant propounded; and, therefore, the substantial rights of the defendant were not prejudicial by the refusal of the court to require the jury to find a separate-general verdict.

Judgment affirmed.

WATSON, &c. v. WATSON'S TRUSTEE IN BANKRUPTCY.

(Filed June 11, 1908—Not to be reported.)

Fraudulent Conveyances—Evidence—An examination of the facts of this record make it manifest that the conveyances complained of were fraudulent, and the lower court properly so held.

A. C. Moore and J. M. Mocquot for appellants.

Hendrick, Miller & Marble and C. H. Wilson for appellees.

Appeal from Livingston Circuit Court.

Opinion of the court by Judge Carroll, affirming.

This action was brought by the appellee trustee in bankruptcy for the purpose of recovering for the creditors of the bankrupt two tracts of land which he alleged the bankrupt had fraudulently conveyed a short time before taking the benefit of the bankrupt law, for the purpose of cheating and delaying his creditors.

On the 7th day of February, 1905, the appellant, Watson, conveyed to L. Z. Watson, his nephew, a tract of land, containing 88¾ acres for the recited consideration of \$1,000, to be paid within five days from that date. On the same day he conveyed to his sister, Mrs. S. A. Mandry, a tract of land, containing 100 acres, for the recited consideration of \$650, cash in hand paid.

John F. Watson testified that Mrs. Mandry's son, on the day and at the time the conveyances were made and at his house, paid him in cash, \$650; and that L. Z. Watson on the following day paid him the thousand dollars mentioned in the deed, and due on February 12th. He also proved by Isaac Lindley, who wrote both the deeds, that Mrs. Mandry was not present, but she was represented by her son, Phines Mandry, and that he saw Phines Mandry pay to Watson, in cash, \$650. And by L. Z. Watson that on February 8th, he paid to John F. Watson the one thousand dollars.

Asked what he did with the \$1,650, Watson said that when he went to bed on the night of the 8th of February, he put the money under his pillow, and the next morning, after getting up, he went out to feed his stock, and when he came back the money was gone. That there was no one about the house during the night or morning, except his wife, his three children, and his niece. That he did not at any time mention the theft to any person, except to his wife and niece. Nor did he take any steps whatever to discover the thief, or make any effort to ascertain who took the money, although he was satisfied that neither his wife, children, nor niece got it. He also said there was snow on the ground at the time, and that on examination of the premises he failed to discover any tracks or traces of persons who had come to or been about his house.

L. Z. Watson, whom the evidence discloses to be a young person about 24 years of age, a day laborer; and the owner of little property, said that his grandmother, on her death-bed, some seven years

before the transaction with John F. Watson, gave him the \$1,000 that he paid to Watson. That he did not lend any of the money out, or put it in a bank, or make any other use of it, but kept in his possession during these seven years the identical money that his grandmother had given to him; that no one knew he had it except his uncle, John F. Watson.

Although L. Z. Watson testifies that his grandmother, in 1897, presented to him as a gift, \$1,000, in money, the record shows that in December, 1896, she and her husband conveyed to John F. Watson, the appellant, a tract of land in consideration of his agreement to board, take care of, furnish medical treatment and give decent burial to them when they died, and there is no evidence, aside from the testimony of L. Z. Watson, that his grandmother had any property of any kind at the time of this alleged gift of \$1,000.

It is a significant fact that neither Mrs. S. A. Mandry, nor her son, Phines Mandry, were introduced as witnesses by appellant; nor did they testify; although the purpose of the action was to subject to the payment of John F. Watson's debts, the tract of land for which, according to his contention, Mrs. Mandry had paid him \$650.

The lower court held that the conveyances were fraudulent. The facts we have recited make this conclusion so manifestly just that we do not deem it necessary to extend this opinion in a further discussion of the inferences that might be drawn from the facts to show that the transaction was not an honest one. It might be admitted that in the presence of Lindley \$650 was paid by Phines Mandry to John F. Watson; but it would not be an unreasonable or far-fetched conclusion, especially in view of the failure of Phines Mandry or his mother to testify, that this \$650 was very promptly returned to them.

It is unnecessary to comment upon the alleged payment of the \$1,000 by L. Z. Watson.

The judgment of the lower court is affirmed.

MARTIN v. FERGUSON.

(Filed June 11, 1908—Not to be reported.)

Judgment for Specific Property—(Renebaum v. Atkinson & Co., 21 Ky. Law Rep., 587. for a full discussion of this question.) The language of section 1665 is too plain to require construction. Wherever there is a variance between it and section 588 of the Code, the statute must prevail for it was enacted subsequently to the Code provision.

Walter P. Lincoln for appellant.

J. D. Reed for appellee.

Appeal from Jefferson Circuit Court, Common Pleas Branch, Third Division.

Opinion of the court by Judge Barker, affirming.

This is an action by the appellee, S. J. Ferguson, for the recovery from the appellant, Catherine Martin, of three large mirrors, valued at \$200 each, and for fifty dollars damages for their wrongful detention. A judgment was rendered by the circuit court that the mirrors were the property of appellee; that they were worth

two hundred dollars each, and in the aggregate six hundred dollars; that the owner had been damaged in the sum of fifty dollars by reason of the wrongful detention of her property by the appellant, and that, in the event the mirrors could not be delivered, appellee was entitled to a judgment for six hundred dollars. On this judgment, the appellee caused execution to issue in her favor against the appellant for the sum of six hundred dollars. Appellant moved to quash this execution, and, the motion being overruled, has prosecuted an appeal to this court.

The only question arising upon the record before us is, whether or not, under the judgment rendered, the appellee has the right to demand the value of the property instead of the property itself, if the latter be tendered in satisfaction of the judgment.

Article 7, of chapter 46, Kentucky Statutes, is as follows:

"Sec. 1665. When a judgment shall be recovered for a specific thing, the plaintiff may have an execution issued thereon, commanding the proper officer to take the thing so recovered, and deliver the same to the plaintiff.

"1. Or the plaintiff may, if he so elect, take an execution for the assessed value of the thing recovered, and, in either case, the execution shall embrace the damages assessed for the detention and costs.

"2. The court may, upon satisfactory proof that the property recovered has perished, or that, without the fault of the defendant, it is out of his power to produce the same, order the plaintiff to receive the assessed value in lieu of such property."

As this statute was enacted subsequently to section 388, of the Code, wherever there is a variance between them, the statute must prevail. The language of the statute is too plain to require construction. It gives to plaintiff (appellee) the right, if she so elects, to an examination for the assessed value of the property involved, and for the damages assessed for the detention and for her costs. The whole question here was passed upon by this court in *Renebaum v. Atkinson & Co., &c.*, 21 Ky. Law Rep., 587, adversely to the contention of appellant, and, under the statute as construed in that case, the judgment must be affirmed, and it is so ordered.

L., H. & ST. L. RY. CO., &c. v. McDONALD.

(Filed June 11, 1908—Not to be reported.)

Railroads—Action Against—Improper Remark to Jury by Counsel—The objection to the improper remark of counsel complained of was sustained and the jury admonished to disregard it and this was all that was necessary under the circumstances.

The answer of the Louisville Railway was properly permitted to be read as evidence against it. Its evidence was not rendered incompetent because appellee's counsel subsequently took the position that no blame could be attached to it. (For a full statement of the facts and circumstances in the matter of the collision in which appellee was injured, see 31 Ky. Law Rep., 617.)

Helm & Helm for appellants.

Bennett H. Young and Max I. Greenstein for appellee.

Appeal from Jefferson Circuit Court, Common Pleas Branch, Third Division.

Opinion of the court by William Rogers` Clay, Commissioner, affirming.

On the 15th day of December, 1904, there was a collision at Fourteenth and Main streets in the city of Louisville, between a cut of freight cars, belonging to appellant, and a street car of the Louisville Railway Company, in which a number of people were injured. A description of the circumstances under which the collision occurred may be found in the opinion of this court rendered in the case of Louisville, Henderson & St. Louis Ry. Co. v. Kessee, By, &c., 81 Ky. Law Rep., 617. Appellee, claiming to be among the number injured, instituted this action against appellant to recover damages. He obtained a judgment for \$2,500, and the railroad company appeals.

For reversal, appellant relies upon the following grounds: First, irregularity in the proceedings and misconduct of counsel for appellee; second, excessive damages; third, error in admitting incompetent evidence; fourth, the giving of an instruction submitting the question of punitive damages to the jury.

First. In closing his argument for appellee, counsel used the following language:

"And with that I commit into your keeping the case of this soldier, maligned by these corporate lawyers, hunted and hounded by their detectives in the hope that they might have revenge on him, because he had the courage to testify against them in nine cases, most of which my friend Helm lost."

Counsel for appellant objected to the making of the above statement. At that time the court adjourned for dinner. On reconvening, the court said: "Gentlemen of the Jury: An objection was made at the time we adjourned, and I overruled it because I did not distinctly hear it. I want to say that that objection should be sustained, because it is not competent to refer in this case to what any jury in any other case did."

In sustaining the objection and admonishing the jury that it was not competent to refer to what any jury in any other case had done, we think the court did all that was necessary under the circumstances. The jury were told, in effect, to disregard the statement of counsel. We do not think it was incumbent upon the court to discharge the jury. Were we to hold that the jury should be discharged every time an improper remark is made by counsel, it would be almost impossible ever to complete a trial by jury.

Second. According to the testimony for appellee, his hand was hurt, his ankle injured, and he also received injuries on the back of his head. Dr. Reynolds testified that the diminution of the eye-sight resulted from the injury on the back of his head. The physicians who testified for appellant, state that appellee's eye-sight was not impaired by any of his alleged injuries. and that the injuries to his hand and ankle were very slight. In view of the conflicting evidence of the physicians, and of the further fact that appellee was entitled to punitive damages, we are unable to say that the sum of \$2,500, is excessive.

Third. During the progress of the trial, the answer of the Louisville Railway Company, admitting that McDonald was a passenger on the street car, was read in evidence. Counsel for appellant earnestly insist that this answer should not have been read, in view of the fact that counsel for appellee admitted that the Louisville Railway Company was not to blame. The latter company, however, was a defendant, and the court had a right to permit its answer to be read as evidence against it. The fact that counsel for appellee

subsequently took the position that no blame attached to the Louisville Railway Company, did not have the effect of rendering the evidence incompetent. Even if it did, we do not think the admission of such evidence was such error as to justify a reversal.

Fourth. With a few slight variations, the evidence as to the negligence of Thomas Riley, the flagman, is substantially the same in this case as it was in the case of Louisville, Henderson & St. Louis Railway Company v. Kessee, supra, and the subsequent cases growing out of the same accident, in all of which an instruction authorizing punitive damages was approved. Counsel for appellant argue with great force and earnestness that such an instruction is not proper. After a reconsideration of the question, however, this court has decided to adhere to the principle enunciated in its former opinions. We, therefore, hold that the court did not err in submitting the question of punitive damages to the jury.

Perceiving no error in the record prejudicial to the substantial rights of the appellant, the judgment is affirmed.

RIDDELL v. COMMONWEALTH.

(Filed June 11, 1908—Not to be reported.)

Malicious Cutting—Self-Defense—Instructions—(Wrist v. Commonwealth, decided June 9th.) While this court has held an instruction erroneous which contains the expression "brought on the difficulty," without describing the manner by which it was brought on, yet, where the instruction contains such a provision, such an instruction presents the law of the case and is not subject to criticism. The evidence shows that appellant began the difficulty, the error in the admission of evidence was not material and the judgment will not be disturbed.

J. B. White and R. W. Smith for appellant.

Jas. Breathitt and Tom B. McGregor for appellee.

Appeal from Estill Circuit Court.

Opinion of the court by Wm. Rogers Clay, Commissioner, affirming.

Appellant, John W. Riddell, was indicted by the Estill Circuit Court, at its December term, 1907, for the offense of malicious cutting and wounding, with intent to kill, one Edgar Thomas, with a knife or other edged instrument. At the April term of said court, he was tried and convicted and his punishment fixed at two years' confinement in the State penitentiary. From an order overruling his motion and grounds for a new trial, this appeal is prosecuted.

Appellant and the prosecuting witness, Edgar Thomas, were share tenants of a crop of corn grown on the farm of James Winn, in Estill county, during the year 1907. Appellant and Thomas were each to get one-fourth of the corn raised, while Winn was to receive one-half of the crop. On the day of the cutting, they, together with some other men, were engaged in gathering and hauling the corn from the field. The corn had been cut and placed in shocks in the field. As it was shucked they threw it on the ground in piles, one pile in each shock. They would then get down on their knees and throw the corn up into the wagon. While engaged in loading the corn, appellant and Thomas became involved in a dispute as to whether Thomas should have the thirteen or sixteenth

load. The evidence for appellant, shows that he first said to Thomas, "If you get the thirteenth load, there will be a better man in the field than I am." Thomas then sprang to his feet and ran his hand into his pocket, took therefrom his knife and opened it, and said to appellant, "Uncle John, God damn you, you can't bluff me or you can't run a sandy on me." Thereupon appellant got up, took out his knife and said, "Edgar, if you want to cut me, I will help you cut." Thomas then kicked up a frozen clod, and appellant told him not to hit him with that clod. Thomas thereupon changed his knife to his left hand and threw the clod with his right hand, at appellant's head, striking him on the arm. Appellant then grabbed Thomas and stabbed him in the back with his knife. According to the proof for the Commonwealth, Thomas had a small, broken knife, which he had been using in cutting vines from around the corn shocks. This knife was in Thomas' hip pocket, and he tried to get it out at the time he was cut, but failed to do so. Appellant began the difficulty by advancing on Thomas with an open knife and Thomas, after receding a few steps, picked up the clod and threw it at appellant. Appellant asks a reversal on the ground of admission of incompetent testimony and for errors in the instructions.

After the cutting, Thomas was carried to a barn near by, and the court permitted witnesses to testify to the fact that Thomas said that he was killed, and was going to die, and that he thereupon began to pray. While this testimony should not have gone to the jury, it was not material one way or the other, and we are of opinion that its admission was not prejudicial to the substantial rights of the appellant.

After submitting to the jury the question, whether or not the cutting was done maliciously and with intent to kill, or whether it was done in sudden affray and without previous malice, the court gave the usual self-defense instruction, with the following qualification:

"But this instruction is subject to the following qualifications: If the jury should believe from the evidence, beyond a reasonable doubt, that the defendant, John W. Riddell, brought on the difficulty in which said Edgar Thomas was cut, stabbed and wounded by assaulting the said Edgar Thomas with a knife when it was not necessary, and when the defendant had no reasonable grounds to believe it necessary, to protect himself from immediate danger of the infliction on him of death or great bodily harm, or which reasonably appeared to him about to be inflicted on him by said Thomas, and that the defendant thereby brought on such danger to himself, if they believe from the evidence that any such danger existed, then in that event, the jury can not acquit the defendant on the ground of self-defense or apparent necessity."

While this court has held an instruction erroneous, which contains the expression "brought on the difficulty," without describing the manner or means by which the difficulty was brought on, yet where the instruction contains such a provision, and qualifies it by words showing the manner in which the difficulty was brought on—as, for instance, in the case at bar, by using the words "by assaulting said Edgar Thomas with a knife," &c.—such an instruction presents the law of the case, and is not subject to criticism. (*Allen v. Commonwealth*, 9 Ky. Law Rep., 784; 10 Ky. Law Rep., 582; *Crawford v. Commonwealth*, 15 Ky. Law Rep., 356; *Johnson v. Commonwealth*, 15 Ky. Law Rep., 281; *O'Day v. Commonwealth*, 30 Ky. Law Rep., 848.)

Perceiving no error in the record prejudicial to the substantial rights of the appellant, the judgment is affirmed.

CITY OF GLASGOW v. CRISP.

(Filed June 11, 1908—Not to be reported.)

1. Streets—Re-construction Of—Injury to Person in Crossing Street—Damages—Appellee, in crossing one of appellant's streets stumbled over a pile of brick that had been left following the re-construction of the street, injuring herself. It was a bright, sunshiny day, she knew the bricks were in the street and saw them as she attempted to cross it. Upon the trial for damages for the injury, there should have been a peremptory instruction directing the jury to find for the city.

2. Same—While it is true that persons have a right to walk across the street at all points where it can be done with safety, no one, knowing of a danger, has a right to wantonly cast himself upon it and then demand damages for the injury received as a result of his own negligence.

J. Lewis Williams and B. G. Ellis for appellant.

Baird & Richardson for appellee.

Appeal from Barren Circuit Court.

Opinion of the court by Judge Barker, reversing.

The appellee, Alberta Crisp, in crossing East Main street in Glasgow, Kentucky, stumbled over a pile of bricks or cement blocks, which were in the highway, and fell, receiving severe personal injuries. Upon the trial of this action, which was instituted to recover damages of the municipality for the injuries which she received, a jury awarded her the sum of five hundred dollars; and of the judgment based upon this verdict, the city is complaining.

The city authorities had re-constructed the sidewalk in front of appellee's residence, and the bricks or cement blocks, which had been taken up and replaced by new material, were piled in the highway along the edge of the gutter. The debris was not piled in any regular order, but, as we gather from the testimony, was scattered along the edge of the street near the gutter. Appellee was crossing the street from her house to that of a neighbor, in order to inform the neighbor that her son had been injured. It was a bright, sunshiny day, and she knew the bricks were in the street and saw them at the time she undertook to cross it. She says, however, that she did not know they would "creen" or turn under her foot and throw her down.

Was appellant entitled to recover anything from the municipality? We think not. In making public improvements, municipalities are bound to use the highway for the deposit of debris, but, in doing so, they are required to use, at least, ordinary diligence to protect the public from danger, and, therefore, when it is dark, or when, from other causes, this use of the highway renders it dangerous to the public safety, sufficient warning must be given to the traveling public of the danger. Ordinarily, at night, lights are placed upon piles of stone or other debris, or barricades are made around them; but generally, it may be said that in daylight, where piles of stone or brick, or cement blocks are in the highway, it is presumed that the public can see them and will not recklessly walk over them and be hurt. While it is true that persons have the right to walk across the street at all points where it can be done with safety, no one has a right, knowing of a danger, to wantonly cast himself upon it and then demand damages for the injury

received, as a result of his own reckless negligence. The plaintiff in this case, as said before, deliberately walked over the blocks, which turned under her feet and threw her to the ground. For her to say that she did not know that blocks, piled roughly one upon the other, are liable to turn under one's feet if walked upon, is as absurd as to say that she did not know the law of gravitation prevailed at the particular place.

The facts of this case bring it within the principle enunciated in *City of Covington v. Manwaring*, 113 Ky., 592. There, the plaintiff stumbled over bricks on the sidewalk, which had been raised out of the level by the roots of a tree which was growing there; and although the plaintiff testified that he did not know the bricks were raised or in bad condition, it was held that the fact that he worked at a store near the place of injury and swept off the sidewalk at least once a week, charged him with knowledge of the condition of the bricks, and that he could not recover. The plaintiff, in the case cited had a stronger case than has appellee here. She admits that she knew the bricks were in the street and saw them at the time she walked upon them. The trial court should have sustained appellant's motion for a peremptory instruction to the jury to find for it at the close of plaintiff's testimony.

The judgment is reversed for a new trial consistent with this opinion.

HURT v. CHESS & WYMOND CO.

(Filed June 11, 1908—Not to be reported.)

Question of Fact—Finding of Chancellor—This controversy as to the sale of some stave timber, is simply over a question of fact, the evidence is very conflicting and it being a rule of this court not to disturb the finding of the chancellor where on all the evidence, the mind is left in doubt as to the truth of the matter, the finding of the chancellor is approved.

Baird & Richardson and J. W. Kincead for appellants.

Carroll & Middleton and J. C. Carter for appellees.

Appeal from Metcalfe Circuit Court.

Opinion of the court by Judge Hobson, affirming.

The Chess & Wymond Company brought this suit against S. F. Hurt, enjoining him from interfering with it in cutting certain stave timber from 300 acres of land owned by him, which it claimed to have bought of him by a written contract made on September 27, 1905. By his answer he charged, in effect, that the written contract was obtained from him by fraud and asked that it be set aside. The court continued in force the restraining order granted by the clerk until the final hearing of the case and on final hearing he perpetuated the injunction and dismissed the defendant's counter-claim by which he sought a cancellation of the contract. From this judgment he appeals.

The appeal raises simply a question of fact. The evidence is very conflicting and on the whole case we can not say that the chancellor abused a sound discretion in refusing to set aside the contract. Our rule is not to disturb the chancellor's finding, where, on all the evidence, the mind is left in doubt as to the truth; and

upon the whole record we can not say that the weight of the evidence is not with the chancellor. The contract was made with Hurt by a man named Tuck, who was an agent of the defendant. He and Tuck differ very much as to what occurred, but Tuck's version of it is sustained in some measure, by the defendant's own conduct, by Shaw, a bystander, and by the writing itself. Hurt, at that time, made his mark to the contract, and Shaw witnessed it, also making his mark. On the next morning Tuck returned and asked Hurt to sign the paper himself. Tuck says that he had erased the former signature of Hurt and the signature of Shaw as a witness. Hurt says that this was not done, and he seems to think that at that time a different writing was obtained from him. But we are satisfied that the writing that is now produced is the same writing which Hurt originally signed. The paper has been produced before us and shows sign of erasure. Hurt's name is signed lower down on the paper, beneath where the erasure is and the paper itself contains words which Shaw says, were in the paper that he heard read the evening before. It calls for timber standing or lying down and the trees reserved in the paper are those that Shaw says were reserved. The paper also satisfies us that the contract was a sale of the stave timber on the tract and not of 800 trees, for if 800 trees were sold, there would have been no necessity for making the reservations that are in this paper and which Shaw testifies were in the paper which he heard read. It may be that the defendant made a bad bargain, but timber has advanced very much in price since this contract was made and we are satisfied that if the price had declined as much as it has advanced, this controversy would never have arisen.

The purchaser has cut off the land something like 1100 trees. It has exhausted its contract and whatever white oak or pin oak timber is now on the land is the property of Hurt. By moving away, the company has said to Hurt, that it has cut all the timber which it bought and after moving away and abandoning all right to cut further, it can not return to the land and cut other timber. The judgment of the circuit court is to be read in connection with the plaintiff's petition. It only adjudges to the plaintiff the right to the timber in controversy. We do not see anything in the judgment prejudicial to the substantial rights of the defendant; but if the defendant wishes it, the judgment may at any time be corrected in the circuit court, for clerical misprision in so far as it adjudges to the plaintiff any timber other than that specified in the written contract. The court having continued in force, pending the action, the temporary restraining order made by the clerk, thus in effect granted an injunction, and whether he had granted an injunction or not, he could by his final order grant an injunction.

On the whole record we do not see that the substantial rights of the defendant were prejudiced by the judgment.

Judgment affirmed.

SUMRALL v. VANARSDALL'S ADM'R.

(Filed June 11, 1908—Not to be reported.)

Estates—Settlement Of—Costs of Settlement—Payment Of—S. complains that the money realized from the sale of the real property, in this action to settle a decedent's estate, can not be taken to pay the costs of the settlement suit, and while this view as a principle is correct it can not be applied here for the reason

that the personalty realized more than enough to pay the costs, a part of which went to discharge a part of the prior mortgage debt. Appellant's mortgage being inferior, can not complain of the judgment requiring him to pay the costs. (19 Ky. Law Rep., 1773)

J. T. Wilson for appellant.

Greene & VanWinkle for appellee.

Appeal from Mercer Circuit Court.

Opinion of the court by Judge Barker, affirming.

Jackson Vanarsdall died intestate, domiciled in Mercer county, Kentucky. His estate was wholly insolvent. The real property was heavily mortgaged; and he owed some six thousand dollars of unsecured debts; the personalty realized only the sum of six hundred and forty-eight dollars and ninety-five cents. C. D. Thompson, the appellee, was appointed and qualified as administrator of the estate, and shortly after his appointment instituted this action to settle the estate of his decedent. He made the mortgagees of the real property, J. T. Lillard and C. M. Sumrall, parties defendant, and called upon them to set up their claim against the estate, which they did. The case was referred to the commissioner, with directions to advertise for and report on claims. The liens of the mortgagees, Lillard and Sumrall, were enforced and the property sold at judicial sale, realizing a little less than the debts of the mortgagees and the back taxes due the Commonwealth. Leaving out the taxes the real property brought one hundred and fourteen dollars more than the mortgage debts. Sumrall, whose mortgage was inferior to that of Lillard, purchased the latter's debt, and became thereby, holder of all the mortgage claims on the property.

After the estate was settled, the court entered a judgment allowing the plaintiff's attorney four hundred dollars as a fee; to D. N. Currie, the commissioner, the sum of ninety dollars was allowed for his services; and the Harrodsburg Democrat Company was allowed twenty dollars for advertising the sale. From this judgment, C. M. Sumrall, the holder of the mortgage lien, has appealed, claiming that the money realized from the sale of the real property can not be taken to pay the costs of the settlement suit; and he cites in support of that position the case of Kentucky National Bank v. Louisville Bagging Company, 98 Ky., 371. His position, as a principle of law, is undoubtedly sound, but we see no occasion for its application here. The personal property realized six hundred and forty-eight dollars, a sum which seems to have been amply sufficient to pay the costs of settling the estate, including the attorney's fee. It is true, some of the money realized from the sale of the property will have to be taken to pay the items the allowance of which is complained of; but appellant overlooks the fact that he has already received from the proceeds of the personal property as much as, or more than, will have to be taken from the proceeds of the sale of the real property. The items complained of amount to five hundred and ten dollars in the aggregate. The administrator, C. D. Thompson, out of the personal property, paid to Lillard, the holder of the first mortgage, two hundred and fifty-eight dollars, on the interest of his debt. Appellant, in his brief, admits that the administrator paid one hundred and eighty-four dollars taxes on the real property. It is also shown that, pending the litigation, the administrator paid fifty-eight dollars insurance and thirty-eight dol-

lars for repairs on the mortgaged property. Equity requires that these sums should be accounted for by the holder of the mortgage. He can not take the fund which was primarily liable for the costs of settlement of the estate, and have it applied for his benefit to the detriment of the officers engaged in settling the estate. In addition to this, a large part of the expense he would have had to pay out of the proceeds of the realty at all hazards. His mortgage would have had to be foreclosed before he could get his money. This would have entailed court costs, including commissioners' fees and fees for advertising the sale. This expense would have had to come out of the proceeds of the sale of the realty even if it brought no more or less than the mortgage claim; and appellant is in nowise injured by being required to pay this court cost in this action. This is in full accord with the principle announced by this court in *Farmers and Traders Bank v. Norton's Assignee*, 44 S. W., 428, 19 Ky. Law Rep., 1773.

We do not see how, upon equitable principles, the appellant was injured by the judgment complained of; it is, therefore, affirmed.

SCHNEIDER v. COMMONWEALTH.

(Filed June 11, 1908—Not to be reported.)

1. Liquor License—Discretion of County Court in Granting License—The county court has a discretion in granting tavern licenses, and unless it is shown, that that discretion has been abused, there is no cause of complaint.

2. Same—Appellant's license was regularly procured, the evidence is to the effect that he is a keeper of a tavern in good faith, and that there is a real necessity for a tavern at the place. The fact that he is charged in two cases of illegal sales of liquor does not show that appellant keeps a disorderly house.

John B. Grider, D. W. Wright and S. D. Hines for appellant.

Thos. W. Thomas for appellee.

Appeal from Warren Circuit Court.

Opinion of the court by Wm. Rogers Clay, Commissioner, reversing.

Appellant, Joe Schneider, has a tavern located at Delafield, Warren county, Kentucky, at what is generally known as the "boat landing." At the November term, 1907, of the Warren County Court, he made application for a tavern license with the privilege of selling spirituous, vinous and malt liquors. No question was made as to his having filed proper notices as required by law; but as there was an oral protest against granting the license, the court, without objection by any one, set out by metes and bounds the neighborhood in which the sense of the legal voters might be obtained as to whether or not the application of appellant should be granted. No written protest was filed, but on the day of the hearing several persons were in court to protest against the granting of the license. After hearing the testimony the county court granted the license. The Commonwealth then appealed to the circuit court, and the circuit court decided that appellant was not entitled to the license. From that judgment, he prosecutes this appeal.

It appears from the record in this case that appellant is a man of good character, and that he has kept a tavern at Delafield for a period of about thirty years. The place where he sells liquor is located on the road, while his residence, consisting of about six rooms, is situated fifty yards to the rear of where the liquors are sold. Near his residence is, also, another large room, in which four beds are kept. It is the contention of the Commonwealth that appellant is not a keeper of a tavern in good faith, and that there is no real necessity for a tavern at that point. In addition to this, the Commonwealth insists that he has not kept an orderly house.

Delafield, it seems, is a small river town, on Barren river, at the head of navigation, about one mile from Bowling Green. Considerable business is transacted at that point. Steamboats ply from Bowling Green to Evansville, Indiana, and also up Green River. The boat landing is the harbor for the fleet of United States boats that are frequently engaged in improving the river. The proof shows that appellant's place was the only tavern in Delafield, and that it was continuously patronized by people going away, or coming in on boats; that shippers of hogs and cattle depended almost solely upon Schneider's tavern and premises. It is true, appellant stated that he frequently kept personal friends for nothing, and that he let people hitch their horses in his yard without making any charge therefor. It seems, too, that he never kept any books showing his receipts from guests independently of the bar. He does swear, however, that his receipts, aside from the bar, amounted to sixteen or twenty dollars per week. It is argued that, because the receipts from his bar were far in excess of that amount, the keeping of a tavern was a mere device to enable him to conduct a saloon. We are unable to say that, because the receipts from the bar were larger than those from the tavern proper, the owner is not a bona fide tavern keeper. If such were the rule, no man could be said to be a keeper in good faith of a tavern or a hotel, for it is a well known fact that the bar privileges in many instances carries with it returns much larger than are received from the accommodation of guests in other respects.

Nor do we think there is anything in the argument that appellant was not prepared to receive women. True, his family occupied the most of his residence, but, in case of an emergency, we doubt not that his family could be doubled up in such fashion as to enable him to take care of women guests.

Counsel for appellee earnestly insists that, because Bowling Green is situated about a mile distant from Delafield, and the former city has hotels which would accommodate the patrons who go to Delafield, there is no necessity for a tavern at Delafield. We do not think, however, that the question depends upon whether or not accommodation can be secured at another place. It depends upon whether or not there are persons, who, in going to Delafield, naturally seek or desire accommodation at appellant's tavern. Where a tavern has existed at one place for about thirty years, and the proof shows that the receipts from it, exclusive of the bar, amount to from sixteen to twenty dollars per week, and a number of reputable citizens testify that, in their opinion, there is a necessity for a tavern at the place in question, we are unable to say that no such necessity exists, even though an equal number of citizens testify that, in their opinion, there is really no need for such tavern.

The only other point attempted to be made against the granting of the license was that Schneider did not keep an orderly house. There was some proof to the effect that at times large crowds of negroes assembled around the tavern. There was also some proof

to the effect that drunken men were seen occasionally on the pike beyond Schneider's tavern. It does not appear, however, that they became or were drunk at Schneider's tavern. Appellee relies principally upon the fact that appellant was twice convicted of selling liquor to minors, claiming that, under the rule laid down in *Caudill v. Commonwealth*, 23 Ky. Law Rep., 2140, this fact showed that Schneider did not keep an orderly house. In that case, Caudill had applied for a merchant's license to sell spirituous liquors. The applicant had been engaged in the illegal sale of liquor both to adults and minors. This court held that the county court was given a judicial discretion as to when a license to sell liquors should be granted; that, as it was an admitted fact that the applicant had sold without license, and in further violation of the law, there was no abuse of the legal discretion confided to the court, in refusing the applicant a license. In the case cited there were numerous violations of the law on the part of the applicant. Here, we have two isolated cases of illegal sales of liquor to minors, made by the proprietor's clerk in the proprietor's absence. This court has held, in a large number of cases, that the county court has a discretion in granting tavern licenses, and, unless it is shown that that discretion has been abused, there is no cause of complaint. (*Lupe & Hambright v. Barbee, &c.*, 18 B. Mon., 9.) Where, then, an applicant has been a tavern keeper for thirty years, is a man of good character, and the only evidence of his having kept a disorderly house is the fact that a few negroes congregated about his place, that drunken people were seen upon the road—it is not being shown however, that they became drunk at his establishment—and that he in two instances had sold liquor to minors, we do not feel authorized in reversing the action of the county court, which, in the exercise of the discretion vested in it by law, held that the applicant was entitled to a license.

No doubt, the fact that Bowling Green has recently gone "dry" has made the opposition to a tavern at Delafield all the more pronounced, and in the opinion of many substantial people it is not desirable to have a tavern there. That being the case, the law has provided means whereby the sale of liquor at that point may be prevented.

For the reasons given, the judgment is reversed and cause remanded, with directions to grant appellant a license.

JOHNSON, &c., v. COOK BENEVOLENT INSTITUTE.

(Filed June 12, 1908—Not to be reported.)

Benevolences—Funds Set Apart to—Object to Which it Should be Applied Ceasing to Exist—The association having long since ceased to exist, viz: in 1858, the fund sought to be set apart to its use can not be reached by the appellants who claim to be survivors of it. Testator intended to make some provision for a volunteer fire association and it ceasing to exist, his executors merged the fund intended for it in an object of charity, to which he had bequeathed the great bulk of his estate, and the refusal of the chancellor to disturb it after the great length of time the latter institution had had control over it, will not be disturbed.

D. W. Sanders and J. W. S. Clements for appellants.

F. Hagan for appellee.

Appeal from Jefferson Circuit Court, Chancery Branch, First Division.

Opinion of the court by Chief Justice O'Rear, affirming.

Prior to 1837, and until 1858, volunteer fire companies were the protection of Louisville against fires. There was no provision then for paid enlisted firemen. The volunteer companies were manned by able-bodied, public-spirited citizens. There was a fine spirit of emulation among the companies for quick, efficient work. Samuel Hinman Cook, a man of wealth, and who had evidently been identified with one of these companies, or at least affected with keen appreciation of the public spirit displayed by its members in their hazardous endeavors in the city's behalf, made his will in 1837, in which is this clause:

"I give and devise to my aforesaid executors one thousand dollars, to be laid out in stocks as aforesaid, the dividends whereof are to be expended and applied for the benefit of disabled firemen and indigent widows of firemen of the Mechanics Fire Company, of the city of Louisville."

The executors laid out the \$1,000 in bank stock, and kept it so invested till after 1858, at which date the city of Louisville, having installed a paid fire department of trained men, who devoted all their time to the calling, the volunteer organizations, including the Mechanics Fire Company, were disbanded permanently. In the meantime appellee corporation had been created by an act of the Legislature to carry out the benevolent bequests and devises of Samuel Hinman Cook. Some time after 1858, owing to the fact that the Mechanics Fire Company no longer had an existence, appellee, construing that, under the doctrine of cy pres, it should apply this \$1,000 bequest to an object of charity as near like the specific one named in the clause of the will giving it, merged it with the great bulk of the testator's estate which he had devised to institute and maintain a hospital for the care of "sick and infirm persons of the city of Louisville, and such as be so sick and infirm in said city and destitute of the means of relief." This hospital, maintained by the testator's benevolence, is an Old Woman's Home, which receives and cares for worthy destitute old women who have no relations or means upon which they can rely for support:

Appellants, some eight or ten in number, claim to be the surviving members of the Old Mechanics Fire Company, save two of appellants who claim to be widows of former members. These people are aged from 65 to 88 years. Some of them claim to be destitute. The two widows claim to be entirely destitute and helpless. The appellants assert that they were the sole beneficiaries of the \$1,000 bequest, and that its income, and indeed the \$1,000 itself should be given over to them for their relief. They charge a diversion and misappropriation of the trust fund and claim an accounting and restitution. The circuit court dismissed them without relief. They appeal.

The clause of Cook's will bequeathing the \$1,000 must be read in the light of his surroundings to get at his meaning. At that time steam fire engines were not known, certainly not in use in Louisville. Nor were there then paid, regularly enlisted firemen whose business and duty it was to give all their time and labor to fighting fires in the city; nor is it probable that such a plan was then thought of. It was evidently contemplated by the testator that the Old Mechanics Company, which had probably been a useful and honorable organization for years, and which, in its younger days, he had belonged to, would continue to serve the public with that disinterested devotion to the public welfare which was the cause of his admiration and pride; that its membership would be con-

stantly changing; and that in the dangers incident to its work some of its active members would receive disabling injuries, maybe death. These things might occur at any time during the future. His purpose was, we think, to help those who were disabled while in that public service, and to relieve the indigent widows of such as might die in the service; not necessarily die while in the line of duty, but die while members of the company. He could not have meant that so small a sum should be distributable among so many as would result if all who had ever been members should at any time in the future, whether then members or not, become disabled, or leave indigent widows. His mind was upon a continuing service, and his aim was to help that service by coming to the aid of those in it who most needed help. When twenty years later, in the progress of events and the development of more modern methods, the old volunteer companies were done away with, that which had moved the testator to establish the charity ceased to exist, and the object of his bounty, the volunteer fire company service to be done by the Mechanic's Fire Company, died. That we think was the end of the matter, so far as the former members of the Mechanic's Fire Company were concerned. Those who had become widowed during the existence of the company, and were indigent, had a vested interest in the fund bequeathed, and if the female appellants had averred and shown facts bringing them within the class just described they would have been entitled to relief. But at any rate, if they are as described in their petition, we have no doubt that the trustees of appellee society would feel a particular obligation resting upon them to admit these women to the Old Woman's Home, if applied to, owing to their relation to this old company.

But we can not see that appellants have any legal right to the fund in question.

Judgment affirmed.

MANN, &c. v. REIGLER, &c.

(Filed June 12, 1908—Not to be reported.)

Easements—In Adjacent Wall—Prescription—One may acquire an easement in an adjacent wall by deed, or by prescription, which presumes a deed. Conceding that the wall stood upon appellees' lot when appellants came to rebuild their house, their easement was established and it included the right to repair or rebuild.

Vance & Heilbronner for appellants.

Clay & Clay for appellees.

Appeal from Henderson Circuit Court.

Opinion of the court by Chief Justice O'Rear, reversing.

Appellee, Mary P. Reigler, and appellant, Mann, owned adjoining city lots, on which two-story brick business houses had been built many years ago. The dividing wall between the houses was used in common, the joists and rafters of each house resting in or upon it. This condition had existed for more than twenty-five years (how much longer no witness ventures to state), and was so when each of the parties to this suit acquired title to their respective lots. Some twelve or fourteen years before the institution of this suit appellants' house was damaged by fire. In repairing it, they dug a more extensive cellar beneath their house, replaced the burnt joists with sound ones, and carried the wall up another story. Appellees knew of that

fact when it transpired. This suit was brought recently by appellees to oust appellants from the use of the wall, upon the allegation that the wall was wholly upon the lot of the plaintiff, and appellants' use of it was without her consent. The circuit judge found that the old wall was worth \$728; also that it was wholly on appellees' lot. It was adjudged that it would be inequitable to require appellants to remove their house; so appellants were directed to pay to appellees one-half of the value of the old wall, and it was further adjudged that each party should, without further hinderance from the other, have the right to use the new wall—the third story.

We are told that the judgment was rested on *Wilford v. Gerard*, 108 Ky., 322; 22 Ky. Law Rep., 203; 56 S. W., 416. While there are several features of the two cases in common, we think the controlling principle of the case at bar, which was not in *Wilford v. Gerard*, was overlooked. In the instant case appellants relied upon a title to an easement in the wall by prescriptive use, and the evidence abundantly sustains their claim. One may acquire an easement in an adjacent wall by deed, or by prescription, which presumes a deed. If appellants' vendors had, by deed, acquired the right to build their house against and tying it into appellees' adjacent wall, appellants would have had the right to repair the injured structure or rebuild it in case it was burned down or removed. Such an easement, unless the language restricted it to a particular period, would have been continual. Whether such deed was made in the case here is not shown. But for all that is shown, it may have been; or at least appellees' predecessors may have built and owned both houses, or have received pay for the use of the partition wall from the owners of the other house. There is nothing to show that something of that kind, executed in ample form, did not happen. The great lapse of time, with such open and continuous use without hindrance or complaint, supports the inference that it did. It is because of such conditions that the law raises a presumption, after such great lapse of time, of a grant and its loss. Such presumption, unrebutted, is as efficacious as a grant in fact, in most ample form. The situation, then, when appellants came to rebuild their house, was that appellants' easement in the wall, conceding that it stood wholly on appellees' lot, was established, which included the right to repair or rebuild. (3 Kent's Com., 437, 13 Ed.)

But the appellants did not have the right to impose a new or an additional servitude by virtue of the easement of the particular one connected with a building of the dimensions of the old one. (*Wilford v. Gerard*, supra.) When appellants built on the additional story by running up the partition wall a sufficient height to form one of its walls, appellees, with full knowledge of the fact, stood by without protest and suffered it. It is there for their use also. It does not appear that it has to any extent damaged the old wall, or impaired appellees' use of it as it was enjoyed before. Under these circumstances, appellees will not now be heard to claim compensation for the wall, which they may enjoy in common with appellant, and which has cost appellees nothing, and damaged them nothing.

The judgment is reversed, with directions to dismiss the petition.

CITY OF OWENSBORO v. SINGLETON.

(Filed June 12, 1908—Not to be reported.)

Streets—Grades of—Damage to Property by Grading—A lot owner is not entitled to recover from a city for damage to his lot because of the original grading of the street, where the grade has not theretofore been fixed. The grade of the streets must be presumed to have

been taken into consideration when the land was dedicated or acquired by condemnation. The case of *City of Owensboro v. Hope*, 33 Ky. Law Rep., ante, is conclusive of this question.

J. A. Dean and Geo. W. Jolly for appellant.

W. T. Ellis, C. M. Finn, Miller & Todd and R. W. Slack for appellee.

Appeal from Davless Circuit Court.

Opinion of the court by Judge Hobson, reversing.

Mary L. Singleton owns a house and lot in the city of Owensboro, on Crittenden street, between Second and Third streets. The city council established the grade to be cut down about two feet in front of her property. The street was constructed upon the grade thus established; and she then brought this suit against the city, charging that her property was very much injured, from the fact that two of her shade trees were destroyed; that two others were practically destroyed; that it would be necessary for her to build a retaining wall to protect her lot; and that even with this, ingress and egress would be very much affected, and the value of the property depreciated. Her lot fronts on the street seventy-five feet. On a trial of the case she recovered a judgment for \$425, and the city appeals.

It appears from the record that, though the street had been in the city for a number of years, the grade of the street had not been established. In *City of Owensboro v. Hope*, 108 S. W., 873, 33 Ky. Law Rep., ante, it was held that a lot owner is not entitled to recover from a city for damages to his lot because of the original grading of the street where the grade has not heretofore been fixed; as the grade of the streets must be presumed to have been taken into consideration when the land was dedicated or acquired by condemnation. It was also held in that case that the establishment and maintenance for more than fifteen years of improvements on lots adjacent to an ungraded street did not affect the right of the city to establish the grade; and that the delay of the city to fix the grade, did not estop it from fixing the grade when, in the judgment of the council, it became necessary. That case seems to be conclusive here. It is true that the street in this case has existed for a long time; but we do not see anything in the evidence to take the case out of the rule laid down in the case cited.

Judgment reversed and cause remanded, for a new trial.

HARDWICK, SR., &c. v. KARN.

(Filed June 12, 1908—Not to be reported.)

1. Landlord and Tenant—One who takes possession from a tenant can make no defense against the landlord which the tenant could not make.

2. Same—Equity—(28 Ky. Law Rep, 615.) Hardwick was awarded a writ of possession against Smith, his tenant. K. can not take possession of the property from Hardwick's tenant and then enjoin Hardwick from enforcing the writ of possession which had obtained against the tenant. If the gift by K. to his daughter was void he may assert his right to the land in a proper action.

Sweeney, Ellis & Sweeney and W. E. Aud for appellants.

C. S. Walker, Wilfred Carrico and Lavega Clements for appellee.

Appeal from Daviess Circuit Court.

Opinion of the court by Judge Hobson, reversing.

J. B. Karn was the father of Eva K. Hardwick. When she married he said to her that as a wedding gift she might then have and take possession of a tract of land owned by her mother, then dead, and in which he had an estate for life, as tenant, by the courtesy, Mrs. Hardwick being the only child of her mother. At that time the land was rented to C. S. Smith, who thereafter rented the land from Mrs. Hardwick until she died, in the year 1902. After her death, Smith refused to give possession of the land to her husband and child. They instituted an action of forcible detainer against him and recovered judgment in the magistrate's court. Smith appealed to the circuit court, which also decided against him. He then appealed to this court, and the judgment was affirmed. (Smith v. Hardwick, 28 Ky. Law Rep., 615.) After the judgment of the circuit court had been affirmed in this court a writ of possession was awarded against Smith. Before the writ was executed, J. B. Karn brought this suit against the sheriff and Hardwick, alleging that he was in possession of the property; that they were asserting claim to it and asked that his title be quieted, and that they be enjoined from interfering with his possession. By their answer, the defendant set up the proceeding in the forcible detainer case referred to, and alleged that before the writ of possession could be executed, Karn procured Smith, the tenant of Hardwick, to surrender possession of the place to him and placed in possession of the property one Goff, as his tenant; that this was done for the purpose of defeating the judgment rendered in that case; that Karn was the real defendant in that case; that he employed counsel, was present at the trial, and directed the defense. They also alleged that Karn took possession of the property by collusion with Smith and thus placed it in the possession of Goff as his tenant, for the purpose of evading the judgment in the case referred to. The circuit court sustained a demurrer to the answer and entered judgment in favor of Karn, as prayed. From this judgment the defendants appeal.

Smith was Hardwick's tenant. Having entered under Hardwick and held as his tenant, he can not deny his landlord's title. If Karn got possession from Smith he stands in Smith's shoes. He who takes possession from the tenant can make no defense against the landlord which the tenant could not make. If he has title to the property he may assert it in the proper proceeding. But he can not force the landlord to bring an action of ejectment to get possession from his tenant. The possession of the tenant is the possession of the landlord, and he who enters under the tenant holds as the tenant holds. If it be true that the gift by Karn to his daughter, being in parole was void under the statute of frauds, the title to the land for his life is still in him. He may assert his rights in a proper action; and when he so asserts his rights, any equities in favor of his daughter, or those claiming under her, growing out of improvements to the property, or the like, may be set up; but Karn can not take possession of the property from Hardwick's tenant, and then enjoin Hardwick from enforcing the writ of possession which he had obtained against the tenant.

Judgment is reversed and cause remanded, with directions to the circuit court to overrule the demurrer to the answer, and for further proceedings consistent herewith.

LOUISVILLE & NASHVILLE R. R. CO. v. ROBBINS.

(Filed June 12, 1908—Not to be reported.)

Railroads—Pleading—Private Crossings—(L. & N. R. R. Co. v. Emerson, 30 Ky. Law Rep., 1149, for the facts of this case.) The provisions of the Kentucky Statutes, relating to farm crossings, did not have the effect to repeal the provision in appellant's charter relating to such crossings. The petition seems sufficient to support the judgment; it does not appear that any demurrer was filed to it, and where objection is made that a private statute is not properly pleaded, it should be done by special demurrer.

Benjamin D. Warfield, Chas. Carroll and Chas. H. Moorman for appellant.

J. F. Combs and Ben Chapeze for appellee.

Appeal from Bullitt Circuit Court.

Opinion of the court by Judge Nunn, affirming.

This is an appeal from a judgment of the Bullitt Circuit Court requiring appellant to provide for appellee a proper wagon-way across its right of way and railroad track, so as to enable appellee to pass from one side of the railroad, where a part of his land is, to the other, where the remainder lies, and for the sum of \$130 in damages sustained by him on account of its failure to provide the crossing at the time he first made application for it to the time of the trial.

The facts of the case at bar are the same as those in the case of L. & N. R. R. Co. v. Emerson, 30 Ky. Law Rep., 1149; Thompson v. L. & N. R. R. Co., 25 Ky. Law Rep., 530; Louisville & Nashville R. R. Co. v. Brooks, 25 Ky. Law Rep., 1307, and L. & N. R. R. Co. v. Pittman, 21 Ky. Law Rep., 1037. The opinion in the case, L. & N. R. R. Co. v. Emerson, *supra*, concludes the questions raised in this case, except two. The first is, appellant claims that the petition is not sufficient to support the judgment. It was alleged in the petition that it was the duty of appellant, under the provisions of its charter, to provide him a wagon-way so that he could cross from one part of his farms to the other. Appellant relies on section 119, of the Civil Code, as sustaining this position. It is as follows:

"1. Neither the evidence relied on by a party, nor presumptions of law, nor facts of which judicial notice is taken, excepting private statutes, shall be stated in a pleading.

"2. In pleading a private statute, it shall be sufficient to refer to it by stating its title and the day on which it became a law."

Appellee did not state in his petition the title of appellant's charter nor the day on which it became a law. It does not appear in the record that any demurrer was filed to the petition in this case; and this court, in the case of Rudd v. Deposit Bank, 105 Ky., 443, decided that an objection that a private statute relied on was not properly pleaded should be made by special, not general, demurrer. In addition to this, we are of opinion that this section of the Code is not applicable in a case like this. In our opinion, it was not necessary that appellee give appellant information as to the date when the act creating it became a law, nor the title of the act. It is conclusively presumed to know these things. The section of the Code was intended to require a party, who was relying upon a private act, to give the other party notice of it, when the other party is not presumably familiar with or connected in any way with the private act.

Appellant filed an amended answer alleging, in substance, that on July 14, 1902, it by its board of directors, accepted the provisions of the present Constitution of the State and filed in the office of the

Secretary of State these resolutions and thereby accepted the provisions of the Constitution; and it is contended that by reason thereof that the provisions of its charter requiring it to construct farm crossings are repealed, and the provisions of the General Statutes with relation thereto take the place of them. In our opinion, the laws found in the Kentucky Statutes, with reference to farm crossings, were not intended to, and did not have, the effect to repeal the provisions of appellant's charter referred to. Appellant obtained its right of way through the State by virtue of its charter, it received donations of right of way, purchased and condemned the balance of the right of way with the provision in its charter requiring it to construct such farm crossings, thus entering into and forming a part of the contract by which it obtained the right of way upon which to construct its road. This was an inducement, probably, to some to give right of way and induced others to sell at a less price, and in all probability lessened verdicts in cases in which it condemned the right of way, and it can not evade this liability which it assumed when it accepted its charter.

For these reasons the judgment of the lower court is affirmed.

ADAMS v. COMMONWEALTH.

(Filed June 12, 1908—To be reported.)

1. Criminal Law—Pro tem. Commonwealth's Attorneys—Appointment—Statutory Provisions—Discretion of Court—Under sections 120 and 127, Kentucky Statutes, relating to the appointment of a pro tem. attorney in the absence of the Commonwealth's Attorney, Held—Their meaning is that in the absence of both the Commonwealth's attorney and county attorney, or when both are of kin or of counsel for the accused, the circuit judge shall appoint a Commonwealth's attorney pro tem. whether in cases of felony or misdemeanor, but in the absence of the Commonwealth's attorney, when the county attorney is present, the circuit judge shall not appoint such pro tem. attorney, except in felony cases he may, or not, appoint such pro tem. attorney in his discretion.

2. Same—Presence of County Attorney—Refusal to Appoint Pro Tem. Commonwealth's Attorney—On the trial of one indicted for murder, in the absence of the Commonwealth attorney, it was not error in the circuit judge to refuse to appoint a pro tem. Commonwealth's attorney, where the county attorney was present and took an active part in the prosecution, though employed counsel was permitted to close the argument for the Commonwealth before the jury. The case of Keeton v. Commonwealth, 32 Ky. Law Rep., 1164, is modified so far as it conflicts with this opinion.

3. Same—Employed Counsel—Opening and Closing Argument—This court will refuse to reverse a judgment of conviction in a criminal case upon the ground that employed counsel was permitted to make the opening statement and the closing argument where it appears that the trial was otherwise properly conducted and the defendant's guilt is reasonably certain.

4. Misconduct of Counsel—Admonition of Court to Jury—Effect—An improper statement made by the county attorney to the jury, which the court admonished the jury not to consider, can not be considered on appeal as prejudicial to the defendant.

Bethurum & Bethurum for appellant.

Jas. Breathitt and Tom B. McGregor for appellee.

Appeal from Rockcastle Circuit Court.

Opinion of the court by Judge Settle, affirming.

Appellant was indicted in the Rockcastle Circuit Court for the murder of William Hays. On the trial the jury, by their verdict, found him guilty of voluntary manslaughter and fixed his punishment at confinement in the penitentiary eighteen years. Judgment was thereupon entered in conformity to the verdict. Appellant was refused a new trial by the circuit court, and, by this appeal, seeks a reversal of the judgment of conviction.

Appellant killed Hays by shooting him with a shotgun at the latter's residence. Although but fifteen years of age at the time of the homicide, appellant had become greatly infatuated with the wife of deceased, who was twenty-five years of age and the mother of three children. She was evidently a lewd woman and had maintained an improper intimacy with appellant for at least a year before the homicide. She had twice left her husband, and during one or both of these separations, became an inmate of a bawdy house. By correspondence and assiduous personal attention of an affectionate character, she fed appellant's passion until it became his habit to visit her two or three times a week for a year before he killed her husband. During and between such visits she furnished him with cheap novels and other unwholesome reading matter, of the "Buffalo Bill" variety, which could not in any way have profitably ministered to his intellectual or moral growth.

On the day of the homicide appellant, gun in hand, left his father's residence, which was about a quarter of a mile from that of deceased, and after, as he claimed, spending two hours in hunting squirrels, reached the house of the latter, upon entering which he leaned his loaded gun against the wall by the door, took a chair near by and apparently became absorbed in the contents of a novel which Mrs. Hays handed him. When he arrived at the Hays' residence deceased was engaged in gathering corn, but soon came to the crib lot with a load and called to his wife to come to him. She obeyed the call, and, after a short conversation with her husband, returned to the room where appellant still sat reading. Telling appellant of the presence near the house of her husband, she requested him to go to another room and remain until the husband left, in order that the latter might not see him; but appellant failed to comply with her request. In a short time deceased went into the house and, passing through the room by appellant, without speaking to him, entered the kitchen and there deposited his coat which had been carried on his arm. Again coming into the room where appellant sat, deceased said to him: "Wolford Adams, this is my house and none of yours; you get out of it." Upon completing this statement, deceased reached a stove used for heating the room, and bending over it, proceeded to warm his hands. While deceased was warming his hands at the stove appellant got upon his feet, seized his gun and shot deceased in the jaw and neck. The latter fell to the floor and immediately expired. When shot by appellant deceased was not menacing him in any way, or even looking at him; and was at the time unarmed.

Thus far we have given, in substance, the testimony of the Commonwealth which was furnished by Mrs. Hays and two of her children, one eight and the other seven years of age, who, besides appellant, were the only eye witnesses of the tragedy. On the other hand, appellant's testimony was to the effect, that deceased, upon entering the room, cursed his wife and appellant; that at this juncture, fearing an attack from deceased, and intending to leave the room to avoid it, appellant picked up his gun which deceased attempted to grasp with his left hand and take from him; at the same time moving his right hand toward his hip pocket, as if to draw a weapon, with which

to kill him; seeing which appellant pointed the gun at deceased and fired in his necessary self-defense.

From the foregoing outline of the evidence it will be seen that of the Commonwealth conduced to prove, that in shooting deceased, appellant was guilty of willful murder, while that of appellant tended to prove that the shooting was excusable on the ground of self-defense. It may be remarked, however, that the fact that the shot from appellant's gun entered the lower side face and neck of deceased, would seem to support the testimony of the Commonwealth's witnesses, that when shot, he was warming his hands at the stove and not looking at appellant. If, as claimed by appellant, he took the life of deceased to save his own, the latter's attack upon him must have been provoked by jealousy arising from appellant's improper intimacy with his wife. Upon the other hand, if appellant took the life of deceased without justification, jealousy doubtless furnished the motive for the homicide and the act was, therefore, murder, because maliciously committed. In view of the evidence contained in the record appellant has, in our opinion, no right to complain of the verdict. His youth, and the fact that his inexperience had made him a victim of the arts of a designing woman, no doubt appealed to the sympathy of the jury and induced them to find him guilty of voluntary manslaughter, when otherwise they would have found him guilty of murder, as charged in the indictment.

We will only consider such of the grounds urged in the circuit court for a new trial as are now relied on by appellant for a reversal of the judgment appealed from. The errors assigned are four in number.

1st. That the circuit court failed to appoint a Commonwealth's attorney pro tem. to act in behalf of the Commonwealth in conducting appellant's trial. 2d. That employed counsel was improperly permitted to make the closing argument to the jury. 3d. That the county attorney and employed counsel were allowed to make, in argument to the jury, improper and inflammatory statements, that were prejudicial to appellant's substantial rights. 4th. That incompetent evidence was admitted for the Commonwealth in rebuttal.

As to appellant's first contention, it may be remarked, the record shows that the regular Commonwealth's attorney was disqualified to engage in the prosecution of appellant by reason of his employment by the latter, before his election as Commonwealth's attorney, to defend him for killing deceased; the Commonwealth was, therefore, as fully deprived of that officer's services in appellant's case as if he had been absent. Indeed, in contemplation of law, he was absent. The Commonwealth, however, was represented throughout appellant's trial by the county attorney, who conducted the examination in chief of the State's witnesses, made an argument to the jury, and properly performed such other duties as are required by law to be discharged by the Commonwealth's attorney.

Section 120, Kentucky Statutes, provides: "In the absence of the Commonwealth's attorney, at any term, or part of a term, of a circuit court, the judge of such court may appoint some suitable attorney to act in his absence, * * * but the court shall not appoint an attorney to act in the place of the Commonwealth's attorney unless he and the county attorney are both absent, or of kin to or counsel for the accused, except in cases of felony."

This section contains the only authority conferred by the law of the State upon the circuit judge or other court, to appoint a Commonwealth's attorney, pro tem. Section 127, Kentucky Statutes, which in part, defines the duties of the county attorney, provides: "He shall attend to the prosecution of all cases in his county in which the Commonwealth or the county is interested; * * * he shall also attend the circuit courts held in his county and aid the Commonwealth's attorney in all prosecutions therein, and in the absence of

an acting Commonwealth's attorney, he shall attend to all Commonwealth's business in said courts."

Considering the two sections quoted as one (and they should be so read), their meaning is that the judge of the circuit court shall, in the absence of both the Commonwealth's attorney and county attorney, or when both are of kin to or of counsel for the accused, appoint a Commonwealth's attorney pro tem. to perform the duties of both, whether in cases of felony or misdemeanor. But that the judge shall not, though the Commonwealth's attorney be absent or of kin to or counsel for the accused, appoint a Commonwealth's attorney pro tem. when the county attorney is present and not of kin to or of counsel for the accused, except in cases of felony, in which event he may appoint a Commonwealth's attorney pro tem., but is not bound to do so; the appointment being discretionary with him.

If this be a correct interpretation of the statute in question, of which we have no doubt, we must further hold that the failure of the circuit court to appoint a Commonwealth's attorney pro tem. to represent the Commonwealth in appellant's trial, was not error. The county attorney took an active, if not the leading part, in the prosecution. The record manifests the ability with which he and associate counsel conducted the case, and fails to indicate that in dealing with appellant's substantial rights, either was less than ordinarily fair. The prosecution was not, as insisted, wholly turned over to the control of counsel employed by the friends of deceased to convict appellant. It does not appear from the record that the county attorney was, at any stage of the trial, unmindful of his duty, or of the appellant's rights.

We are aware that much may justly be said of the danger of entrusting the prosecution of criminal cases too much to employed counsel, and we do not mean to be understood as holding that either the courts, Commonwealth or county attorneys, should be permitted to turn over the prosecution of criminals to those who are under no responsibility to the State, but the right of employed counsel to assist in such cases has long been recognized, and their assistance may be accepted by official prosecutors of the Commonwealth charged with the duty of enforcing the law. Obviously, the Commonwealth's attorney is the representative of the State in all prosecutions for violations of its criminal and penal laws, but under the law the county attorney is not less so, and his responsibility to the law, the courts and the people is just as great. Both should be honest, fearless and impartial in the performance of official duty, and as far removed from conniving at the escape of the guilty from punishment, as of demanding a conviction that would be unauthorized. It is true, as claimed by counsel for appellant, that this court, in *Keeton v. Commonwealth*, 32 Ky. Law Rep., 1164, held that it was reversible error for the trial court to refuse to appoint a Commonwealth's attorney pro tem., but it appears from the opinion that the county attorney was in that case, permitted by the court to turn over the prosecution of the accused wholly to counsel employed by relatives of the person whom he killed, and that too, over the objection and notwithstanding a motion of the accused that a Commonwealth's attorney pro tem. be appointed. Upon the facts of that case, we are yet of opinion that the trial court abused its discretion in refusing to appoint a suitable attorney to act in the place of the Commonwealth's attorney; but in discussing generally the power of the judge of the circuit court to make such appointment the opinion in some measure misinterpreted section 120, Kentucky Statutes, and entirely overlooked section 127, relating to the duties to be performed by county attorneys in the circuit court. The opinion in *Keeton v. Commonwealth*, *supra*, is now, therefore, modified to the extent that it conflicts with the conclusion herein expressed.

The second contention of appellant is not well taken. This court will refuse to reverse a judgment of conviction in a criminal case upon the ground that employed counsel was permitted to make the opening statement or close the argument if it appears, as in this case, that the trial was otherwise properly conducted and the defendant's guilt is reasonably certain. (*Bennyfield v. Commonwealth*, 13 Ky. Law Rep., 446; *Roberts v. Commonwealth*, 94 Ky., 449.)

The third contention of appellant is likewise untenable. The statements of the county attorney in argument in regard to the peaceable character of deceased, while not strictly within the record, was not more improper than the statements made in argument by appellant's counsel imputing to deceased a character for violence not shown by the evidence. The county attorney was responding to this statement. What he said should have been omitted, but the court's failure to exclude it was not prejudicial error. The further complaint of appellant that employed counsel, in argument to the jury, said: The children (meaning the children of deceased, used as witnesses for the Commonwealth) testified before the coroner's jury and could have been contradicted by members of that jury if their testimony on the trial of appellant differed from that given by them before the coroner, can not be sustained, because the statement was excluded by the court and the jury given to understand that they were not to consider it, therefore, it could not have been prejudicial to appellant.

The fourth contention relating to the admission for the Commonwealth of evidence in rebuttal, is equally untenable. The testimony was furnished by several witnesses and was as to the election of the body of deceased immediately after the killing; location of blood spots, and the fact that no arms were found upon his person. Much of this testimony might have been introduced in chief, but it was made necessary and competent in rebuttal by the testimony of appellant, which brought out new particulars as to these matters, and, besides, differed in many material respects from that of other witnesses introduced in chief by the Commonwealth. The testimony in question was properly admitted. The instructions aptly presented all the law of the case.

Being satisfied that the record is free from prejudicial error, and that appellant had a fair trial, the judgment is affirmed.

MILAM, &c. v. STANLEY, &c.

(Filed June 12, 1908—To be reported.)

1. Wills—Letter of Father to Daughter—Anticipation of Death—Probation as Will—A letter written in jail by a prisoner who was under sentence to be hanged, to his four daughters, three days before his execution, in which he said that he "wanted to make a deed to two of them (naming them) to a certain house and lot because they had attended to their mother so good," was properly admitted to probate as the will of the deceased father.

2. Wills—Testamentary Paper—Situation and Intention of Maker—In determining whether a paper is testamentary or not the court will look not only at the language of the instrument, but at the situation of the maker and at his intention.

S. J. Browning for appellants.

Geo. S. Hardy for appellees.

Appeal from Logan Circuit Court.

Opinion of the court by Judge Hobson, affirming.

W. R. Fletcher was convicted in the Logan Circuit Court of rape and sentenced to be hung. He appealed to this court, where the judgment was affirmed. He applied to the Governor for clemency and his application was denied. The date of his execution was fixed for February 15, 1907. On February 12, 1907, he wrote the following letter:

"My Dear Loving Daughters:

"I guess my last hope is gone. I don't want you all to grieve after me for I think I will be better off than to be in jail, for I think I am prepared to go and want to ask one thing of you all is to meet me in heaven. Jennie, Lula and Bettie and Mary, I want you to understand that I am as innocent of the charge which I have to die for as an angel in heaven, and it does me good to know that God knows that I am not guilty. Jennie, tell John to see that my body is taken home and buried in our own graveyard, and get Stinson to preach my funeral. Tell him I am at rest. I want to make you and Lula a deed to that house and lot, and I don't want you and her to ever have any trouble over it. Jennie, I don't do this because I think more of you and Lula than I do of Mary and Bettie, but I do it because you both attended to your dear old mother so good. I hope to soon meet her in heaven. Jennie, Mary has got enough of my money to bury me, I guess. So this is from your loving father,

"W. R. FLETCHER.

"To Jennie and Lula, may God bless you all, is my prayer.

"Yours,

"W. R. F."

He was executed on February 15, and afterwards the letter was offered for probate as his will. The appeal before us is prosecuted from the judgment of the circuit court admitting the paper to probate. It is insisted that the paper is not testamentary in character; that it only indicates an intention to make Jennie and Lula a deed to the house and lot, and that the deceased having died without executing this intention by making a deed, the paper can not be probated as a will.

In determining whether the paper is testamentary or not the court will look, not only at the language of the instrument, but at the situation of the maker and at his intention. W. R. Fletcher knew when he wrote this paper that he was to die on February 15. His last hope of life was gone, and knowing that he was to die on the fifteenth, he wrote this letter to his daughters. The letter shows on its face that it is inartificially written; but his meaning is sufficiently apparent. He did not have in mind that he was thereafter to make his daughters a deed to the house and lot. What he had in mind was that he wished them to have the house and lot, and not to have any trouble over it; for he added, "I don't do this because I think more of you and Lula than I do of Mary and Bettie, but I do it because you both attended to your dear old mother so good." These words show that he had in mind not something that he was going to do, but something he was then doing. In other words, they show that he intended them to have the house and lot by virtue of the letter he was then writing, and not by virtue of some instrument he was thereafter to write. A will may be in any form. The words in which the intention of the testator is expressed are immaterial if sufficiently appears from the instrument that he was making a disposition of his property testamentary in character. In *Clark v. Ransome*, 50 Cal., 595, the following note written in expectation of death was probated as a will, "Dear Old Nance: I wish to give you my watch, two shawls, and also \$5,000. Your old friend, E. A. Gordon."

In *Beyers v. Hope*, 48 Am. Rep., 89, the decedent wrote on the back of a business letter, addressed to a man and his wife, the following, addressed to the wife: "After my death you are to have \$40,000. This you are to have, will or no will. Take care of this until my death." In *Hunt v. Hunt*, 17 Am. Dec., 438, the decedent endorsed on the back of a note, these words: "If I am not living at the time this note is paid, I order the contents to be paid to A. H." He died before the note was paid. In *Fickle v. Snepp*, 49 Am. Rep., 449, the instrument was in form a promissory note; in all these cases the papers were probated as a will. Indeed the general rule is that an instrument is a will if properly executed whatever its form may be, if the intention of the maker to dispose of his estate after his death is sufficiently manifested. (*Babb v. Harrison*, 70 Am. Dec., 203.)

Under these principles the circuit court properly admitted the paper to probate as the will of W. R. Fletcher.

Judgment affirmed. ✓

SWARTWOOD'S GUARDIAN, &c. v. LOUISVILLE & NASHVILLE RAILROAD CO., &c.

(Filed June 12, 1908—To be reported.)

1. Railroads—Children Stealing Rides—Legal Duty of Company—Actional Negligence—There is no legal duty devolving on railroads to prevent children of tender years from stealing rides by jumping on passing trains in cities or towns. Where there is no legal duty there can be no actional negligence.

2. Same—Trespassers—Duty Owed to Company—All persons who venture upon a railroad train unbidden by the company and unknown to it, do so at their own peril, and as they have no right, the company owes them no duty in such cases. This rule applies without respect to the age or condition of the trespasser.

3. Invitation to Children to Play on Lot—Stealing Rides—Proximate Cause of Injury—The fact that a railroad company had a pile of sand on an open lot, near its track, on which children sometimes played, does not render the company liable to damages in an action by a child who ran from the sand pile and jumped on a passing train to steal a ride and was thereby injured. The sand pile had no connection with the injury, and was not the proximate cause of it.

B. F. Graziani for appellants.

Benjamin D. Warfield, S. D. Rouse, John Galvin and Maurice Galvin for appellees.

Appeal from Kenton Circuit Court. .

Opinion of the court by Chief Justice O'Rear, affirming.

The question for decision in this case is, whether railroad companies, whose lines traverse cities and towns, or other populous communities, must maintain a lookout for children who are in the habit of jumping on and off the cars while in motion, although the railroad people did not know that the particular child who might be injured by such practice, was in fact upon its cars; and to provide against such injuries.

The petition in this case, which was held bad on demurrer, alleged that the infant plaintiff, aged eight years, was attracted to appellee's trains in the city of Covington, by other children jumping on and off the cars while in motion, stealing rides, and that the

defendants were aware of the practices of such children at that point; that a watchman of the appellees, whose duty it was to lower and raise a nearby gate across a street railroad intersection, also knew of the practice of the children, but on the occasion of the plaintiff's injury, took no precaution to learn whether he was on the train or not; that plaintiff, following the practice of the other children, and in attempting to jump on one of the moving cars, slipped and fell beneath it, thereby having a foot cut off. It is not charged that the defendants knew that plaintiff was attempting to make his perilous try at the time he did it, or that defendants neglected to use any precaution to save him from injury after discovering his peril. So the question comes down to the point stated in the beginning of this opinion.

It is a fact of which we all know that railroads traverse streets and lots in our cities on their grade; that there is little or no protection against trespassing upon the railroad tracks; that children and others do so in spite of the well known danger of the practice. The Legislature has not taken action to require railroad companies or the cities to maintain barriers against such trespassers. The habit of such trespassing, including perhaps the childish tendency and practice of clambering on to the moving cars to get a short, free ride, is well known also to everybody, including, of course, the railroad people. If the operators of the train know of the actual presence of such trespassers—for such they are—they are required, by the humaneness of the law, not to injure them if, with the means at their command, they can avoid doing so. Nor will the inconvenience and annoyance entailed be counted. The courts have never gone further than that. The Legislature may, but it has not. Any other rule, particularly the one contended for by appellant, would require practically that such railroads should police all their lines and vehicles in such cities and towns in anticipation of the dangers to thoughtless and heedless persons.

Because of their inexperience and childish instincts, infants of tender years are not always held to the same strict accountability as adults in such matters. The latter are charged with their own negligence in willfully going into such perilous places, without right to do so. But even if they were not negligent, as for example, if they were insane, the rule would not be different. So the rule is not based entirely upon the negligence or even wrong of the so-called trespasser. Rather, the reason a recovery is denied is because the railroad company has not been legally negligent of any duty it owed to such person. Without legal duty there can not be actionable negligence. The duty is not owing because, as such person had not the right to be at the place, his presence need not be expected, and need not therefore be provided against. It is true it is known that such trespasses are probable. But they are sporadic. The railroads are required to serve the public by running their trains over their tracks; they are held to a rather strict accountability in many matters connected therewith. To require this additional duty would be to put railroad operations beneath the rights of trespassers upon the railway tracks. It would be hard, if not impracticable, to draw a line between willful trespassers and those of other degrees; or between those who trespass in towns and those who trespass in the country. Both quarters are alike subject to the practice, though with varying frequency. Hence no distinction is recognized as existing with respect to such.

The courts have gone as far as seems allowable within the principles of the common law, in applying the doctrine of liability to technical trespassers; where, for example, the public uses a railroad as a street or passway for such time and with such frequency as to show, with reasonable certainty, that they are present at all times, the railroad company, by its acquiescence seemingly assenting to and inviting such use, the traveler is not deemed a trespasser; or if he

is, the company is charged with notice of the fact of his presence. It may be thought harsh and arbitrary to draw a line between such and children who are allowed to habitually trespass on the moving cars. But the line must of necessity be drawn somewhere. And where the gradation becomes shadowy and indistinct it may appear that the line is drawn arbitrarily. But it is not so in this instance. A very practical differentiation exists logically. The public—which of course, includes everybody—may obtain an easement in land by prescription. The particular land thereby is dedicated to the public use. As railroads do run upon streets of cities, it is not inconsistent that streets may be opened up along the railroad track. If the railroad, in fact, so dedicates its track in a city, or allows it to be so used for such a length of time as that the public right attaches, as if there had been such dedication, then the public are there as a matter of right; or, at least, the railroad, because of its acquiescence and seeming invitation, will not be heard to deny it. Its duty in that event is to maintain a lookout for such persons, knowing they are probably present; and to take precautions against injuring them.

But this rule of presumptive dedication does not apply as to sparsely settled sections, or where the use is comparatively infrequent and without semblance of an assertion of a public right.

These rules obtain without any respect to the ages or mental conditions of those using such ways.

Now as to the cars, there is no such thing as the public's acquiring a right to use them by prescription. There is no precedent for such a claim and no principle in law analogous to it. All who venture, unbidden by the company, and unknown to it, upon its trains, do so at their own peril, as they can have no right, and the company therefore, owes them no duty, in such case. This rule also applies from the very necessity of the matter, without respect to the age or condition of the trespasser. For the court must deal with the question first of legal duty, not compassionate innocence.

Counsel for appellant cites and relies upon *Louisville & Nashville Railroad Company v. Popp*, 96 Ky., 103; *Branson's Adm'r v. Labrot*, 81 Ky., 638, and a line of cases, known as the *Turntable Cases*." In *L. & N. R. R. Co. v. Popp*, supra, the injured child, was known to be on the car by the trainmen, when they bumped other cars against it so violently and negligently as to throw the plaintiff off and hurt him. The principle on which the recovery was allowed in that case is one firmly fixed, namely, the known presence of a trespasser imposes the duty on the trainmen to use care not to injure him. They have the right to eject him because he is a trespasser, but not to kill or maim him.

Branson v. Labrot supra, rests on the same principle as the turntable cases, namely, the negligent leaving upon one's lands, unguarded, dangerous contrivances attractive to children, whereby they are lured on to the real property of the negligent owner and sustain injury. But that principle has not a place here. The cars were not left in unguarded lots, but were being used in the only way the conditions permitted them to be used at that time and place.

So far we have discussed this case, omitting to mention another allegation of the petition which appellant seems to place some stress upon, as supporting a right to recover in this action; that is, it is alleged that on an open lot owned by defendants, adjacent to their track, where the injury occurred, defendants had placed a pile of sand and left it unguarded, which was attractive to children, and did attract them and the plaintiff to that point to play; that whilst they were there, the train came along, when plaintiff left the sand pile and attempted to board the cars. The allegation as to the sand is wholly redundant. The sand had no connection with the injury,

and was not a proximate cause of it. If the plaintiff had been injured by the sand, or by rolling or slipping from it under the train, and thereby got hurt, a different question would be presented. But such was not the fact.

We are of the opinion that the ruling on the demurrer was without error, and the judgment must be affirmed.

EVANS v. COOK, &c.

(Filed June 16, 1908—Not to be reported.)

1. Passway—Long Use—Evidence to Establish—Burden of Proof—The law is now well settled in this State that, where the use of a passway extends over a long period of years, very slight evidence will be sufficient to show that it was enjoyed as a matter of right, and when the proprietor undertakes to close it the burden is on him to show that the use was merely permissive and not a claim of right.

2. Same—Obstruction—Erecting Gates—Points of Entry and Exit—Failure to Show—Statutory Fine—Where gates were erected across a passway that has been used and claimed as a matter of right for more than fifteen years by the public, the burden is on the owner of the land through which it runs to show that they were erected at the points where it enters and leaves his premises and failing to do this the gates are an obstruction, for which he is liable to a fine under Kentucky Statutes, section 4354.

Porter & Sandidge, Duff & Hutcherson, J. W. Compton and J. R. Beauchamp for appellant.

Baird & Richardson for appellees.

Appeal from Metcalfe Circuit Court.

Opinion of the court by William Rogers Clay, Commissioner, affirming.

Appellant, R. V. Evans was tried and fined in the Metcalfe county court for obstructing a passway by erecting gates across same. Thereafter he instituted this action to enjoin the collection of the fine and further threatened prosecution.

By section 4354, Kentucky Statutes, it is made an offense to obstruct a passway. The fine that may be imposed for the offense is ten dollars. The county judge had jurisdiction to try the offense herein. While it is true that, in the case of Trustees of Louisville v. Gray, 1 Litt., 146, this court enjoined the collection of a fine where the question of title to real estate was involved, that decision was rendered prior to the enactment of section 285, of the Code. The latter section provides that an injunction to stay proceedings on a judgment shall not be granted in an action brought by the party seeking the injunction, in any other court than that in which the judgment was rendered. Under this section, it has been held that, where an action is brought to stay proceedings on a judgment in a justice's, county or quarterly court, it must be brought in the court which rendered the judgment. (Davis v. Davis, 10 Bush, 274; Neeters v. Clements, &c., 12 Bush, 359.) As this proceeding was brought in the circuit court, and not in the county court, the former properly held that the collection of the fine imposed could not be enjoined. As the petition, however, seeks to restrain further threatened prosecutions, and, as this court has held that where the offense concerns

property, the title to which is involved, a court of equity will restrain prosecutions until the question of title is determined (*Trustee of Louisville v. Gray*, *supra*; *Shinkle v. City of Covington, &c.*, 83 Ky., 420), it will be necessary to consider the record and the points raised by appellant.

In the first place, appellant contends that the alleged passway was never established by an order of court, or dedicated to the public and that it is not an offense to obstruct a pathway not so established or dedicated. In this construction of the statute, counsel are in error, for this court has distinctly held that there is nothing in the section referred to which limits its application to a passway established by order of the court. It applies to all passways which have been legally established by the acts of the parties or by the act of law. The purpose is to prevent the obstruction of such ways when once opened by the wrongful acts of others. (*Hughes v. Holbrook*, 32 Ky. Law Rep., 1210; *Miller, &c. v. Pettit*, Id., 337.)

Counsel for appellant contend that the proof shows that neither the prosecuting witness, W. B. Cook, nor the public had any right of passway through appellant's land, and, even if they had, the construction of gates by appellant did not constitute an obstruction of the passway. The evidence of all the witnesses in this case shows that there has been a well-defined passway across appellant's land for a period of more than thirty years. This passway extends not only across appellant's land, but over the lands of the prosecuting witness, W. B. Cook, the farm which now consists of two tracts formerly belonging to the father of appellant. Upon the death of the father, appellant obtained the farm now owned by him, while the other portion of the farm went to his brother, who, about fourteen years prior to the institution of this action, sold the same to appellee, Cook. The law is now well-settled, that, if the use of a passway extends over a long period of years, very slight evidence will be sufficient to show that it was enjoyed under a claim of right; and when the proprietor undertakes to close a passway, the burden is on him to show that the use was merely permissive, and to explain away the presumption that its uninterrupted enjoyment, for more than fifteen years, was not exercised as a claim of right. (*Smith v. Pennington, &c.*, *supra*.) Not a single witness testified that the use by appellee Cook, and his vendors, or by the public in general, was ever permissive. There can be no doubt, therefore, that appellee and others had a right of passway over appellants land.

The next question is whether the erection of the gates constituted an obstruction of the passway. This court has frequently recognized the right of the owner of the premises, through which a passway extends, to erect gates at the points where the passway enters and leaves his land. (*Smith v. Pennington, &c.*, *supra*; *Maxwell v. McAttee*, 9 B. Mon., 20; 23 Am. & Eng. Ency. of Law, page 34.) As the burden of proof was on appellant, it was necessary for him to show that the gates erected by him were at points where the passway enters and leaves his premises. The proof utterly fails to show the exact location of the gates; indeed, from the language used by appellant, we are inclined to the opinion that the gates, as a matter of fact, were not constructed at points where the way enters and leaves his premises. If, as a matter of fact, appellant had constructed gates at such points, such action on his part would not constitute an obstruction of the passway, and he would be entitled to the relief sought. He failed to show that the gates were so placed, and it therefore follows that he must be denied the relief prayed for.

For the reasons given, the judgment is affirmed.

HOME INS. CO. OF NEW YORK v. MYERS.

(Filed June 16, 1908—Not to be reported.)

Isaac T. Woodson for appellant.

R. Gudgell & Son for appellee.

Appeal from Bath Circuit Court.

Judge Settle delivered the following response to petition for rehearing, overruling.

Appellant's petition for a re-hearing having been considered by the whole court, it is thought proper to withdraw the following paragraph of the opinion:

"Another thing is that it was neither alleged nor proved by appellant that it had, even since the destruction of the house returned or offered to pay appellee the unearned part of the premium. In view of appellant's theory that the policy was rendered void by the sale of the property, and transfer of the policy to appellee without the written consent given at the Chicago office, it should have tendered appellee the unearned part of the premium."

The foregoing paragraph should have no place in the opinion, because the contract was entire, and the risk having attached, the premium was not apportionable. If the appellant had been entitled to insist upon the forfeiture as claimed, no tender of any part of the premium would have been necessary.

The court concludes that the opinion in other respects correctly states the law of the case.

Wherefore, the petition is overruled.

McCANDLESS, BY, &c. v. McCANDLESS' ADM'RS.

(Filed June 16, 1908—Not to be reported.)

Estates—Settlement Of—May be Brought as Soon as Representative qualifies—The law is well settled in this State, that an action to settle the estate may be brought as soon as the personal representative qualifies. (22 Ky. Law Rep., 1366.) Appellant seeks to have her husband's estate constituted a trust for her benefit because of his parol declaration just after he was shot and shortly before his death, and while the court properly held that she was not entitled to the whole of it, it was error to dismiss her action on the ground that she asked a settlement of the estate.

John W. Compton and Porter & Sandidge for appellants.

Rollin Hurt and J. R. Beauchamp for appellee.

Appeal from Metcalfe Circuit Court.

Opinion of the court by Wm. Rogers Clay, Commissioner, reversing.

James A. McCandless, a resident of Edmonson, Metcalfe county, Kentucky, was shot and killed. Just prior to his death he made certain statements in regard to the disposition of his property, which appellant contends constitute a trust for her benefit. We give below the language claimed to have been used by him, by the witnesses who testified in appellant's behalf:

"Nora E. McCandless: (Record, page 17.)

"Q. When you got to your husband, J. A. McCandless, if he said anything to you, tell all he said?"

"A. He said, 'I am killed, and I want you to have everything I have got.' He said more, but I was so excited that I can't recollect it."

"Same witness: (Record, page 18.)

"Q. Did you hear what he said to G. W. Hundley in regard to taking care of you, and the property said McCandless owned then?"

"A. Yes, sir."

"Q. Tell what he said, as near as you can remember."

"A. He said: 'Be good to Nora; take care of her, and I want her to have everything I have got.'"

"Q. Did he tell him anything about wanting G. W. Hundley to see that you got the property that he, McCandless, left?"

"A. Yes, sir."

"Q. Tell what you remember that he said to Hundley."

"A. He said: 'I want you to take care of what I have left for her and see that she gets it.'"

"G. W. Hundley: (Record, page 23.)

"Q. How long after he (J. A. McCandless) was shot until you saw him?"

"A. Not over ten minutes."

"Q. Did he call you to him?"

"A. When I stepped in the door of his house they were laying him down, and I went to him and took hold of his hand."

"Q. If he said anything to you, tell what he said."

"A. I asked him what was the matter, and he said, 'I am shot and killed.' And he said: 'I want you to be good to Nora, for I have given her everything I have got, and I want you to see that she gets it.'"

"M. O. Scott:

"This witness is county judge of Metcalfe county, and was present when the shooting occurred, and at decedent's request called his wife to him. He is asked and answers: (Record, page 30.)

"Q. Did you hear what conversation took place between J. A. McCandless and his wife, after she got there? If you did, tell all that you remember that he said to her"

"A. Yes, sir, he told her he was killed. He told her he was shot in the heart, and I think he said he could not live but a few minutes. He told her that he wanted her to have everything he had. She said something to him about not being willing to give him up, and that she could not live without him, and he told her that he gave her all of his property to take care of her. I heard him tell her that his left arm was shot off, and he called her some pet name, I think it was 'Kid,' and told her not to take on."

"On cross-examination, same witness is asked and answers:

"Q. You say on direct examination, that you heard James A. McCandless. 'Tell his wife that he gave her all his property to take care of her?' I want to ask you if he used the word 'property' or the words 'all I have got?'"

"A. He used both words. At first he said he gave her all he had, and afterwards, in talking to her, said he gave her all of his property."

"A. J. Franklin: (Record, page 28.)

"Q. Did you hear the conversation that passed between McCandless and Nora, his wife?"

"A. Yes, sir; I was standing there."

"Q. Tell what McCandless said to his wife as near as you can remember."

"A. He said something about his property, but I can't tell you how it was. I paid no attention to it."

"J. H. Ball: Record, page 35.)

"This witness heard conversation between decedent and G. W. Hundley, about nine o'clock on night of shooting. After conversation detailed by Hundley, he is asked and answers:

"Q. Did you hear him (decedent) say what he wished done with his property? If yes, tell all he said and to whom he was talking at the time."

"A. Yes, I heard him say what he wanted done with his property. He was talking to Mr. Hundley and said to him that he wanted him to take good care of his daughter and that all he had was for her."

Counsel for appellant rely upon the case of Roche, &c. v. George's Ex'or., 92 Ky., 609, wherein the court approved the following language used in the case of Barkley v. Lane's Ex'ors, 6 Bush, 587; "The authorities are all agreed that to fasten a trust on property by parol declaration it is only necessary that the language used clearly and explicitly manifest the owner's purpose to transfer the right, and point out with certainty both the subject of the trust and the person who is to take the beneficial interest." In the opinion of this court, this case is distinguishable from the case cited in that no specific property was referred to. The court, therefore, finds it unnecessary to consider what is essential to create a trust in specific property.

It appears from the record in this case that appellant not only sued for the whole of her husband's estate, on the theory that a trust had been created for her benefit, but also asked for a settlement of the estate. The court below dismissed her petition. While the court properly held that appellant was not entitled to the whole of her husband's estate, we are of opinion that it was error to dismiss appellant's petition in so far as it asked a settlement of the estate. The law is well settled in this State, that an action to settle the estate may be brought as soon as the representative qualifies. (Brand's Ex'or v. Brand, 22 Ky. Law Rep., 1366.)

Upon the return of the case the court will set aside the order dismissing appellant's petition in so far as it seeks a settlement of the estate, and the administrator of appellant's husband will settle his accounts in this action. In view of the fact that the judgment is affirmed upon the principal question involved, the administrator will pay the costs of this appeal out of the estate.

For the sole reason that the judgment directed appellant's petition to be dismissed in so far as it sought a settlement of the estate, the judgment is reversed and cause remanded, for proceedings consistent with this opinion.

PADUCAH TRACTION CO. v. SINE, BY, &c.

(Filed June 16, 1908—Not to be reported.)

1. Personal Injury—Collision of Wagon with Street Car—Injury to Boy Assisting Driver—Question of Fellow Servants—Where a boy, assisting the driver of an ice wagon in delivering ice, was injured by a collision with a street car, the boy and driver of the wagon, though fellow-servants of the ice company, sustained no such relation to each other as that the negligence of the driver should be imputed to the boy in an action by the boy against the street car company for damages in causing his injury.

2. Same—Care Required to Avoid Collision—It is the duty of one driving or riding in an ice wagon, on a street to exercise ordinary care in approaching a crossing on which a street car line is running, to avoid a collision, and while the street railway company is entitled

to the free passage of its cars it is also its duty to use ordinary care to discover the approach of a wagon to its track and avoid injuring it or the persons in it.

3. Negligence of Driver—Concurring Negligence of Street Car Company—If the boy's injuries were caused wholly by the negligence of the driver of the wagon, no right of recovery exists against the street car company, but if they resulted from the joint or concurring negligence of the company and the driver, both are liable and a recovery may be had against either.

4. Duty of Motorman—Failure to Use Ordinary Care—If the motorman of the street car, notwithstanding the negligence of the driver of the wagon, by the use of ordinary care, could have stopped the car in time to have prevented the collision and failed to do so, such failure constituted negligence for which the company was liable to the boy in an action for damages, and this would be true whether the motorman's failure to stop the car was caused by his running it too fast, or by not maintaining a lookout ahead of his moving car.

5. Instructions After Closing Argument—The giving of an additional instruction to the jury, after the conclusion of the argument, while not proper practice, yet where a proper instruction was given, after the argument, which it would have been error to have omitted, the giving of the instruction was not a reversible error, especially where neither counsel asked to make an additional argument.

Wheeler, Hughes & Berry for appellant.

Hendrick, Miller & Marble for appellees.

Appeal from McCracken Circuit Court.

Opinion of the court by Judge Settle, affirming.

The appellee, William Sine, an infant, by a collision between an ice wagon and one of appellant's street cars, was thrown from the wagon to the railway track and his leg so crushed by the wheels of the car as to necessitate its amputation. For the injuries thus sustained, appellee, by next friend, sued appellant in the McCracken Circuit Court, alleging they were caused by the negligence of the motorman operating the car. \$10,000 was the amount of the damages claimed. The answer traversed the petition and in addition pleaded that appellee's injuries were caused by his own contributory negligence and the negligence of the driver in charge of the wagon. These pleas were denied by reply and upon the issues thus made a trial was had, resulting in a verdict and judgment in appellee's favor for \$2,000. Appellant moved for a new trial which was refused by the circuit court and this appeal followed.

The collision occurred at the intersection of Jackson and South Third streets, in the city of Paducah. The ice wagon was the property of the Robertson Ice Company; appellee and the driver of the wagon were employes of the ice company and engaged in the business of delivering ice to its customers. The driver's place, of course, was at the front of the wagon, from which he controlled the mules drawing it. Appellee's post of duty was at the rear end of the wagon, upon a foot board, attached to and hanging down about a foot and a half from the bottom of the wagon bed. From this position he delivered ice from the wagon in such quantities as might be requested by purchasers. The ice wagon contained a heavy curtained top, or cover open at each end, the roof and sides of which extended back beyond the step, so enclosing it that appellee, in order to see any object on either side of the wagon, would have to hold the wagon bed with one hand and lean his body backward.

On the occasion of the collision, the ice wagon in approaching the intersection of Jackson and Third streets, was going from east to west on Jackson street, and the street car passing over Third street from north to south. As the wagon neared the railway track, there was a building on the corner which prevented the approaching car from being seen by the driver until the wagon reached the edge of Third street, and if the street was fifty feet in width between pavements and the railway track was in the middle of the street and eight feet wide, the wagon was within about twenty-one feet of the track before the driver could have seen the car. Appellee, however, was less favorably situated, as he was standing on the foot board, at the back end of the wagon, and his view of the street, in the direction of the coming car was obstructed by the side of the wagon cover as well as the corner building. Both he and the driver testified that they did not see the car until the wagon got upon the railway track, though they claimed to have been keeping a lookout for a car at the time. Both also claimed to have first looked along the railway track south for a car and upon looking north only discovered, after getting on the track, the one by which the wagon was struck, but it was then too late to avert the collision.

It further appeared, from appellee's evidence, that Jackson street was constructed of brick, and the ice wagon in moving over it made a considerable noise; that the street car was running at an unusually high rate of speed, and that no effort was made by the motorman to give the usual signals of its coming, or to control or lessen its speed after he discovered, or by ordinary care could have discovered, the wagon and that it was about to cross the track in front of the car. If appellant's motorman saw the wagon on the railway track or about to go upon it, in time to have prevented the collision by stopping the car, but for the high rate of speed at which he was running it, or if the collision was caused by his failure to maintain a proper lookout ahead of him, or his failure to sound the car gong, in approaching Jackson street, in either of these events, he was guilty of negligence, which entitled appellee to recover; and there was evidence in appellee's behalf tending to prove negligence on the part of the motorman in one or more of these particulars.

Appellant introduced on its behalf considerable evidence to the effect that the car was not running at a high rate or dangerous rate of speed, that the usual signals were given, and a lookout maintained by the motorman, and that the driver of the ice wagon ought to have seen, and by the exercise of ordinary care could have seen, and heard the car, from the time the wagon reached Third street and before going upon the track in front of it, and thereby have prevented the collision; but that he failed to exercise such care and negligently drove upon the track when so near the car that it was impossible to stop it in time to prevent the collision. Appellee and the driver of the ice wagon were lawfully upon the street occupied by appellant's car track and had the right to use any part of it with the ice wagon, but in using the street, it was their duty to exercise ordinary care to avoid a collision with appellant's car, and while appellant was likewise entitled to the use of its railway track on the same street for the free passage of its cars, it was also its duty to use ordinary care to discover the ice wagon and avoid injuring it or persons in it. (Palmer Transfer Co. v. Paducah Railway and Light Co., 28 Ky. Law Rep., 473; Green v. Louisville Ry. Co., 27 Ky. Law Rep., 316.)

The record furnishes very slight, if any, evidence of contributory negligence on the part of appellee. The great weight of it conduced to show the absence of such negligence. He testified that he did not see and could not discover the presence of the car until the

wagon was on the track and the collision became an inevitable fact, and that it was then too late for him to jump out of the way of the car. No witness expressly contradicted this and the statement was apparently corroborated by the physical fact that his position on the foot board prevented him from seeing the car until he got to or practically upon the track.

As already intimated, there was evidence on appellant's behalf to the effect that the driver of the ice wagon was guilty of negligence; though much of appellee's evidence conduced to prove that he was not. However, if it be conceded that the driver's negligence contributed to the accident, we do not regard it material in this case in view of the proof of the motorman's negligence. This is not an action of a servant against the master to recover for injuries resulting from the negligence of a fellow-servant. Appellee and the driver, though fellow-servants, in the employ of the Robertson Ice Company, sustained no such relation to each other as to the appellant, in this case; nor should the negligence of the driver be imputed to appellee as he was neither his agent nor servant.

If appellee's injuries were caused wholly by the negligence of the driver, no right of recovery exists in his behalf against appellant, but if they resulted from the joint or concurring negligence of appellant and the driver both are liable therefor in damages, or a recovery may be had against either. On the other hand, if appellee's injuries were caused by the negligence of the motorman alone, appellant's responsibility therefor, can not be questioned. So, if it be admitted that the evidence in this case tends to show that the driver of the ice wagon was negligent, in not discovering the approach of the car, before driving upon the railway track, or in attempting to cross the track in front of the car, if, as the evidence strongly conduced to prove, appellant's motorman, notwithstanding such negligence, on the part of the driver, by the use of ordinary care could have stopped the car in time to have prevented its collision with the wagon, and failed to do so, such failure constituted negligence entitling appellee to recover of appellant the damages he sustained from the collision. And this would be true whether the motorman's failure to stop the car in time to prevent the collision, was caused by his running it at a too rapid and dangerous rate of speed, or an account of his not maintaining a lookout ahead of the moving car. The doctrine fixing appellant's liability upon such a state of facts as here presented, if its contention as to the negligence of the driver of the ice wagon is allowed, is well stated in the case of *Kentucky and Indiana Bridge Co. v. Sydnor*, Adm'r, 26 Ky. Law Rep., 951, as follows:

"McDowell was a fellow-servant of decedent, Renfro, in repairing the car, it is true, but it does not follow from that fact that anybody in connection with McDowell could wrongfully injure or kill Renfro in that work and escape liability on the ground that the fellow-servant, McDowell, aided in the wrongful act. Nothing is better settled than that when two or more by their joint tort damage another, the joint tort feasons are jointly and severally liable to the injured person for his entire damage. The doctrine of non-liability of a master or employe to one of his servants for an injury inflicted by the negligence of a fellow-servant is based upon the implied contract of the parties, which is, that each servant agrees to assume the risk of his fellow-servant's negligence, the correlative undertaking of the master being that he will use reasonable diligence to engage none but competent fellow-servants. If the master notwithstanding, engages incompetent workmen, from whose negligence damage is sustained by his fellows, the master is liable for the injury, because it was brought about by a breach of his implied

undertaking. But this assumption by the laborer of his fellow-servant's negligence, or, to put it differently, the excusing of the master for the act of such, is the result of the contract between the master and servant and is personal to them. A stranger to the contract is not entitled to its benefits, for he does not bear any of its obligations. As to him the fellow-servant with whom he acts in doing the wrong is like any other joint tortfeasor; they are both liable for the injury they have inflicted by their negligent acts." (Pugh v. C. & O. Ry. Co., 101 Ky., 77; Farwell v. Boston & W. R. Corp., 4 Met. (Mass.) 49, 38; Am. Dec. 339; Johnson v. Lindsay, 65 L. T. N. S., 97; Smith v. N. Y., &c R. R. Co., 19 N. Y., 132; Gray v. Phil., &c., R. R. Co., Fed., 168; Grand Trunk Ry. Co. v. Cummins, 106 U. S., 702; Bishop, Non-Contract Law, section 518.)

We have considered the objections urged by appellant to the instructions. The instructions are numerous; for that reason, and because of the already sufficient length of the opinion, they are not set out therein. While in some respects inaptly worded, they substantially conform to the conclusions herein expressed; set forth the reciprocal duties resting upon appellant and appellee with respect to the state of facts resulting in the latter's injuries, and fairly presented for the guidance of the jury the law applicable to every issue in the case.

The giving of the additional instruction after argument had been concluded, was not, under the circumstances, reversible error. The instruction in question was eminently proper. The others would have been insufficient without it, and the failure to give it would have been error.

The giving of instructions, after the conclusion of the argument to the jury, should not be approved, as a practice. In a few cases this court has refused to reverse for it, where, as in this case, it was made to appear that the additional instruction was indispensably necessary; that the case had been fully and satisfactorily argued on each side, or that neither counsel asked to make a further argument on account of the additional instruction. (Turner v. Commonwealth, 21 Ky. Law Rep., 2161; Kenneday v. Commonwealth, 30 Ky. Law Rep., 1066; Sears' Adm'r v. L. & N. R. R. Co., 22 Ky. Law Rep., 152.)

We do not think the giving of the instruction after argument was prejudicial to appellant. It is conceded by appellant's counsel that the verdict is not unreasonable in amount.

Judgment affirmed.

BEREA COLLEGE v. BURNELL, &c.

(Filed June 17, 1908—Not to be reported.)

Passway—Permissive Use—Rights Conferred—Where the Use of a passway is merely permissive on the part of the owner, a privilege extended to his neighbors without any intention to surrender his right to it, or purpose on their part to assert claim, and no act or conduct by either indicating that such use was other than a neighborly act, such use, even for fifty years, would not confer the right to claim it against the owner, or prohibit him from closing it.

Smith & Smith for appellant.

J. C. & D. W. Chenault for appellees.

Appeal from Madison Circuit Court.

Opinion of the court by Wm. Rogers Clay, Commissioner, affirming.

In this action, appellant, Berea College, seeks to enjoin appellees from obstructing a road or passway leading from the lands of appellant, over the lands of appellee, to the Berea and Big Hill turnpike. The land now owned by Berea College, and to which this alleged passway leads, was formerly owned by Sam Pigg, Berea College being his vendee. The land now owned by Anthony Burnell, and over which appellant claims a passway, was formerly the property of J. K. Harris, the appellees Anthony Burnell and William Burnell being the vendees of Harris.

About seven or eight years prior to the institution of this action, appellees constructed a fence on each side of a lane which was located a few yards from a road formerly leading through the lands of appellee, Anthony Burnell and his vendor, J. K. Harris. Several witnesses testified that, prior to that time, the road adjoining the lane in question and the lane itself were used by appellant and its vendors and the public in general for a period of more than fifteen years. The testimony for the appellees is to the effect that the persons so using the road through the premises of J. K. Harris did so with his permission; some of the witnesses testifying that, in some instances, they paid for the privilege of going through J. K. Harris' lands. The evidence further shows that appellees' vendor, Sam Pigg, used the old road through J. K. Harris' land by permission from Harris. The evidence for appellees also tends to support their position, that the use of the land, which they fenced after their purchase of the property from Harris was merely permissive. Indeed, it appears that the president of Berea College at one time sought to purchase from Anthony Burnell the strip of land along which the lane now runs. This is not consistent with the position that Berea College and its tenants used the passway as a matter of right.

Where the use of a passway is merely permissive on the part of the owner of the land, a privilege extended to his neighbors without any intention on his part to surrender his right to it, or purpose on their part to assert claim, and when there is no act, or conduct by either that would indicate that the use of the way was other than a neighborly act, and it is recognized that the privilege is one that may be revoked at any time by the owner of the land, its use for over fifty years will not confer the right to claim it as against the owner, or prohibit him from closing or discontinuing it. (Smith v. Pennington, &c., 28 Ky. Law Rep., 1282.)

Without giving the testimony in detail, it may be said that, while there is considerable evidence of the uninterrupted use of the passway for a long period of years, there is also much evidence that this use was only permissive. The chancellor took the latter view, and decided in favor of appellees. After a careful reading of the record, we are unable to say that his conclusion was erroneous.

Judgment affirmed.

CLARKE v. LOUISVILLE & NASHVILLE R. R. CO.

(Filed June 17, 1908—Not to be reported.)

1. Railroads—Volunteer—Riding On Freight Train—Where one voluntarily performs services upon a freight train on which he is riding, with the knowledge of the conductor, without having paid compensation, he can not be considered as a passenger, or as an employe, but may be classed as a volunteer.

2. Same—Injury to Volunteer—Performing Services—Knowledge of Engineer—Care Required—Recovery—Where a volunteer riding on a freight train, received an injury in attempting to couple the engine

to the cars, with the knowledge of the engineer, the only duty the servants of the company owed him, was to exercise ordinary care to prevent injuring him, and, to entitle him to recover damages for an injury so incurred there must be evidence conducing to show that the engineer failed to exercise ordinary care in handling his engine at the time he was injured.

J. J. Osborne and W. J. Osborne for appellant.

Benjamin D. Warfield and E. M. Dickson for appellee.

Appeal from Nicholas Circuit Court.

Opinion of the court by Judge Carroll, affirming.

The appellant, at the time he received the injuries complained of, was eighteen years of age. His foot was crushed by being caught between the couplers in a train. Averring that the injuries he received were caused by the negligence of the employes of appellee in operating the train, he brought this action to recover damages.

Upon a trial, and at the conclusion of the evidence offered in behalf of appellant, the lower court directed the jury to return a verdict in favor of appellee. So that, the only question we are called upon to consider is whether or not the evidence introduced was sufficient to authorize a submission of the case to the jury. In the disposition of this question, it will be necessary to relate with some detail the facts.

On the day he was injured, Clarke went to Maysville, Ky., on a passenger train. Late in the afternoon, he went to the depot for the purpose of returning to his home upon a freight train that left Maysville for Paris, about 5 o'clock. Arriving at the depot some twenty minutes before the freight left, he assisted the train crew, with whom he was acquainted, and with the knowledge of the conductor, in making up the train, coupling and uncoupling cars, and performing such other duties as brakemen ordinarily discharge. He did not ask permission of the conductor to ride on the train, nor did the conductor ask him if he was going to ride, nor was anything said between them concerning this matter. But, when the train left Maysville, he got on it, and soon after it left the depot he went into the caboose where the conductor and the train crew were seated. The train had its full compliment of men, consisting of the engineer, fireman, conductor and three brakemen. Between Maysville and Parks Hill, at which last named point the injury occurred, the train stopped at several stations for the purpose of unloading and loading freight; and at each of these places, Clarke assisted the trainmen. He does not state particularly that the conductor requested him to assist the crew in loading and unloading freight, but does say that the conductor was present at each station and did not object to his assistance or request him to desist. He also testifies that, in the presence of the conductor, one of the brakemen furnished him a suit of overalls to wear, so that he might not injure or soil his clothes in handling the freight. He did not pay or offer to pay any fare; nor was any fare demanded of him. When the train reached Parks Hill, a station on the road Clarke was directed by the conductor to uncouple the engine from the freight car next to it, so that the engine might go down on a switch some two hundred yards distant, and get a couple of cars that they wanted to put into the train. When the engine started after the cars, Clarke, in connection with one of the brakemen, got in the engine cab and rode down to the point where the cars were standing on the side-track. He says he was directed by the conductor to go with the engine and assist in getting the cars out. When the engine

reached a point some 25 feet from the loaded cars, Clarke got out of the cab, and walked back to couple the tender to the end of the nearest car. The coupling knuckles on the car were closed, and the tender bumped its coupling knuckle into the coupling knuckle of the freight car without making the coupling. Clarke then signalled the engineer to pull away from the freight car, which he did, until there was a space of some 10 feet between the end of the tender and the car. After the engine had pulled away, Clarke undertook with his hand, and finally with his foot, to open the coupling on the freight car, so that the tender could be coupled to it. While in the act of opening the coupler with his foot, the engine backed in, catching his foot between the couplers, injuring it to such an extent as to make necessary the amputation of his leg between the ankle and the knee.

Counsel for appellant contends, first, that at the time of his injury, Clarke was a passenger and entitled to sue and recover as a passenger for injuries sustained; and second: that if he was not a passenger, he was an employe and entitled as such, to maintain the action and recover damages.

The question as to when a person, who is not riding on a passenger train, or a train upon which passengers are permitted to ride, is entitled to the rights that attach to a passenger, has been considered by courts of last resort in a number of States, including our own court; and different views are taken as to when and under what circumstances the relation of passenger is created. But we do not think that any of the elements necessary to constitute Clarke a passenger, or to fix the liability of the company upon the basis that he was a passenger, exist in this case. There is no pretense that the train, upon which he was riding, had any accommodation for passengers, or that passengers were ever carried upon it, or that he asked or was given consent by the conductor or any other person to ride as a passenger, or that he tendered or offered to tender his fare as a passenger. On the contrary, Clarke knew, that the train did not carry passengers, and that he was not riding on it as a passenger, except in the sense that he was being carried from one place to another. The mere fact that he was riding by the invitation or with the knowledge and implied consent of the conductor, did not, under the facts of this case, convert him into a passenger in the ordinary and legal acceptation of the term. We do not deem it necessary in the consideration of this case, to point out the conditions under which a person, riding upon a freight train, may become a passenger, or to define the authority of the conductor of a freight train relative to permitting persons to take passage upon it. The facts make it so apparent that Clarke, at the time he received the injury complained of, was not a passenger, that we will not do more than cite the following authorities in which different phases of this question are illustrated: *Dunn v. Grand Trunk Ry. Co.*, 58 Maine, 187; 4 Am. Rep., 267; *L. & N. R. Co. v. Thornton*, 22 Ky. Law Rep., 778; *Dalton v. L. & N. R. Co.*, 22 Ky. Law Rep., 97; *Skirvin v. L. & N. R. Co.*, 30 Ky. Law Rep., 1208; *B. & O. S. W. R. Co. v. Cox*, 66 Ohio State, 276, 90 Am. St. Rep., 583; *Thompson on Negligence*, sec. 2666, 3326; *L. & N. R. Co. v. Hailey*, 27 L. R. A., 549; *Eaton v. Deleware, Lackawanna, &c., R. Co.*, 57 N. Y., 382; 15 Am. Rep., 513; *L. & N. R. Co. v. Scott's Adm'r.*, 22 Ky. Law Rep., 30; *C., N. O. & T. P. Ry. Co. v. Jackson*, 22 Ky. Law Rep., 630; *Elmore v. Sea Board Air Line R. Co.*, 42 S. E., 989.

Nor can Clarke, at the time of his injury, be considered as an employe of the company. The train had a full crew, there was no emergency, and no especial need for the services of Clarke. The conductor, under the circumstances had no authority to and did not employ

him to assist as a brakeman. The general rule is that where a brakeman is absent, and the proper and safe management of the train so requires, and in cases of sudden emergency demanding extra labor, it is within the implied authority of the conductor to employ assistance; but all the authorities agree that except under the conditions indicated, the conductor is not authorized to employ agents or servants to assist in the management or operation of the train. (Sloane v. Railroad Co., 62 Iowa, 728; Railway Co. v. Prospect, 83 Ala., 518; Eason v. Railway Co., 65 Texas, 577; McDaniel v. Railroad Co., 90 Ala., 64; Elliott on Railroads, sec. 302; Church v. Chicago R. Co., 50 Minn., 218.)

Neither can it be said with propriety that at the time of the accident, he was a trespasser. He was performing duties with the knowledge and consent of the persons who had at least, the apparent right to request his assistance. So that, we think, he may properly be treated as a volunteer. In Thompson on Negligence, section 4680, it is said:

"A person who volunteers to assist the servant of another, without being employed so to do by that other, is deemed to assume all the ordinary risks incident to the situation. His position is that of a volunteer, and is analogous to that of a trespasser or bare licensee. He takes things as he finds them, and in case of his being injured—unless the injury occurs under such circumstances as to create a liability, if he were regarded as a trespasser, intruder or bare licensee—he can not recover damages from the master of the servant whom he had volunteered to assist. If, after discovering such volunteer has placed himself in a position of danger, even through his own negligence, the servant fails to exercise reasonable care to avert injury, the latter will be liable. This liability does not rest on any contract obligation, but on a general duty not to inflict a wanton or willful injury on another." To the same effect is Elliott on Railroads, section 1305; Evarts v. St. Paul Ry. Co., 56 Minn., 141; 45 Am. St. Rep., 460; L. & N. R. Co. v. Pendleton. 31 Ky. Law Rep., 1025.

Considering the matter from this standpoint, and treating Clarke as a volunteer, the only duty that the company owed under the facts of this case, was to exercise ordinary care to prevent injury to him. With the knowledge of the engineer and by the direction of the conductor, Clarke was engaged in an effort to couple the engine to the cars, and while in the performance of this act, the engineer was obliged to exercise ordinary care to prevent injuring him. So that, the point upon which this case must turn is whether or not the engineer exercised this degree of care. If he did, the company was not liable, and the ruling of the trial court was proper; on the other hand, if he did not, the case should have gone to the jury.

In the disposition of this question, we are not concerned in anything that took place before the arrival of the train at Parks Hill, or on other previous occasions, as for the purpose of this case we may assume that at Parks Hill, Clarke, for the first time, volunteered to perform any duties in connection with the train.

In order that the facts as to the pivotal point in the case may be clearly understood, we will state the testimony as to what took place. Clarke's evidence is as follows:

"Q. How close was the tender to the two loaded cars when you got out of the cab?"

"A. About 35 or 40 feet."

"Q. What did you do after getting out of the engine cab?"

"A. I walked along, backing him on back, bringing the engineer back by signals."

"Q. What signals did you give him?"

"A. Just to back up."

"Q. What signals did you give the engineer, if any?"

"A. After he came on back, the knuckles were closed and wouldn't couple. He came on back and hit and made a bump, and then had to pull the engine up; had to open the knuckle. I had to pull him up once after the train had bumped and didn't couple, then the second time I tried to push the knuckles open and got my foot caught."

"Q. What signal did you give the engineer, if any, after the engine bumped into the car and didn't couple?"

"A. Gave him the signal to pull up."

"Q. About how far did he pull up from the end of the first car?"

"A. It wasn't over 15 feet."

"Q. What did you do then, after he pulled up?"

"A. I was trying to open the knuckle."

"Q. How were you trying to open the knuckle?"

"A. Trying to open it with my hand until the train got nearly there; I threw my foot up to try to kick it open."

"Q. What signals, if any, did you give the engineer from the time he commenced backing in the engine and tender after he first pulled up and before your foot was caught?"

"A. Gave him the signal to stop—shut down."

"Q. How close was the tender to the loaded car at the time when you gave him that signal?"

"A. About eight or ten feet."

"Q. What then happened after you gave him the signal to stop?"

"A. He kept on coming back."

"Q. Then what happened?"

"A. Why, I was trying to couple—trying to kick that knuckle open, and he came back in a jerk and caught my foot in there."

"Q. About what distance was the jerk?"

"A. Four or five feet."

"Q. How were you trying to push open the coupling knuckle?"

"A. With my foot."

Homer Bourne, a witness introduced for appellant, testified in substance, that he was on top of the box car at the time the coupling was attempted to be made; that he saw Clarke leave the engine cab and start back and come towards the car upon which he was to make the coupling, but didn't see him afterwards. He said that the engine came back to make the coupling in the usual way, and didn't jar the car on which he was any more than was done in making an ordinary coupling.

Another witness, Riley Payne, said that he saw Clarke and two other brakeman get out of the cab, and that Clarke and the brakemen both gave signals to back the engine. He was within ten feet of Clarke at the time of the accident, and on the same side of the train, and said that: "Clarke got off the cab and signalled back, to come on back; that he came in and aimed to kick the coupling off, and caught his foot. That he did not remember but one effort made to couple the cars." That there was no change in the speed of the engine, from the time Clarke got out of the cab until his foot was caught; that Clarke stepped from the engine and went along with the engine as it backed, and that the engine moved gradually. That the nearest brakeman was about 15 feet behind Clarke, and before this brakeman came up to where the coupling took place, Clarke went in and attempted to kick the coupling open with his foot, and just as he kicked the coupling open, the engine came back and caught it.

Tom Payne testified that he was on the box car, that the engine intended to couple to. That he saw Clarke get out of the engine cab

and signal the engineer to come back. That he did not see any person else giving signals. That the engine backed up to make the coupling, that it missed, and pulled up about 10 or 12 feet, and backed again, and caught Clarke's foot the second time. That Clarke, upon the failure to make the coupling, on the first attempt, gave the signal to pull up, and in obedience to the signal the engineer did pull up 10 or 12 feet, and that when Clarke gave the signal to back, the engine was backed.

The foregoing evidence does not establish that the engineer knew that Clarke was in a perilous position, nor is it sufficient to show that in backing the engine, he failed to exercise ordinary care. It is true that Clarke says he signaled the engineer to stop, but he does not say that the engineer received the signal or if he did receive it, that he could have stopped the engine in time to have prevented the accident or that the movement of the train was unusual or unnecessary. In *C., N. O. & T. P. R. Co. v. Jackson*, supra, a boy, 16 years of age, while riding on a freight train, with the permission of the conductor, and with the understanding that he should open the switch, was injured—in discussing his evidence that he had signalled the engineer to back the train, the court said:

"Appellee's evidence that he signalled the engineer to back the train is no evidence of the fact that he did act upon that signal, as there were four other men connected with the train whose business it was to look after its movements and give necessary signals. He testifies that he gave the signal from the right side of the train, the side upon which the engineer was sitting, and that the engineer was looking back through his window. Still that does not prove that the engineer did see him or his signal, but simply shows that if he cast his eyes where the appellee stood, he could have seen him. If the appellee had been an employe in operating the train, and had given a signal to back it, under the circumstances stated by him, then an inference might be drawn or a presumption indulged that the engineer saw him and acted on his signal. * * * Besides, this, there is no proof offered by the appellee, to show that the jerk which threw him from the train was one that was unusual in the moving of freight trains, or that any unnecessary force was applied to the train which produced the sudden movement designated as a jerk. There was no negligence shown upon which to base a recovery."

To entitle Clarke to recover in this case, there must have been some evidence conducing to show that the engineer failed to exercise ordinary care in handling his engine at the time Clarke was injured. Upon this vital point there is a total failure of proof, and the judgment of the lower court must be affirmed.

LOUISVILLE & NASHVILLE RAILROAD CO. v. GORMLEY.

(Filed June 17th, 1908—Not to be reported.)

Benjamin D. Warfield, J. A. Sullivan and Jno. T. Shelby for appellant.

Smith & Smith for appellee.

Response to petition for re-hearing, per curiam.

Upon another trial the court should instruct the jury that, in estimating the damages, if any, to which appellee is entitled, they should take into consideration the difference between the fair market value of the horse immediately before his injury and afterwards, and find

in damages such sum as will reasonably compensate appellee for any injury the horse sustained that resulted directly from or was caused by the injury he received.

The parties may also introduce evidence conducing to show the condition of the horse up to the time of the trial, but no recovery can be had for loss that may have been sustained on account of inability to keep racing engagement the horse was entered in, although damages are allowable for money in caring for the horse that was made necessary on account of his injuries.

Petition overruled.

BARNES v. JOHNSON.

(Filed June 17th, 1908—Not to be reported.)

1. Actions—Equitable Issues—Right of Jury Trial—Discretion of Chancellor—The absolute right to have issues in an equity case tried by a jury is confined to issues which are purely legal in their character. Where issues are of equitable cognizance it is within the discretion of the chancellor whether he will order a jury to aid him in finding of the facts.

2. Same—Action to Cancel Deed—Consideration—Issues—In this action to cancel a deed, held that the plaintiff failed to establish the allegation that there was no consideration for the deed or that the deed was intended for a mortgage and that the chancellor did not err in refusing to submit the case to a jury.

John W. Douglas for appellant.

Appeal from Owen Circuit Court.

Opinion by the court by William Rogers Clay, Commissioner, affirming.

On March 14th, 1905, S. S. Barnes and wife, Anna Barnes, for the recited consideration of \$1,000.00, conveyed to appellee, W. H. Johnson, the life estate of S. S. Barnes in and to a certain tract of land situated in Owen county, Kentucky, consisting of 80 acres. This deed was duly acknowledged by S. S. Barnes and his wife, and recorded in the Owen county clerk's office. In the month of March, 1906, appellant, S. S. Barnes, instituted this action to have the deed in question canceled. He charges that the conveyance was obtained by fraud and misrepresentation, and that there was no consideration therefor. He also charges that the deed was executed to secure appellee in the payment of money borrowed through him from the Cincinnati Tobacco Warehouse Company, and that the deed was intended to be, and was, only a mortgage. The petition concludes with a prayer that the deed be set aside, and if this be not done that appellant have judgment against appellee for the sum of \$1,000.00. Appellee filed a special demurrer to the petition, which was sustained. Appellant thereupon amended his petition, and made his infant children parties to the action. Thereafter appellant filed a second amended petition in which he alleged that, during the winter and spring of 1905, he borrowed about \$800.00 through appellee, W. H. Johnson, the exact amount of which he could not state; that subsequently he made a contract with appellee whereby he sold the tobacco which he had previously purchased, amounting to 6,000 pounds, and also his individual crop of tobacco, raised in the year 1904, con-

sisting of about 4,500 pounds; that appellee, Johnson, purchased said tobacco with the understanding that he was to pay appellant's indebtedness. By appropriate pleadings, appellee made an issue as to the matters alleged in the petition and amended petitions.

About the same time, appellant sued appellee for the sum of \$100.00 and interest, alleged to be due under and by virtue of a written agreement whereby appellee held back \$100.00 due appellant on a land trade. By the agreement it was provided that the \$100.00 was retained by Johnson to secure him for losses on tobacco purchased by appellant with money furnished by the Cincinnati Tobacco Warehouse Company. The \$100.00 was to be payable in the event Barnes paid the warehouse company. To this petition, Johnson filed an answer in which he charged that appellant was still indebted to the warehouse company largely in excess of the sum of \$100.00, and that appellee was bound as appellant's surety for the payment of said sum.

Thereafter the court consolidated these two actions. Evidence was taken, the case submitted, and judgment rendered in favor of the appellee. From that judgment S. S. Barnes prosecutes this appeal.

It appears that appellant Barnes was also the owner of a life estate in another tract of land, consisting of 40 acres, and that this was likewise conveyed to appellee by deed properly signed, acknowledged and recorded. Appellant complains, first, of the error of the trial court in sustaining the special demurrer to the petition, and requiring the infant children of appellant to be made parties. As appellant had only a life estate in the tract of land in controversy, and, as his children owned the estate in remainder, it was altogether unnecessary to make the latter parties to the action, and the special demurrer was, therefore, improperly sustained. We are of opinion, however, that the judgment should not be reversed because of such error, but that on the return of the case it should be modified so as to adjudge that the costs made necessary by this action of the court should be paid by appellee.

Appellant also contends that the court erred in consolidating the two actions. It appears from the record, however, and especially from the evidence introduced by appellee, that the \$100.00 referred to in the common-law action was a part of the purchase price for the 80 acres of land. That being the case it was proper to consolidate the actions and consider the two together for the purpose of determining whether or not there was any consideration for the deed sought to be canceled.

During the progress of the case, appellant made a motion to have the following questions tried by a jury: 1. Was there any consideration for the 80 acres of land? 2. Did W. H. Johnson buy appellant's tobacco and thereby become paymaster to the Cincinnati Tobacco Warehouse Company for the money borrowed to pay off same? 3. Was the \$100.00 held by Johnson a payment on the 40-acre tract of land or a payment on the 80-acre tract of land? 4. Was the deed to the 80-acre tract of land a genuine sale for a valuable consideration, or was it intended only as security for the money furnished to pay for the tobacco alleged to have been purchased by Johnson, Section 12, of the Civil Code of Practice, provides for the trial before a jury of ordinary issues in equitable actions. The absolute right to have such issues tried by jury, however, is confined to issues which are purely legal in their character. Where issues are of equitable cognizance, it is entirely within the discretion of the chancellor whether he will order a jury to aid him in a finding on the facts. (Kennedy v. Ten Broeck, 11 Bush, 241; Blakey v. Johnson, 13 Bush, 200.) The question in this case is: Should the deed be set aside? Incidental to the determina-

tion of that question, and forming an inseparable part thereof, are the other questions concerning which appellant asked a trial by jury. Such issues have always been of equitable cognizance, and must necessarily be so for the reason that the question is whether, in good conscience, the transaction should stand or be set aside. (Ford, &c. v. Ellis, &c., 21 Ky. Law Rep., 1837.) That being the case, it was decretionary with the chancellor, whether or not he would seek the aid of a jury, and, in refusing to submit such issues to the jury, no error was committed.

The only question remaining to be considered is, whether or not the evidence supports the findings of the chancellor. It appears that, prior to the time of the execution of the deed, appellant had executed two mortgages to appellee covering the property in question. Appellant claims that a portion, if not all, of these mortgage debts had been paid off. He also swears that no money was paid him on the day the deed was executed. According to the evidence for appellee, only a portion of the mortgage debts had been paid, and he, upon the day the deed was executed, paid to appellant the sum of \$175.00. This evidence is confirmed by that of other witnesses, who testify that they were present and saw the money paid. It is also in the evidence that appellant stated, after the deed was made, that he had sold his property to appellee. Of course, the burden of proof in this case was on appellant. Where appellee already had two mortgages on the property in question, it is not likely that the deed was intended to be an additional mortgage—especially in view of the fact that appellee gave appellant the additional sum of \$175.00, and admits holding back the sum of \$100.00, which was payable to appellant when his indebtedness to the Cincinnati Tobacco Warehouse Company should be discharged. Without giving the evidence in detail, we are of opinion that appellant failed to establish the fact that there was no consideration for the deed in question, or that the deed itself was intended as a mortgage. On the other hand, the weight of the evidence is with appellee, and we think fully sustains the finding of the chancellor.

Inasmuch, however, as the \$100.00 retained by appellee was for the purpose of securing him to that amount as surety for appellant to the Cincinnati Tobacco Warehouse Company, appellee, of course, can not retain this money as his own, unless he has already paid, or shall hereafter pay, to the Cincinnati Tobacco Warehouse Company a sum equal to that amount. In other words, appellant is entitled to have the sum so retained by appellee applied to his indebtedness to the warehouse company. If appellee has not already made this payment, or if he shall fail in the future to make such payment, proper proceedings may be had to require him to pay such sum as a credit on appellant's indebtedness to the warehouse company.

Judgment affirmed.

MCDONALD, TREASURER, &c. v. PARKER, SUPERINTENDENT,
&c.

(Filed May 14th, 1908—To be reported.)

1. Graded Common Schools—District Established for Seventeen Years—County Superintendent—Refusal of Pro Rata to District—Where a graded school district has been established and recognized for seventeen years as such without question, either by the State or county officials, or others, the County Superintendent of Schools can not refuse to pay over to the treasurer of such school district

the pro rata to it from the common school fund, on the ground of an alleged defect in the election proceedings by which such district was established as a graded school.

2. Same—Employing Teachers Without Certificates—Gratuitous Services—A college known as Union College, which belonged to the Methodist church was burned, near Barbourville, in August, 1906. The professors of said college (including two young lady teachers, who had no certificates of qualification and who made no charge for their services), were employed by the trustees of a graded common school district to teach said district school for the year 1906. Held—That while the statute forbids the employment, as teachers in the common schools, of persons who do not hold certificates showing them competent to teach, it does not forbid the trustees from accepting the aid of teachers whose services are given gratuitously.

3. Same—Employing Teachers From Denominational College—Constitutional Inhibition—Where a denominational college was destroyed by fire, the fact that the trustees of a graded common school district employed the faculty of said college to teach its school for that year is not a violation of Sec. 189 of the Constitution, forbidding "the appropriation of any fund raised or levied for educational purposes to be used by or in aid of any church, sectarian or denominational school," the said teachers at the time having no connection with the burnt college.

J. M. Robsion, J. D. Black, P. D. Black and S. B. Dishman for appellants.

Appeal from Knox Circuit Court.

Opinion by the court by Judge Barker, reversing.

Appellant, W. H. McDonald, who, at the time this litigation commenced was the treasurer of graded common school district No. 1, instituted this action against B. E. Parker, County Superintendent of Common Schools of Knox county, for purpose of obtaining a writ of mandamus requiring the appellee to pay over to him, as treasurer, the sum of one thousand, four hundred and seventy dollars, which was the pro rata of district No. 1, of the common school fund in his hands for distribution in Knox county for the school year 1906-1907. Appellee does not deny the possession of the money, but resists the action to require him to pay it over to the treasurer on two grounds: First, a defect in the election proceedings by which the district was established as a graded school; and, second, because the trustees have made a combination with Union College, in violation of the provision of section 189, of the Constitution. The issues on these two defenses were properly joined, and the case having been submitted to the circuit judge, on final hearing he dismissed the petition; and from this judgment this appeal is prosecuted.

The first defense may be disposed of in very few words. It is based upon supposed defects in the orders of the court authorizing the submission to the qualified voters of the district the question whether or not a graded school should be established therein and certain bonds issued for the purpose of erecting buildings, &c. The election by which the graded school was established in the district, was held seventeen years ago, and in due time thereafter it was declared by the proper authorities that the graded school was established by a majority of the votes cast upon the question; and ever since, it is not disputed that, a graded school has been maintained and carried on in the district without any question by either the State or county officials, or the taxpayers interested in the proposition. The appel-

lee has himself, as superintendent, always recognized it as an established fact, and has made official reports accordingly. Before he became superintendent, he was employed as teacher in the school for several years. It is manifest that it would be intolerable, after a district has thus been established, if the legality of the election by which it was established could be called in question in a collateral proceeding every time a litigant is tempted by the stress of his case so to do. There was no contest inaugurated to call in question the validity of the election by which the district was established as a graded school, and, as the time has long since expired in which such a contest could be made, it can not now be done. (Hopkins v. Swift, 100 Ky., 14; Wilson, &c. v. Hines, 99 Ky., 221; Cole v. Commonwealth, 20 Ky. Law Rep., 385.)

The second defense, which is based upon the theory that the trustees of the school have made a combination with the authorities in charge of Union College, which is situated in the district, grows out of the following facts: Union College is an educational institution, operated under the auspices of the Kentucky Conference of the Methodist Episcopal Church. In September, 1906, Union College had among its teachers Prof. G. H. Reibold and two ladies, the Misses Weaver, who were under contract with it to teach during the ensuing school year. In August 1906, Union College suffered a disastrous fire by which its administration building was totally destroyed. This misfortune made it impossible to open the institution to its full capacity until the burned buildings could be rebuilt, and the trustees of the institution found themselves with more teachers on their hands than they could utilize in teaching the student body they had room to accommodate in their remaining buildings. A re-arrangement of their professional corps became absolutely necessary. Shortly before the fire the trustees of the graded school were anxious to secure the services of Prof. Reibold as principal of their school, and had made overtures looking towards his employment in this capacity. He informed them, however, that he was under contract with Union College to teach for it and could not honorably release himself. After the fire, the faculty of Union College became anxious to make some arrangement by which they could be relieved of some of the burden of paying teachers whom they could not use; and, looking to this end, the president of the college, Dr. Easley, opened negotiations with the trustees of the graded schools. It was first thought that some sort of fusion could be entered into by the two institutions, which would be mutually advantageous to them, and considerable discussion along this line was had, some of the trustees being in favor of it if it could be legally done; but, upon the advice of counsel, this whole idea was abandoned, the attorney for the trustees being correctly of the opinion that no part of the public school fund could be lawfully paid over in any way or by any arrangement to a denominational school. Prof. Reibold then resigned his position as teacher in Union College, and was employed along with Profs. Faulkner and Jones as teachers to conduct the graded school. It was suggested also that the Misses Weaver should be employed in the lower grade department of the district school to teach the smaller children, but it was found to be an insuperable objection to this that they did not have the certificates required by the statute, which authorized their employment as teachers in the common schools of Kentucky. Thereupon the faculty of Union College, being under contract with the Misses Weaver for the ensuing year, donated their services as teachers to the graded school; Union College undertaking to pay them their salaries, and their services to be absolutely free to the district. The contract between the trustees and Profs. Reibold, Faulkner and Jones is as follows:

"This contract made and etered into this September 13, 1906, between John Bolton, L. W. Farmer, A. W. Hopper, J. Stanfill and Benjamin Mathews, trustees of Barbourville graded common school, district No. 1, parties of the first part, and G. H. Reibold, W. C. Faulkner and H. B. Jones, parties of the second part, witnesseth: That for and in consideration of the conditions and obligations hereinafter set out, the first parties have this day employed second parties to conduct and teach the said common graded school, district No. 1, Barbourville, Ky., for a period of nine months, beginning on September 13, 1906. The said second parties agree to teach each and every white child within the lawful school age, living in said district, who presents himself and desires to be taught, free of charge, for the said full period of nine months. Said school to be taught in accordance with the common school laws of the State of Kentucky, and said teachers and school at all times be subject to the visitation and lawful authority of the said trustees of said district and the county superintendent of schools of Knox county and the Superintendent of Public Instruction of the State of Kentucky. Said second parties are, at all times, to keep and maintain the school rooms in a clean and healthful condition. The said G. H. Reibold is to be principal and have general supervision and control of the entire school, both teachers and pupils. The said W. C. Faulkner is to be first assistant teacher and the said H. B. Jones, second assistant teacher. The said G. H. Reibold is to receive for his services the sum of one hundred dollars per month. The said W. C. Faulkner shall receive the sum of fifty dollars per month for his services, and the said H. B. Jones shall receive the sum of fifty dollars per month for his services; all of said teachers to be paid out of the public fund of said district, and shall be paid at such time as the public funds shall be turned over to the treasurer of said district. First parties shall furnish all fuel and supplies and provide janitors.

(Trustees) "JOHN BOLTON, Chairman,
 "A. W. HOPPER,
 "L. W. FARMER,
 "J. F. STANFILL.

(Teachers) "H. B. JONES,
 "W. C. FAULKNER,
 "GEO. H. REIBOLD."

At the commencement of the school the trustees distributed among all the patrons of the graded school the following notice:

"NOTICE.

"To the patrons of Barbourville White Graded School, District Number 1.

"All patrons of Barbourville (White) Graded School, District No. 1, will take notice that said school will open Thursday, September 13, 1906.

"The board has secured Prof. Geo. H. Reibold as principal, with an able corps of assistants. The school is free to all white children living in said district who are within the school age."

It is conceded that the school, which was conducted by the trustees for the school year in question was the most successful and prosperous one, from an educational standpoint, ever held in the district. It is admitted that every white child of school age who desired so to do was taught therein free of charge. But it is said the fact that Prof. Reibold and the Misses Weaver had but lately come from Union College and the young ladies were without the certificate required by law, authorized the superintendent to withhold the fund paid into his hands by the State and county for the benefit of the district. Section 189, of the Constitution, which is invoked in support of

part of this position is as follows: "No portion of any fund or tax now existing, or that may hereafter be raised or levied for educational purposes, shall be appropriated to, or used, by, or in aid of, any church, sectarian or denominational school."

It is conceded by appellant that the young lady teachers were without the necessary certificates which would authorize their employment as teachers in the common school system of the State; but it does not follow that, because they could not be employed as teachers for pay, they might not teach in the public schools without pay. It is abundantly established by the evidence in this case, that these ladies were eminently qualified to teach young children, this being a branch of pedagogy for which they were especially educated and by nature adapted. We are unable to see how their employment violates either the letter or the spirit of the statute, which forbids the employment of any one as a teacher who is without the required certificate. The reason and spirit of the statute is, that the public money, devoted to educational purposes, shall not be squandered on incompetent teachers, and the certificate is a guaranty of the qualification of the teacher. The statutory requirement is undoubtedly a wise and useful provision, but it was not intended to prevent charitable persons from donating their services to the education of the common school children. If one skilled in the teaching of music or drawing were so philanthropically disposed as to be willing to teach the children music or drawing, without any charge to the State, or the district, it would hardly be supposed that this would not be permitted because the specialist in question did not have the statutory certificate authorizing his general employment as a teacher in a public school. Philanthropy is not so prevalent in our State that laws have to be enacted to forbid its exercise. The record before us establishes, without any sort of contradiction, that the authorities of Union College, finding themselves under contract with the young ladies in question, and being unable to employ them in their own school, donated their services to the use of the pupils of graded common schools in district No. 1. Nor do we think the evidence in this case authorizes the inference that there was any connection, direct or indirect, near or remote, between Union College and the graded school. It is shown in the testimony, and not denied, that the appellee was present at the opening of the public school in September, 1906; that he made a speech there, in which he congratulated the district upon its good fortune in securing the services of so able a body of teachers, and complimented the trustees upon their zeal and fidelity in inaugurating the school under such auspicious surroundings. We are not advised as to why he changed, so radically, his position with reference to this school, for he bears able testimony, that he had never had a better school under his charge as superintendent than that which he seeks to destroy in this litigation.

It can not be controverted, that the statute forbids the employment, as teachers in the common schools, of persons who do not hold certificates showing them competent to teach. But we hold that the provision does not forbid the trustees from accepting the aid of teachers whose services are given gratuitously. Altruism is not within the inhibition of the statute. Nor can it be denied, that the Constitution forbids the diversion of any money raised by taxation for public education into the coffers of any denominational school; but we have read this record several times, with the utmost care, and have failed to find the slightest evidence of any intention to pay one cent of the fund involved here to Union College, or to any one connected therewith, or to either of the Misses Weaver. On the contrary, the uncontradicted testimony shows that every dollar of it will be paid (and is due) to Profs. Reibold, Faulkner and Jones, who were

employed by the trustees to teach the school during the session of 1906-1907. No one disputes that these men were qualified in every way to teach in the public school, or that they carried out their contract with the utmost fidelity. It is conceded that the character of their work was of the highest class, and that every white child in the district, within the pupil age, who desired to attend school, was received and taught.

So far from putting the public school under sectarian influences, the evidence shows that nearly all of the trustees are members of, or sympathizers with denominations other than the Methodist Church. Not one of the teachers in question, including the young ladies, were shown to be members of, or sympathizers with that denomination. The truth is, the appellee's defense, so far as the constitutional point is concerned, is merely suspicion, based upon very small and insignificant circumstances. Among others, he showed that there were two very poor young men trying to work their way through Union College; that President Easley persuaded the trustees to hire these boys, at eight dollars per month each, to act as janitors in the school. It is not denied that the services of a janitor were needed, or charged that the young men did not faithfully earn the pittance paid them; but the fact that they were students at Union College at the time of the employment, seems to have presaged all the evils of a union of church and State. Again, owing to the fact that appellee wrongfully withheld from the treasurer the money with which to operate the school, the trustees were unable to pay Prof. Reibold his salary; and in order that this able educator might continue his work, President Easley persuaded his board to advance his salary, taking his obligation to repay it out of the money coming from the State. But for this generous action by the board, doubtless the deadly thrust aimed by the appellee at the existence of the school, would have been fatal in its consequences.

In conclusion, perhaps no higher encomium could be paid the character of the school involved here than is contained in the opinion of the learned trial judge, whose judgment we are reviewing. After setting out the arrangement we have detailed above, he said: "Under this arrangement, in connection with Profs. Reibold, Faulkner and Jones, a most excellent school has been conducted for some seven months in the graded school building. It has given almost universal satisfaction in the town of Barbourville; in fact, I might say, that the school for this year, has been the best ever conducted in the city of Barbourville. * * * The proof shows, I think, that every child within the school age of Barbourville graded school district, has had an opportunity to attend this school free. I regard it as the very greatest of misfortunes to the people and the children of Barbourville if they should lose this school; but it is a misfortune not of my making. I think that the defendant would much better have administered to the interests of the people of Barbourville if he had sought to have avoided this issue, rather than to raise it; but that is a matter for him—not for me—to decide."

We are of opinion that Profs. Reibold, Faulkner and Jones had a valid contract with the trustees of graded school No. 1, of Barbourville, to teach for them during the school session of 1906-1907; that they earned this money by honest and faithful work; that the evidence shows conclusively that all of it is due and will be paid to them, and none of it will ever go to Union College, or any one connected with it, nor to either of the young ladies who lacked the required certificates to qualify them to teach in the public schools. These professors were in nowise to blame, even if we assume (which was not shown) that some of the acts of the trustees were irregular or improper. Having faithfully performed their contract, and the district

having received the benefit of their services, they can not be deprived, by any defense based on suspicion, of the reward justly due them.

For these reasons the judgment is reversed, with directions to the trial court to enter a judgment in conformity with the prayer of the petition.

McGLONE, SHERIFF, &c. v. WOMACK, &c.

(Filed June 17, 1908—Not to be reported.)

1. Taxation—Tax on Dogs—Act Regulating Sheep Industry by Taxing Dogs—The act of the Kentucky Legislature, approved March 1, 1906, entitled "An act to promote the sheep industry and to provide a tax on dogs," means that it is an act to promote the sheep industry by providing a tax on dogs, and is, therefore, not inimical to section 51, of the Constitution, providing that "no law enacted by the General Assembly shall relate to more than one subject, and that shall be expressed in its title.

2. Same—Statute—Police Regulation—Remuneration for Sheep Killed by Dogs—The act is not a revenue statute, but is a police regulation, in that its object is to remunerate the owners of the sheep for any losses they may suffer by the killing of their sheep by dogs, and the license imposed was intended to be a regulation of dogs and in this way to promote the sheep industry.

3. Ownership of Dogs—Legislature—Regulation—Dogs are an appropriate subject of regulation under the police power of the State. It is within the power of the Legislature to prohibit their ownership entirely and to provide, where their ownership is allowed, any regulation which the legislative discretion may impose.

4. Special Privileges—Public Services—The statute does not confer any special privileges on the owners of sheep, but merely protects these owners from the destruction of their property by dogs, and, therefore, it is not inimical to section 3, of the Bill of Rights, forbidding the grant of exclusive privileges to any man, or set of men, except in consideration of public services.

Jas. Breathitt, J. S. Morris, N. B. Hays, C. H. Morris and Hazelrigg, Chenault & Hazelrigg for appellants.

Jas. Andrew Scott and W. C. Marshall for appellees.

Appeal from Carter Circuit Court.

Opinion of the court by Judge Barker, reversing.

This action was instituted by appellees, citizens of Carter county, Kentucky, and owners of dogs, to test the validity of an act of the General Assembly of the Commonwealth of Kentucky, approved March 1, 1906, entitled "An act to promote the sheep industry and to provide a tax on dogs." By the first and second sections of the act a license tax of one dollar per capita is required to be assessed upon every dog four months old within the Commonwealth, which the owner of the animal is required to pay. This tax is required to be levied and collected as are other taxes, and paid over to the State Treasurer, but to be kept separate from the other public accounts and taxes by the Auditor and Treasurer. The funds thus raised are declared to be for the purpose of indemnifying losses by the killing or injuring of sheep by dogs. The third and fourth sections of the act provide how the losses by the killing of sheep by dogs shall be proved and paid; and if there be any surplus after paying all losses

occurring by the killing of sheep by dogs, it shall be paid over to the school fund of the county in which it was assessed. There are several other provisions of the act, but a consideration of them is not necessary to an adjudication of its validity.

The petition sets forth the act and the fact that it was about to be enforced by the sheriff and assessor of Carter county, and prays for an injunction restraining these officers from its enforcement on the ground of its invalidity. A general demurrer to the petition was overruled, and, the officers declining to plead further, a judgment was rendered in accordance with the prayer of the petition; and from this judgment this appeal is prosecuted.

The first objection to the act is, that its title is inimical to section 51, of the Constitution, which provides that "no law enacted by the General Assembly shall relate to more than one subject, and that shall be expressed in the title;" it being said that the title of this act relates to two separate subjects of legislation, and is, therefore, invalid. If the act under consideration does relate to two subjects, it goes without saying that it is void as a whole. But we do not agree that the title before us relates to two subjects. The subject-matter of the act is the promotion of the sheep industry, and this is to be accomplished by the imposition of a tax on dogs. No other attempt to promote the sheep industry is indicated by any provision in the act taken as a whole. It may be that the title to the act is somewhat awkwardly expressed. What it really means is, that it is an act to promote the sheep industry by providing a tax on dogs, and when thus read, all duality disappears.

A second objection to the act is, that it is violative of section 171, of the Constitution, in that the taxes imposed are not collected for public purposes; and, third, it is invalid because in violation of sections 172 and 174, of the Constitution, which require all property in the Commonwealth, not exempted from taxation by the Constitution, to be assessed at its fair cash value and taxed in proportion thereto. These two objections may be considered together, and they involve a most important part of the claim that the act is invalid.

The first question to be determined is, whether or not the statute before us is a revenue statute, or whether it was enacted for the purpose of police regulation. That it was not intended as a revenue statute is obvious from the most superficial reading. The title declares the purpose of the enactment to be the promotion of the sheep industry by the levy of a tax on dogs, and the body of the act shows clearly that its object is to remunerate the owners of sheep for any losses they may suffer by the killing of their sheep by dogs. The license tax imposed, then, was intended by the Legislature to be a regulation of dogs, and in this way to promote the sheep industry.

This confronts us with the question as to whether or not it is within the competency of the Legislature to regulate dogs in the manner undertaken to be done in the statute before us. That dogs are an appropriate subject of regulation, under the police power of the State, is established by an overwhelming weight of judicial authority; and unquestionably it is entirely within the power of the Legislature to prohibit the ownership of dogs at all, and to provide, where their ownership is allowed, any regulation which the legislative discretion may impose. No where has this doctrine been asserted with greater clearness than by our own court.

In the case of *Bradford v. McKibben*, 4 Bush, 545, an act was upheld which authorized the killing of any dog found on the premises of a neighbor without the presence of its owner or keeper. In its opinion, the court said: "Whatever may be the temptations, therefore, to entice a dog from home without the presence of his owner or keeper, even though it be for the propagation of his species, his innocence is no protection to him; if he is found roaming on a neighbor's

premises, without the presence of his protector, his life is forfeited, if the owner of the premises on which he is found will exact the penalty, and choose to execute the sentence."

In the case of *Commonwealth v. Markham*, 7 Bush, 486, an ordinance of the city of Frankfort provides: "That all persons owning or controlling dogs within the city of Frankfort are hereby required annually, on the 10th day of April, to apply to the city clerk to register, and procure a brass collar, duly stamped, for each dog, and pay to the clerk at the time of registry a tax of two dollars for every dog so owned and registered; which tax the clerk shall pay into the city treasury. Any person failing to comply with the provisions of this ordinance shall, on conviction before the police judge, be fined the sum of five dollars for each day of failure, and for each dog owned or controlled by him, not registered as aforesaid. The marshal or any police officer shall forthwith kill any dog found upon the streets without such collar so procured from the city clerk." The charter of the city of Frankfort only authorized the council to levy ad valorem taxes on the real and personal estate of its citizens for local revenue; so that if the ordinance was for revenue only, it was void as being contrary to the charter. The court held that the act was sanitary and not for revenue, and upheld the ordinance under the police power delegated to the city by its charter. In the opinion it is said:

"Presuming that the owners of worthless or pestilent dogs would not pay such a tax for such a license, the expulsion or destruction of inferior or dangerous dogs, as well as protection to the useful class, was the constructive aim of this enactment by the council. The purpose was sanitary and not fiscal. How far the end may be accomplished by the means prescribed is for the municipality, and not the judiciary, to decide. And this court can not adjudge that because a more adaptable expedient, molded in better form, might have been chosen, that which has been adopted was unauthorized."

In the case of *Sentell v. New Orleans, &c., Railroad Co.*, 698, the the Supreme Court of the United States upheld as constitutional a law of the State of Louisiana, requiring dogs to be placed upon the assessment rolls, and limiting any recovery by the owner to the value fixed by himself for the purpose of taxation. The court, through Mr. Justice Brown, in a very learned opinion, discusses in a broad and philosophic manner the whole subject of the property in dogs, and the question as to whether or not, and how far, these animals are subject to the police power of the State. The rule as to the right of the State to prohibit the keeping of dogs is thus stated: "Even if it were assumed that dogs are property in the fullest sense of the word, they would still be subject to the police power of the State, and might be destroyed or otherwise dealt with, as in the judgment of the Legislature is necessary for the protection of its citizens. That a State, in a bona fide exercise of its police power, may interfere with private property, and even order its destruction, is as well settled as any legislative power can be, which has for its objects the welfare and comfort of the citizen. For instance, meats, fruits and vegetables do not cease to become private property by their decay; but it is clearly within the power of the State to order their destruction in times of epidemic, or whenever they are so exposed as to be deleterious to the public health. There is also property in rags and clothing; but that does not stand in the way of their destruction in case they become infected and dangerous to the public health. No property is more sacred than one's home, and yet a house may be pulled down or blown up by the public authorities, if necessary to avert or stay a general conflagration, and that, too, without recourse against such authorities for the trespass." (*Bowditch v. Boston*, 101 U. S., 16; *Mouse's Case*, 12 Coke, 63; *Governor, &c. v. Meredith*, 4 T. R., 794; *Stone v. The Mayor, &c.*, 25 Wend., 157; *Russell v. The Mayor, &c.*, 2 Denio, 461.)

To the same effect is *Blair v. Forehand*, 100 Mass., 136; *Morey v. Brown*, 42 N. H., 373.

In 22 Am. & Eng. Ency. of Law, title Police Power, page 930, it is said: "The police power of the State has been used to a greater extent to regulate and control the keeping of, and property in, dogs than any other class of domestic animals. And statutes requiring the payment of a license fee, sometimes denominated a tax, for the keeping of dogs, are very usual, as also are provisions requiring all dogs running at large to be muzzled. And the police power has even been held to extend to authorizing the summary killing of dogs found running at large contrary to law."

Cooley, in his work on Constitutional Limitations, 7th edition, page 881, in note 3, thus summarizes the law on the subject in hand: "Dogs are subject to such regulations as the Legislature may prescribe, and it is not unconstitutional to authorize their destruction, without previous adjudication, when found at large without being licensed and collared according to the statutory regulation. (Authorities omitted.) As a measure of internal police, the State has the power to encourage the keeping of sheep, and to discourage the keeping of dogs, by imposing a penalty upon the owner of a dog for keeping the same. (*Mitchell v. Williams*, 27 Ind., 62.) Or, by imposing a dog tax for a fund to indemnify sheep owners for losses suffered from dogs." (*Van Horn v. People*, 46 Mich., 139; 9 N. W., 246.)

In the case of *City of Carthage v. August Rhodes*, 9 L. R. A., 352, the Supreme Court of Missouri upheld an ordinance of the city of Carthage licensing dogs and cats, and providing for their being impounded or destroyed if found running at large, contrary to the ordinance. In the opinion it was said: "Taxation may be for the purpose of raising revenue, or for the purpose of regulation. Where for the purpose of raising revenue, or for the purpose of regulation, it is an exercise of the police power of the State. They are both distinct co-existent powers in the State, and either, or both, may be exercised through a municipal corporation. In this case, by the terms of the charter, both powers are granted to the city of Carthage as to the dogs of that city. The dog-license tax required by its ordinance is easily referable to the exercise of the police power granted."

In the case of *Fox v. Mohawk & Hudson River Humane Society*, 51 L. R. A., 681, the Court of Appeals of New York upheld a statute of that State which authorized the humane society to kill unlicensed dogs without notice to the owner and without any judicial proceeding.

From the foregoing authorities, and upon principle, we are of opinion that the regulation of dogs is within the police power of the State, and that it is competent for the Legislature to prohibit the keeping of dogs entirely, or, if it is necessary for the public welfare, any other regulation may be adopted which, to the Legislature, may seem most expedient for the promotion of that end. We are also of opinion that, the statute not being for revenue, but an exercise of the police power, its provisions are not regulated by any section of the Constitution relating to fiscal matters, and, although the sum required to be paid by the owner of each dog four months old is called a tax, and it is required to be assessed by the assessor, collected by the sheriff and paid over to the State Treasurer, this is only a mode of regulating the dog within the State, and protecting the sheep industry to the extent that the burden imposed will result in the destruction of worthless and dangerous dogs and create a fund to pay losses for the destruction of sheep by dogs. We do not think it can be doubted that, if it is competent for the Legislature to prohibit the ownership of dogs, or to prohibit them running at large, it is also competent for it to impose any other regulation which, in its wisdom, is best adapted to promote the sheep industry. Therefore,

it seems to us competent for the Legislature to say to the owners of dogs in the State: "You may own dogs, and you may permit them to run at large, but you must, as a condition precedent to this privilege, provide a fund by which their ravages on sheep may be paid for." That the State may do this legitimately, seems quite clear, unless we are prepared to say that the less is not included in the greater, or a part in the whole. Surely, if dogs be destroyed altogether, or their ownership prohibited, any less drastic legislation is entirely within the competency of the Legislature.

It is true, in the case of *Commonwealth v. Hazelwood*, 84 Ky., 681, it was held that, in our State, the common law rule that dogs were not property has been modified or abrogated by statutes which tax them and thus recognize them as property. Dogs are, therefore, made property by statute; and when these animals, which were not property at the common law, are raised to the dignity of property by the statute, it is entirely competent for the Legislature to fix such conditions as it chooses. The statute before us, which makes dogs property, requires, as a condition precedent, that the owners of them shall pay a tax, the proceeds of which will insure sheep raisers against the effect of their ravages. That this can be done constitutionally, is sustained by the great weight of authority.

In the case of *Holst v. Roe*, 39 Ohio St., 340, the law imposing a per capita tax on dogs, and appropriating the funds so created for the purpose of paying any loss occurring to the owners of sheep by the killing of the property by dogs, was upheld as a valid and constitutional exercise of the police power of the State. To the same effect is *Mitchell v. Williams*, 27 Ind., 62; *Van Horn v. People*, 46 Mich., 183; *Ex Parte Cooper*, 3 Tex. Ct. App., 489; *Cole v. Hall*, 103 Iowa, 30; *Longyear v. Buck*, 10 L. R. A., 43; *Freund on Police Powers*, section 434; *State Regulation of Personal Property* (Tiedeman), pages 845-846.

Nor do we think the act is inimical to that portion of section 3. of the Bill of Rights, which provides: * * * "And no grant of exclusive, separate, public emoluments or privileges shall be made to any man, or set of men, except in consideration of public services." * * * As we view it, the statute does not confer any special privilege on the owners of sheep. It merely protects these owners from the destruction of their property by dogs. It is the duty of the State to protect every citizen in his life, liberty and property; and it certainly is within the competency of the Legislature to exercise the police power of the State to protect all property against the ravages of destructive animals. The question as to how this is to be done, and what property is to be so protected, is a matter of legislative discretion. Undoubtedly the sheep industry is a most important one to the whole State. All of our citizens are interested in an industry which supplies the market with wholesome meat, provides means of obtaining warm and comfortable clothing, and at the same time furnishes labor to the otherwise unemployed. It is only necessary to allude to this phase of the question; the importance of the industry as a whole is most obvious. It is equally obvious that sheep are peculiarly liable to the ravages of dogs. They have neither the fleetness to escape, nor the courage to defend themselves from attack, and their silent suffering enables the dog to prey upon them without any danger that the owner will be warned of the destruction of his property by the outcry of the dying animal. No other domestic animal that we can call to mind is so liable to destruction by dogs as the sheep. It, therefore, seems to us clearly the duty of the State, if the furtherance of the sheep industry is a desirable end, to so regulate the ownership of dogs as to protect the sheep from destruction by these animals. The statute is certainly a reasonable one, and lays but a small burden upon the owner of each dog; and

in effect it only requires the owner to make good the damage done by his property. The fact that sheep are generally killed at night when it is impossible to ascertain the owner of the dog committing the ravage, makes it necessary, if protection is to be had through this channel at all, that each owner of a dog shall be required to contribute a small amount to a common fund dedicated to the remuneration of owners of sheep killed by unknown dogs. As said before, this is simply requiring the owners of dogs to make good the ravages of dangerous animals kept by them; and no citizen has just cause of complaint, if he keeps animals destructive to the property of others, that he is required to make good the damage done by them. The statute, in truth, is but an enforcement of the maxim *sic utere tuo, ut alienum non laedas*; and, as such, its constitutionality is beyond successful question.

Thus far we have rested the right of the Legislature to provide a fund for the payment of losses of sheep by the ravages of dogs, alone upon the police power of the State, but in the case of *Kentucky Live Stock Breeders' Association v. Hager, Auditor*, 27 Ky. Law Rep., 518, we upheld an act which appropriated fifteen thousand dollars per annum, from the funds in the public treasury raised by taxation, to provide for the improvement and development of live stock, agricultural and kindred interests by the establishment and maintenance of a State Fair. In the opinion, in responding to the objection to the act, that the money appropriated was not for a public purpose, it was said: "It is also insisted that a State Fair is not a public purpose for which the money of the State may be appropriated by the Legislature, and that the act merely gives a bounty of fifteen thousand dollars to appellant. The appropriation to the World's Fair was sustained by this court (*Norman v. Board of Managers*, 93 Ky., 537), and if the Legislature may appropriate money in aid of a fair held in another State to properly represent the State in such a fair, it is hard to see how a fair held within the State to make an exhibit of the products of the State is not equally a public purpose. Such legislation has been sustained by the current of authority in the other States of the Union having constitutions substantially the same as ours." (*Daggett v. Colgan*, 92 Cal., 53; *State v. Cornell*, Neb., 74 N. W., 61; *Charpless v. Mayor of Philadelphia*, 21 Pa. St., 147; *City of Minneapolis v. Janney*, 90 N. W., 312; *Downing v. Indiana State Board of Agriculture*, 129 Ind., 443; *Shelby County v. Tennessee Centennial Exposition*, 26 S. W., 694; *Bennington v. Park*, 50 Vt., 178.)

"In *House of Reform v. City of Lexington*, 23 Ky. Law Rep., 1470, and *Children's Home Society v. Hager, Auditor*, 26 Ky. Law Rep., 1135, we held that the State might appropriate money to a public purpose, and make an existing corporation its agent for the disbursement of the appropriation just as it may appoint other agencies for this purpose. We adhere to the rule laid down in those cases for the reasons there given."

It would be difficult to point out a difference in principle between promoting any one agricultural interest and the promoting of all agricultural interests, in so far as being a public purpose is concerned. If the whole State may be taxed for the purpose of maintaining a State fair to exhibit the various agricultural interests, we are unable to see why it may not be taxed to prevent the destruction of sheep by dogs. But we are not driven to resting the case upon this latter principle, as we are convinced that the police power of the State affords a firm foundation upon which to base our opinion in upholding the act involved in this litigation.

The act which we herein construe does not fix, by its terms, the compensation to the sheriff for collecting the tax, and we are asked to say in this opinion how the officers are to be remunerated. The act provides that the license tax shall be assessed and collected as

other taxes, and we are of opinion that the Legislature intended the officers to be paid in the same way, and at the same rate at which they are remunerated for the collection of revenue taxes; that is, for the purpose of ascertaining the remuneration due the officers, the gross amount of the dog tax collected shall be added to the total amount of the revenue tax collected, and, upon the whole, the officers' remuneration shall be fixed by the terms of section 4148, of the Kentucky Statutes; ten per cent. on the first five thousand dollars of the total, and four per cent. upon the residue, the total amount of the remuneration of the officer not to exceed the sum of five thousand dollars.

For these reasons the judgment is reversed, with directions to sustain the demurrer to the petition, and for other procedure consistent herewith.

MORGAN, &c. v. COMBS, &c.

(Filed June 16, 1908—Not to be reported.)

Greene & Van Winkle for appellants.

Wm. Cromwell for appellees.

Appeal from Perry Circuit Court.

Judge Settle delivered the following response to petition for rehearing and modification:

Upon the return of this case to the court below, if it should turn out, as claimed by appellees, that William Ward is in possession and the rightful owner of the land by bona fide purchase, which appellants intended to convey, and believed they were conveying to appellee, W. J. Combs (although that fact nowhere appears in this record), the court, instead of adjudging a reformation of the deed in controversy by a conveyance from appellants to W. J. Combs of the land now claimed to be owned by William Ward, should simply cancel the deed heretofore made to W. J. Combs and rescind the contract of sale, in which event appellants should return to W. J. Combs the value, in money, of the horse exchanged by the latter for the lot intended to be conveyed, as of the date of the sale, with interest thereon, and Combs should be made to account for the reasonable rental value of the lot during the time he has had it in possession; the latter to be given a lien upon the lot for the value of the horse, and if appellants fail to pay same the lien may be enforced to pay such sum, if any, as may be found to be due Combs after charging him with the rent.

Polly Ward should still be allowed to remove from the lot in controversy the buildings she placed thereon. But if it should turn out that Wm. Ward is not in possession and is not the rightful owner of the lot, really purchased by appellee, W. J. Combs, of appellants, the lower court, upon return of the case, should simply carry out the directions contained in the opinion.

To the extent above indicated, the opinion is modified. In other respects the petition is overruled.

PITTSBURG, CINCINNATI, CHICAGO & ST. LOUIS RY. CO.
v. DARLINGTON'S ADM'X.

(Filed June 17, 1908—To be reported.)

1. Railroads—Death Caused by Collision of Trains—Action Against Both Railroads—Verdict Against One—Wrong Name Given in Verdict—Judgment Thereon—Validity—H. D. was killed in a collision between the trains of the P., C., C. & St. Louis Ry. Co. and the L. & N. R. R. Co. In an action by his administratrix against both roads the jury returned the following verdict: "We, the jury find a verdict for the plaintiff to the amount of ten thousand dollars, and fix the blame on the Pennsylvania Railroad Company." The Pennsylvania Railroad Company was not a party to the action, but the evidence showed that the defendant, P., C., C. & St. L. Ry. Co., though a separate corporation, was a subsidiary corporation of the Pennsylvania Railroad Company, and was, on the trial, called by the latter name. Held—That the lower court properly rendered a judgment on the verdict against the Pittsburgh, Cincinnati, Chicago & St. Louis Railway Co., sometimes called the Pennsylvania Railroad Company.

2. Same—Verdict of Jury—Intent—Duty of Court in Ascertaining—The intent of a jury is to be sought in the language they use in their verdict in the light of the record, and resort may be had to the pleadings and other parts of the record to see what the jury meant by their verdict. The court is at liberty, in the absence of a stenographic report, to consult his recollection of the evidence, as well as the file of the court in order to understand what the jury meant by their verdict.

3. Action Against Two Defendants—Verdict as to One—Effect as to the Other—Where two defendants are sued and the jury returns a verdict against one of them the effect of the verdict is to release the other.

Chas H. Gibson for appellant.

Ira Julian and Forcht & Fields for appellee.

Appeal from Jefferson Circuit Court, Common Pleas Branch, First Division.

Opinion of the court by Chief Justice O'Rear, affirming.

Hugh Darlington was killed in a collision between a train operated by appellant and one operated by the Louisville & Nashville Railroad Company, which were using the same track. His administratrix sued both the railroad companies to recover damages for the destruction of his life, charging each with negligence. The result of the trial, which was conducted, so far as the court's rulings went, in unobjectionable manner, was the following verdict:

"We, the jury, find a verdict for the plaintiff to the amount of ten thousand dollars, and fix the blame on the Pennsylvania Railroad Company."

The Pennsylvania Railroad Company was not sued in the action. But the appellant, though a separate corporation, is a subsidiary corporation of the Pennsylvania Railroad Company. Both are owned by a common owner, the Pennsylvania Company. It was a common thing for appellant to be called "The Pennsylvania Railroad," as being a part of that system and so classed in popular understanding. During the progress of the case before the jury it was alluded to several score times by counsel and witnesses as "The Pennsylvania Railroad Company," or as "The Panhandle," the latter being also a popular, and probably an advertised name of appellant's route. It was rarely called by its true name during the trial. The issues being tried by the jury were two: One, whether the death of Darlington was due to the

negligence of the defendants, or to his own negligence; the other, if not to the negligence of both the defendants, but was due to the negligence of either, which was to blame?

The instructions submitted these issues in apt language. The trial lasted two days. The jury's verdict shows, first, that they found for the plaintiff ten thousand dollars, thereby finding the fact to be that decedent did not come to his death by his own negligence; and that under the measure of recovery submitted by the court, \$10,000.00 was fixed as the value of the life which was destroyed. The only thing remaining then for them to do was to say whether either company was alone guilty of the negligence which resulted in the injury, as otherwise both would have been liable, and the judgment would have gone against them jointly. In language not artistic, but leaving no doubt of the jury's meaning, they "fixed the blame" on one of the defendants alone, thereby exonerating the other. If appellant's proper name had been written in the place of "Pennsylvania Railroad Company" there would have been no room for contesting the sufficiency of the verdict.

Jurors are gathered from every walk of life. Very frequently, perhaps most generally, they are not men of literary learning. Their choice of expressions is very apt to be not exact, their verdicts being frequently ungrammatical and rarely couched in the terminology of the law. Hence courts view the findings of the jury with great leniency, and every reasonable presumption is indulged in aid of a general verdict. The main thing is to get an understanding of what the jury intended. Their intent is to be sought for in the language they used in their verdict, interpreted in the light of the record. Resort may be had to the pleadings, or other parts of the record to see what the jury meant by their verdict. (Brannin & Smith v. Force's adm'r, 12 B. Monroe, 506; Miller v. Shackelford, 4 Dana, 264; Pickett v. Pickett, 2 Bibb, 178; Warford v. Osbil, 1 Bibb, 247; Adams v. Landrum, 9 Ky. Law Rep., 287; Buckeye Engine Co. v. Buckwatter, 61 S. W., 263; 22 Ency. Pl. and Pr., 955-959; Lee v. Bradway, 25 Ia., 216; Red River and L. & N. Co. v. Strue, 32 Minn., 95; Austin Water, Light & Power Co. v. Makenson [Tex.], 27 S. W., 588.)

Appellant concedes that the record may be looked to in the interpretation of the verdict. But it contends that the record does not include the evidence, but is only that part which constitutes the roll and which is consequently preserved in writing before the court. Under the practice in this State the evidence may be taken, by order of the court, by the court's official stenographic reporter, and is made, when so taken, a part of the record in the case. (Sec. 4639, Ky. Stat.) But we are inclined to the opinion that, in the absence of such statute, the court was at liberty to consult his recollection of the evidence, as well as the files of the court, in order to understand what the jury meant by their verdict. The reason for admitting the latter admits the former also. In the case of Buckeye Engine Company v. Buckwatter, supra, we said:

"Under the evidence and instructions the verdict of the jury, 'We, the jury, agree and set aside the amount sued for,' clearly means that the jury found against appellant on the account."

It was there held that the usual expression in the reported cases, "a verdict is good if its meaning may be understood in the light of the record," included the evidence in the case. For that matter the instructions of the court to the jury may not become a part of the record until identified by a properly signed bill of exceptions. Nor, in some instances, can the evidence be. Nevertheless, both are before the trial court, and within his knowledge. He may, and should, have resorted to either as well as to any other part of the record, in arriving at the jury's meaning so that it might correctly be carried out in the judgment which is to be entered upon the verdict. The court will then, if necessary to perfect the record, and to sustain the

verdict, require the record to be completed by a properly prepared bill of exceptions, or bill of evidence, as was done in this case, so as to show truly what had occurred in the trial.

In the verdict above quoted the word "blame" is spelled "plame." The verdict was written by a German-American. No one is in doubt as to the meaning of the word, whether spelled correctly or spelled phonetically according to its writer's pronunciation.

On the whole we have no doubt that the jury intended to find, and did find, by the verdict, against appellant. The name given it may be regarded as its nickname or alias. There can be no rational doubt as to the certainty of their meaning in this matter, in the light of the record, including the evidence. The court, in rendering judgment upon the verdict adjudged the plaintiff to recover \$10,000.00 and costs "against the Pittsburg, Cincinnati, Chicago & St. Louis Railway Company, sometimes called the Pennsylvania Railroad Company," which we think was not an improper form of judgment, and fully explains what might otherwise, at first glance, seem an inconsistency between the verdict and judgment.

Appellant also complains that the verdict was incomplete in that it did not pass upon the question of the liability of the defendant, the Louisville & Nashville Railroad Company. But we think it did. The effect of the verdict, and the evident intent of the jury was to find that the Louisville & Nashville Railroad Company was not negligent in the matter. It was equivalent to a verdict in its behalf, and the judgment should have been accordingly. (I. C. R. R. Company v. Murphy, 30 Ky. Law Rep., 93; 97 S. W., 729; Handley v. Lawley, 90 Ala., 527; Maynard v. Pordar, 75 Ga., 654.) But whether the Louisville & Nashville Company may not have ground for complaint because a judgment was not rendered in its behalf on this verdict, is not ground for complaint by this appellant. (I. C. R. R. Co. v. Murphy, supra.)

Judgment affirmed.

CITY OF NEWPORT v. EBERT.

(Filed June 17, 1908—Not to be reported.)

Jailers—Fees Allowed—Ordinances of Second Class Cities—Diverting Fees—Public Policy—By Kentucky Statutes, section 3145, part of charter of second class cities, the compensation of jailers of such cities is fixed at not less than \$1,500 nor more than \$2,500 per annum. Section 1730, Kentucky Statutes, allows certain compensation for dieting prisoners and other fees. By an ordinance of the city of N. (a second-class city), the salary of the jailer was fixed at \$1,800 payable in monthly installments, and provided that the jailer shall account to the city at 20 cents per day for each prisoner other than those from said city. Held—That where a city fixes the fees of a jailer for more than \$1,500 the jailer must look to his fees for the sum so fixed in excess of \$1,500, as it would be contrary to public policy to permit the city to divert to its own use the fees allowed for taking care of persons other than its own.

C. T. Baker for appellant.

Wm. U. Warren for appellee.

Appeal from Campbell Circuit Court.

Opinion of the court by Wm. Rogers Clay, Commissioner, reversing

Appellee, Christian Ebert, was, on the 5th day of November, 1907 at the regular election held in the city of Newport, on that day, duly

and regularly elected city jailer by the qualified voters of said city for a term of four years. Newport is a city of the second class. The General Assembly of the Commonwealth of Kentucky, by an act approved March 6th, 1902, provided that the compensation of such jailer shall not be less than \$1,500, nor more than \$2,500 per annum. This act is section 3145, of the Kentucky Statutes, of 1903, and is a part of the law or charter of cities of the second class. By an ordinance passed in November, 1907, and approved by the mayor of said city on November 29th, 1907, the general council of the city of Newport, fixed the salary of the city jailer, from and after the first Monday in January, 1908, at \$1,800, payable in monthly installments of \$150 each. The ordinance also provided for an allowance to the city jailer of twenty-five cents per day for keeping and dieting each city prisoner, to be paid in monthly warrants drawn upon the city treasurer. The ordinance further provided that "the jailer shall pay and account to the city in the amount of twenty cents per day for each and every prisoner, other than city of Newport prisoners, that he may receive and keep in said jail, and shall also account and pay to the city all the moneys that he may receive from said prisoners other than city of Newport prisoners."

It appears that the city jailer may and does, receive and keep the county, State and United States prisoners. By section 1730, of the Kentucky Statutes, jailers are allowed:

"For keeping and dieting prisoners in jail, when confined for an offense other than a felony or contempt of court, fifty cents per day, to be paid out of the county levy, unless confined for a breach of the by-laws or ordinances of a city or town, or for the violation of a statute, where the city or town gets the benefit of the fine; in that case to be paid by such city or town.

"For imprisoning and releasing a prisoner charged with a misdemeanor, sixty cents, to be paid out of the county levy, unless confined for a breach of the by-laws or ordinances of a city or town, or for a violation of the statute, where the city or town gets the benefit of the fine; in that case, to be paid by such city or town. And for imprisoning and releasing a prisoner charged with a felony, sixty cents, to be paid out of the State treasury."

The United States Statutes also provide for certain fees payable to jailers who receive, diet and discharge United States prisoners.

Appellee instituted this action for the purpose of testing the validity of that part of the ordinance relating to his salary which attempts to require the city jailer to account for, and pay to the city of Newport, the fees received by him from the county of Campbell, the State of Kentucky, and the United States government, under sections 356 and 1730, of the Kentucky Statutes. The circuit court adjudged that part of the ordinance invalid, and from that judgment the city of Newport prosecutes this appeal.

It is the contention of appellant that the jail in question is a city jail, and is maintained by the city of Newport; that in fixing the salary of the city jailer, the city of Newport has the undoubted right to say that the fees payable by the county, State and United States Government shall become its property; and further, that the charter of cities of the second-class provides that the compensation of officers shall be by fixed salary, and not otherwise, and that all fees and commissions growing out of the performance of the duties thus laid upon the officers, shall revert and belong to the city. This court, however, in the case of *Burke on Petition*, 19 Ky. Law Rep., 358, which involved the right of the city to require a policeman to turn over to it fees allowed by the State for apprehending prisoners charged with felony, held that the foregoing provision of the charter applied only to fees, costs and commissions arising out of the

performance of duties owing by the officers to the city. In discussing the matter, the court said: "In our opinion, the law, so far as it may be applicable to policemen, has reference alone to the relation between the city and these officers, and was intended to silence conclusively any claim such officers might assert against the city for services rendered in its behalf, of whatever nature. We do not believe it to have been the intention of the Legislature to authorize the cities to convert to their use the fees allowed by the State to these peace officers for the arrest of felons. This would conduce to take away the incentive for the execution of the criminal laws of the Commonwealth—a matter in which the State, rather than the city as such, has a special interest."

The fees allowed by the Commonwealth and United States government are for the benefit of the jailer, who may and does receive State and Federal prisoners. The office of jailer is as important in the administration of justice as that of the policeman. It is the duty of the jailer to receive, properly diet, and finally discharge the prisoners committed to his care. The fees allowed him are an incentive to the faithful performance of such duties. If the city had the right to divert a portion of the fees allowed by the State and Federal governments to its own use, it would also have the right to divert all of the fees. The State and Federal governments are interested in seeing that their prisoners are properly cared for. If the fees allowed by them, to the jailer, should be diverted by the city, it might, and probably would, result in a lack of care and attention on the part of the jailer to such prisoners. As such fees are allowed to the jailer, and as the purpose of their allowance is to stimulate him to give due care and attention to the prisoners committed to his care, we think it would be contrary to public policy to permit the city of Newport to divert to its own use the fees allowed for taking care of prisoners other than its own.

By the provisions of its charter, the city of Newport must pay to the city jailer not less than \$1,500. We are of opinion, however, that it may provide, where it fixes his salary in excess of this sum, as was done in the present case, that the city jailer must look to his fees for the sum so fixed in advance of \$1,500; in other words, the city may arrange his salary with regard to his fees, just so long as it does not pay him a less salary than it is required by law to pay. In this case the salary was fixed at \$1,800. The effect of the ordinance, therefore, is to credit the city of Newport by fees received in the sum of \$300. To that extent, only, the portion of the ordinance complained of, is valid. This view of the ordinance permits the jailer to retain all the fees allowed him by law for taking care of the county, State and Federal prisoners. If these fees be less than \$300, the city must pay him enough to make his salary \$1,800; if they amount to more than \$300, the city shall have credit to the extent of \$300.

Wherefore, the judgment is reversed in so far as it conflicts with the views herein expressed, and cause remanded, for proceedings consistent with this opinion.

MOORE v. TERRELL.

(Filed June 17, 1908—Not to be reported.)

Forcible Entry and Detainer—Statute of Frauds—Appellant does not show himself entitled to the possession of the premises in controversy. His contract as one not to be performed within a year, was not in writing and was void.

S. W. Tolin and John S. Gaunt for appellant.

Appeal from Boone Circuit Court.

Opinion of the court by Chief Justice O'Rear, affirming.

This is a forcible entry proceeding. Appellant and appellee each claim to have leased the premises for the crop year of 1907, beginning March 1, 1907. Appellant claims to have rented the land on February 15, 1907, from the landlord, by parol contract. But he does not claim that his tenancy was to begin before February 18, 1907, and was for one year thereafter. On February 18, 1907, appellee rented the premises from the landlord by written contract for the same year. There was another tenant in possession whose term did not expire till March 1, 1907. After March 1, 1907, appellee entered into possession, and thereafter appellant entered upon his possession, which was the occasion of the writ. Prior to March 1, 1907, appellant entered by the consent of the old tenant and did some work preliminary to his taking possession under his parol lease.

The landlord denied having rented the land to appellant at all. On the trial in the country on the issue made by appellants plea of not guilty, the jury found for appellee. On the trial of the traverse in the circuit court, the jury there found the inquisition in the country was true. This appeal raises several questions as to the correctness of the trial in the circuit court, but we do not deem them important in view of our conclusion that appellant does not show himself entitled in any event to the possession. His contract being for one year (admitting it was made as he claims) the term was not to begin until some days after the contract was made, and as it was a contract not to be performed wholly within one year and was not in writing, it was void. (*Greenwood v. Strother*, 91 Ky., 482.) Nor was it partially executed so as to take it out of the Statute of Frauds by appellant's so called entry on February 18, 1907. That entry was upon the term of the former tenant, and was by his permission, not the landlord's. No right could be acquired by appellant as against the landlord from that fact. Appellant did not enter upon his term, but upon the former tenant's. What he did was not in execution of his contract, but in anticipation of it. The questions raised by appellant are eliminated by the situation discussed.

The judgment in favor of the appellee is affirmed.

CITY OF OWENSBORO v. SWEENEY.

(Filed June 17, 1908—To be reported.)

1. Municipal Corporations—Sprinkling Streets—Taxing Abutting Property Therefor—Validity of City Ordinance—The question for consideration in this case is, has the General Assembly of the State the power to enact a law "giving cities" the right to adopt ordinances imposing upon property abutting on the streets and public places of the city, a tax based upon the frontage of property, for the purpose of defraying the cost of sprinkling the streets and public places upon which the property abuts?

2. Constitution—Limitations—Arbitrary Power—Taxation Without Corresponding Benefit—While there is no limitation in the Constitution, upon the power to levy improvement taxes nor any definition of what an "improvement tax" is, it does not follow from this that the Legislature is so absolutely supreme that its authority can not be questioned. Arbitrary power exists nowhere in this republic.

There is a line at which the power to tax and take for special assessments must stop, and in this character of assessments we may safely say that it must stop when it goes beyond real and substantial benefits to the abutting property distinct from those enjoyed by the public.

3. Special taxes can not be levied unless the property charged receives a corresponding physical, material and substantial benefit from the exaction, upon the ground that it is an attempt to take private property without just compensation in violation of the Constitution, and we hold that sprinkling streets does not confer a special benefit upon the adjacent property in the sense of contributing to its value and hence a special tax for this purpose can not be maintained.

Geo. W. Jolly for appellant.

W. T. Ellis, C. M. Finn, Miller & Todd and C. S. Walker for appellee.

Appeal from Davless Circuit Court.

Opinion of the court by Judge Carroll, affirming.

The only question we need consider in this case is, has the General Assembly of the State, the power to enact a law giving cities the right to adopt ordinances imposing upon property abutting upon the streets and public places of the city a tax based upon the frontage of the property for the purpose of defraying the cost of sprinkling the streets and public places upon which the property abuts.

It has been expressly ruled by this court in *Maydwell v. Louisville*, 116 Ky., 885, that an ordinance enacted in pursuance of legislative authority, levying an ad valorem tax upon property for the purpose of sprinkling the streets is not unconstitutional. The opinion was rested upon the ground that the sprinkling of streets contributes to the preservation of the public health, and hence the tax levied was for public purposes within the meaning of section 171, of the Constitution, providing that "taxes shall be levied and collected for public purposes only."

The reasoning of that opinion, and the conclusion therein reached, we adhere to; but there is, as we shall endeavor to show, a marked difference in principle between laying a distinct tax for this purpose upon all property of a city, or upon all of the property in a taxing district, if the city is divided into taxing districts, and levying a special tax upon real property according to its frontage.

In the case before us, the tax is not levied upon property according to its value. The value of the property is not taken into consideration. Nor is the tax apportioned to correspond with the benefits received. A vacant lot with a frontage of fifty feet, and worth only one hundred dollars, must pay the same amount of taxes as a highly improved lot with the same frontage, but worth one hundred thousand dollars. There seems to be something radically wrong with a tax that is arbitrarily assessed without any reference to the value of the property or benefits conferred, and although it is everywhere recognized that perfect equality in taxation is impossible of attainment, the fundamental theory upon which all property taxes are imposed is that the property shall contribute in proportion to its value and thus bear as near as may be, its equal share of the burden. And this theory of equality and uniformity is firmly fixed in the tax laws of this State. In more than one section of the Constitution, it is clearly expressed, that taxes shall be uniform upon all property subject to taxation within the territorial limits of the authority levying the tax; and shall be assessed at its fair cash value, estimated at the price it would bring at a fair voluntary sale.

But it is generally agreed that these principles conceded to be sound, only apply to taxes collected for the purpose of defraying the expenses made necessary in the conduct of the governmental affairs of a city, and have no application to special taxes assessed for improvements, such as streets, sidewalks, gutters and sewers. It is recognized by all the courts, including our own, that a municipality may lay a tax upon abutting land for purposes of local improvement, and the tax may be asserted according to the frontage of the property without regard to its value. (*Gosnell v. City of Louisville*, 20 Ky. Law Rep. 510; *Dillon on Municipal Corporations*, section 752.) This manner of assessment and taxation in many instances works a gross injustice upon the property owners, as under it, a vacant lot, practically worthless, may be burdened with the same tax as an adjacent highly improved and valuable lot. But, as this method of taxation, under legislative authority, has now become too firmly established to even question its soundness, all that remains for the courts is to restrain the power within proper and reasonable limits. And this restrictive supervision is made necessary by the growing disposition of municipal bodies to extend it to embrace many subjects not contemplated in its origin.

The question of municipal taxation is one of the most important and intricate public questions of the day. Municipal authorities as a rule are disposed to be liberal in the imposition of taxes, and do not seem disturbed by the ever increasing burden of indebtedness that is accumulating upon the cities of the country. Fortunately, the Constitution of this State has placed a check upon the extravagant expenditure of public moneys and has fixed a limit beyond which a general property tax for public purposes can not go, unless assented to by the voters at an election held for that purpose. But this valuable and salutary limitation would afford little protection if, under the guise of improving property, special taxes might be levied without let or hinderance, and without regard to the constitutional limitations which do not apply to this method of taxation. If the right to lay these special assessments can be extended to embrace any subject which the municipal authorities with the aid of the Legislature deem it expedient to reach, it will soon come to pass that the wise safeguards of the Constitution will afford slight security to the taxpayer. To evade them, it will only be necessary for the municipal authorities to place the burden upon abutting owners under the pretense that it is an improvement tax and hence may be charged in addition to the property tax imposed. Under this plan or scheme, should it be held allowable, if the general property tax in a city has reached the limit and no larger sum can be gathered from this source, the city council may, by charging some of the current expenses of the city to abutting owners, divert to other uses, the amount theretofore expended for this purpose out of the property tax collected. To illustrate, if the cost of maintaining the police department of a city is ten thousand dollars, and this sum has been paid out of the revenue derived from a general property tax, and the Legislature can give the city the right to charge this item of expence against the abutting property owners, upon the ground that it is conferring a special benefit upon them in the preservation of the peace, order and quiet of the city, then this ten thousand dollars may be applied to other purposes. And so, if the fire department cost annually twenty thousand dollars, and the city had appropriated this sum from the general revenue collected, it could, if so authorized, charge it against the property owners, and thus have this additional sum to use in other ways. And thus, the matter might be extended, until the taxation, general and special, upon real property would far exceed the constitutional limit, and the property owners be helpless. If property

can be charged under a special tax with the expense of sprinkling the streets, upon the ground that it is an improvement, beneficial to the property, we see no reason why it may not be charged with the cost of maintaining the fire department, the police department, and the water and lighting system of the city, as it is more important that the city should have police and fire protection, and a supply of water and light, than that the streets should be sprinkled. Indeed, there is more force and propriety in the argument that abutting property would receive more benefits from police, fire, water and light than it would from sprinkling.

But, in answer to all this, the argument is made that in the absence of constitutional limitation, the Legislature is supreme and to its wisdom and discretion, must be left the settlement of these questions.

It is true, there is no limitation in the Constitution upon the power to levy improvement taxes, nor definition of what an "improvement tax" is, but it does not follow from this that the Legislature is so absolutely supreme that its authority can not be questioned. Arbitrary power exists nowhere in this republic. There is a line at which the power to tax and take for special assessments must stop. The only question is where to draw it. And in the character of tax under consideration, we may safely say that it must stop when it goes beyond real and substantial benefits to the abutting property, distinct from those enjoyed by the public.

The theory upon which special taxes are sustained, is that the property assessed receives special benefits in addition to those received by the community at large. This, says Dillon in his work on Municipal Corporations, in section 761:

"Is the true and only just foundation upon which local assessments can rest. And to the extent of special benefits, it is everywhere admitted that the Legislature may authorize local taxes or assessments to be made."

Cooley on Taxation, section 1153, lays it down that:

"There can be no justification for any proceeding which charges the land with an assessment greater than the benefits. It is a plain case of appropriating private property to public use, without just compensation; and a clear case of abuse of legislative authority in imposing the burdens of a public improvement on persons or property not specially benefited, would undoubtedly be treated as an excess of power and void."

The Supreme Court of the United States in *Illinois Central R. Co. v. City of Decatur*, 147 U. S., 190, 37 L. Ed., 134, in discussing the difference between general taxes and special taxes, said:

"On the other hand, special assessments or special taxes proceed upon the theory that when a local improvement enhances the value of neighboring property, that property should pay for the improvement." And quotes with approval from Cooley on Taxation, the following:

"Special assessments, on the other hand, are made upon the assumption that a portion of the community is to be especially or peculiarly benefited in the enhancement of the value of property peculiarly situated as regards a contemplated expenditure of public funds. And in addition to the general levy they demand that special contributions, in consideration of the special benefit shall be made by the persons receiving it. The justice of demanding special contribution is supposed to be evident in the fact that the persons who are to make it, while they are made to bear the cost of the public work, are at the same time to suffer no pecuniary loss thereby, their property being increased in value by the expenditure to an amount at least equal to

the sum they are required to pay. This is the idea that underlies all these levies."

And so in the Law of Special Assessments by Hamilton, section 236, the rule is announced, supported by ample authority, that:

"Special taxation for a local improvement, as well as special assessments of benefits for same, necessarily proceeds upon the theory of benefits to the property on which it is levied, and that a burden imposed upon any other theory is a mere arbitrary exaction—a taking of private property for public use without just compensation."

And in Smith's Modern Law of Municipalities, section 1228:

"A special assessment, or local assessment, as it is frequently called, is a species of taxation imposed by municipalities for the purpose of local improvement, and is based upon the assumption that the property in the locality of the property improved will be specially and peculiarly benefited thereby, by which a duty is imposed upon owners to contribute an amount in payment of the cost of the improvement equal to the benefits received. * * * Special assessments rest upon the ground that special burdens may be imposed for special or peculiar benefits accruing from public improvements. Local assessments can only be imposed to pay for local improvements clearly conferring special benefits on property assessed, and to the extent of those benefits only."

And this court, in a long line of cases in harmony with the foregoing principles, has held that all municipal assessments are based upon the ground that the property subjected to the assessment is benefited by the improvement for which the assessment is made. (Preston v. Roberts, 12 Bush, 570; Broadway Baptist Church v. McAtee 8 Bush, 508; Bradley v. McAtee, 7 Bush, 667; Zable v. Louisville Baptist Orphans Home, 92 Ky., 89.) Some courts hold that the right to impose local assessments is derived from the police power of the State. (Hamilton on Special Assessments, section 40.) But, it is not necessary to resort to the police power to find authority for the laying of taxes of this character. We think the safe, conservative and well-defined place to rest them is upon the theory that they may be imposed as an equivalent for benefits conferred that are not enjoyed by the general public. It is upon this ground that this court, as well as nearly all the others, has found its justification in imposing them.

We may therefore, announce as sound in principle and supported by ample authority, the doctrine that special taxes can not be levied unless the property charged received a corresponding physical, material and substantial benefit from the exaction. And furthermore, that if the assessment does not confer a physical, material and substantial benefit, it will be invalid upon the ground that it is an attempt to take private property without just compensation, in violation of the Constitution. So that the question narrows down to the proposition whether or not street sprinkling may be considered an improvement in the sense that the adjacent property derives special benefits of the character described from it distinct from the benefits received by the public generally. If a sidewalk, or gutter, or street is constructed in front of property, the reasonable and natural result is, that the property derives some benefit and advantage from the improvement, and something substantial or at least tangible is added to its value. Of course, the value of improvements to adjacent property may be different, depending on the use to which the property is put, its situation and surroundings, and in many instances it may not be very appreciable and fail to realize the expectation on which the levy is made, but, nevertheless, all of the property is, to some extent, benefited, or at least this is the object and reasonable intent of the improvement. But, sprinkling streets, does not, in our

opinion, confer a special benefit upon the adjacent property in the sense of contributing to its value; and hence a special tax for this purpose can not be sustained upon the only ground that this class of taxation rests.

The view we have announced is in harmony with the ruling of the Supreme Court of Illinois, in *Chicago v. Blair*, 149 Ill., 310, 24 L. R. A., 412, where, in considering a similar question, it was said:

"In the nature of things, the sprinkling is only useful while the work is continued. In a few hours the beneficial effects are gone, and the property is worth no more than before the street was sprinkled. It is insisted, however, that all improvements—the building of sidewalks, the paving of streets, of however lasting material—are evanescent, and that in a few years at most, they will necessarily require renewing; and that it makes no difference whether it be water put upon the street, or wood or granite; that all alike are but temporary in character. In a sense this is true, but not in a practical sense. It is common experience that well-paved streets and convenient and durable sidewalks, furnishing access to property, do in fact enhance its market value. It is however insisted, that the sprinkling of the street during the summer months renders the occupation of the adjacent property more enjoyable and comfortable, and that therefore, the property is enhanced in value. Doubtless, the same result would follow by placing vases at convenient points on the street, to be filled every morning with fresh-cut flowers; or by open-air concerts, in which music should be selected with reference to the taste of the adjacent dwellers. (*Pettit v. Duke*, 10 Utah, 311.)

Judge Phillips, in *New York Life Insurance Company v. Prest*, 71 Fed. Rep., 815, said:

"Under such ordinances, streets are sprinkled in front of vacant lots, on which are neither houses nor any living creatures. It could hardly be said, with reason, that running a sprinkling car now and then in front of such a lot adds to its market value; nor is there in such occasional laying of the dust any semblances of permanency. It is as evanescent as the early and later dew, and in my judgment it is no more within the power of the municipality thus to create liens on the citizens property than to hire 'rain makers to vex the skies for refreshing showers, and charge the lots adjacent to the rain-drops with the cost thereof. As the sprinkling of the public highways of a city, like the cleaning thereof, contributes much to the comfort and enjoyment of the property, its cost should be made a general and not a special burden."

A contrary view is maintained in *State v. Raise*, 38 Minn., 371, where it is said:

"The testator's main contention, however, is that street sprinkling is not an 'improvement' within the meaning of this section of the Constitution, because it lacks the element of permanence: that its results are transient; that, to constitute an improvement, there must be some work or structure, such as a pavement, sidewalk, or the like, that will remain after the labor is performed, and permanently enhance the value of the property. But, if permanence or durability is to be the test, how long must the beneficial results last in order to constitute an improvement? It certainly will not be claimed that the work must be eternal in duration, or imperishable in character. We are unable to see any difference in principle between the work of street sprinkling, the results of which, unless repeated, last but a day, and the construction of a block pavement or wooden sidewalk, which wears out or decays, and has to be rebuilt every few years. When a pavement or sidewalk has worn out the future value of the property is not enhanced by it any more than it is by street sprinkling when that ceases. Neither do we see that it makes any

difference whether the substance applied to the surface of the street is wood, which has to be renewed every few years, or water, which has to be applied daily. Each benefits the adjacent property as long as it lasts, and no longer. It is not the agency used, or its comparative durability, but the result accomplished, which must determine whether a work is an improvement in the sense in which that word is here used." And by the Massachusetts Supreme Court, in *Sears v. Board of Aldermen*, 43 L. R. A., 834; and the Supreme Court of Indiana, in *Reinken v. Fuehring*, 130 Ind., 382, 30 Am. St. Rep., 247.

The foregoing opinions present the conflicting views touching this question held by other courts. And while there is much plausibility in the reasoning of the Minnesota case, we are not impressed with its soundness. There is clearly a difference not only in degree, but in principle, between the occasional and temporary convenience and pleasure that laying the dust, in the street confers, and the permanent and useful advantage that comes from well paved sidewalks or macadam streets that are suitable and serviceable for travel in rain or shine, summer and winter. Abutting property can not be taxed alone for the convenience or pleasure or comfort of the persons who use the streets, or in order that the neighboring premises may be made more attractive or beautiful to look upon. The rights of the owner must be considered. If his property is taken, he must receive some material, substantial benefit as an equivalent for the exaction. The city, as a whole may, as we have held, devote a portion of its revenue to this purpose; as indeed it may and often does, to the purchase of other conveniences that are esteemed of public service and yet practically considered result in doubtful benefits to the general public. But there is no good reason why the individual owner should be burdened in addition to his heavy load of municipal taxes, with charges that are levied without corresponding benefits.

The law authorizing the tax, as well as the ordinance under which it was imposed, are both invalid, and the judgment of the lower court is affirmed.

GOLLADAY, &c. v. THOMAS, &c.

(Filed June 18, 1908—Not to be reported.)

1. Wills—Dying Without Issue—The devise to Mrs. S. being to her for life, and at her death to her children, and having none that the land should revert to testator's children, the chancellor correctly held that, upon the death of the devisee, the property so conveyed her by the will, passed to her surviving brother and sisters, no children having been born to her.

2. Same—Under section 4843, Kentucky Statutes, the devise having failed, by reason of the death in the lifetime of the testator, the estate must pass as in the case of intestacy, no contrary intent having been expressed in the will.

R. W. Crenshaw for appellants.

John W. Kelly for appellees.

Appeal from Trigg Circuit Court.

Opinion of the court by Judge Hobson, affirming.

The will of Alfred Thomas is in these words:

"I, Alfred Thomas, being of sound mind and deposing memory, do make this my last will and testament revoking all others, to-wit:

"1. I give to my daughter, Ida Golladay, the tract of land where she lives, that I have already deeded to her, and the tract of land of three hundred acres, known as the Bob Lucas—and a tract bought from Mrs. and Dr. Rasco, thirty-two acres, her lifetime then to her children.

"2. I give to my daughter, Inez Vinson, the tract of land where she now lives, of two hundred and ten acres, and the tract of two hundred and three acres, less twelve acres off the west end or corner given to T. M. Thomas for timber, where T. H. Meredith lived in 1903, her lifetime and then to her living children, if any; if none, then it is to descend to my children.

"3. I give to my son, Thomas M. Thomas, the tract of land where he now lives of two hundred and forty-eight acres and the tract of land of one hundred and fifty acres, known as the Parks Wilson land, and twelve acres of land off the tract off the west end or corner where Meredith lived in 1903. for timber, his lifetime, then to his children and all indebtedness either by note or account.

"4. I give to my daughter, Gracey Shoulders, the tract of land where I now live of two hundred and sixteen acres and two acres bought from Tandy Wadlington, her life time and at her death to her children, also a tract of land of one hundred and twenty acres, where Bob Rogers now lives to her her lifetime, then to her children, if any; if none, it is to descend back to my children.

"5. I give the remainder of my land to my four children, their lifetime, to be equally divided between them and then to their children.

"6. I give to Clara and Gracey Martin, each eight hundred dollars out of my personal property, if not enough left, sell enough land off on the land to pay all indebtedness and to give Clara and Gracey Martin the amount given them and to put up a iron fence around the entire grave yard at J. R. Golladay, to cost about, say \$250.

"7. If there is anything left after gifts is paid and indebtedness paid, the remainder be divided equally between my children. This 9th day of April, 1904, I hereunto set my hand and seal.

"ALFRED THOMAS."

At the time the will was made, the testator had four children; after it was made, Mrs. Shoulders died without issue, before her father, the other three children surviving him.

At the time the will was made, Ida Golladay, had two children and Thomas M. Thomas had two or three children. Neither Inez Vinson nor Gracey Shoulders had children. Gracey Shoulders, having died without issue, after the will was made and before the testator's death, this suit was brought to determine who takes the land devised to her in Item 4, of the will. The circuit court held that the land devised to her passed to her surviving brother and sisters. The guardian ad litem of the grandchildren, who were all infants, appeals.

Section 4843, Kentucky Statutes, is as follows:

"Unless a contrary intention shall appear by the will such real or personal estate, or interest therein, as shall be comprised in any devise in such will which shall fail or be void, or otherwise incapable of taking effect, shall not be included in the residuary devise contained in such will, but shall pass as in case of intestacy."

Under this statute it is evident that the devise to Gracey Shoulders having failed, by reason of her death in the lifetime of the testator, the estate must pass as in case of intestacy, unless the contrary intent is expressed by the will. Counsel rely upon section 2064, Kentucky Statutes:

"When a devise is made to several as a class or as tenants in common, or as joint tenants, and one or more of the devisees shall die before the testator, and another or others shall survive the testator,

the share or shares of such as so die shall go to his or their descendants, if any; if none, to the surviving devisees, unless a different disposition is made by the devisor. A devise to children embraces grandchildren when there are no children, and no other construction will give effect to the devise."

This section is not applicable for the reason that the devise here is not made to several as a class. The devise is made simply to Gracey Shoulders and the rule applicable where there is a devise to joint tenants, can not affect the rights of the parties. The only question, therefore, left for decision, is whether an intention appears from the will that if the devise to Gracey Shoulders failed, the property should not pass as in case of intestacy. The testator does not seem to have contemplated that Thomas M. Thomas or Ida Golladay would die without issue, as they then each had several children; but he did contemplate that Inez Vinson and Gracey Shoulders might die without children, as none of them then had children; and so, in both the second and fourth clauses of the will, he provides as to each of them that if they die without living children, the land devised to them is to descend to his children. If Gracey Shoulders had survived her father and died without leaving children, after his death, the land would have descended back to his three remaining children. Inez Vinson has only a life estate in the tract of land devised to her; if she dies without living children, it will descend to the testator's children, and his grandchildren would take no interest in it. (*Montgomery v. Montgomery*, 11 Ky. Law Rep., 87.) We do not think the testator intended that his grandchildren should take an interest in the land devised to Inez Vinson or Gracey Shoulders, if they died before his death, as he expressly provided that if they died after his death, without children, the land devised to them should go to his other children. The law favors the vesting of estates; and we see no reason why the surviving children should not take the same interest in the land devised to Gracey Shoulders, when she died before the testator, as they would have taken had she survived him and then died without children. Section 2346, Kentucky Statutes, is as follows:

"A contingent remainder shall, in no case, fail for the want of a particular estate to support it."

The contingent remainder in the other children was not under this statute defeated by the death of Mrs. Shoulders; but she having died without issue, the surviving three children took the land at the death of the testator under the will. The same result would follow the statute.

Judgment affirmed.

MORSE v. COMMONWEALTH.

(Filed June 17, 1908—Not to be reported.)

1. Embezzlement—Indictment —Averments— Proofs of Assumed Names—Competency—Identification—On the trial of one indicted by the name of Homer Marlon, alias Homer Morris, alias P. Homer Morse, for embezzlement by collecting money from S for a Distilling Co., for which he was acting as agent, and converting it to his own use, under Ky. Statutes, sec. 1202, evidence was competent that he had sold warehouse receipts for whisky in bond to persons other than S. and collected the money, representing himself as Homer Marlon, for the purpose of identifying him as the person indicted.

2. Same—Identification—Range of Evidence Allowed—Upon the trial of an indictment, when the defense is that it was not himself but

another who committed the crime the evidence on behalf of the Commonwealth may be permitted to take a wide range for the purpose of developing the past history of the accused, and the names he has assumed, to the end that he may be identified as the person who committed the offense charged. But if, in the investigation, it should appear that the accused had been guilty of some other offenses the court should admonish the jury that they should consider such evidence only for the purpose of identification.

3. Same—Evidence of Commonwealth—On the trial of one indicted as agent, for embezzling the money of a corporation, the Commonwealth must prove (1) that the accused was the agent of the corporation; (2) that as such agent, in the course of his employment, he received money for the corporation; (3) that he fraudulently converted the money so received to his own use.

4. Same—Guilty Intent—Evidence Showing—Acts Implying—It is not indispensable that the Commonwealth should introduce evidence to show guilty intent before a conviction can be secured for embezzlement. While such intent is a necessary ingredient and must be alleged in the indictment the law will imply an intent from the acts of the accused when they are sufficient to establish his guilt. But the Commonwealth will not be permitted to prove that the accused has committed other and distinct crimes than the one for which he is being tried, unless such evidence is necessary to establish the identity or guilty knowledge of the accused.

5. Corporation—How Proven—On the trial of one for embezzling the money of a corporation the existence of the alleged corporation may be proven by parol evidence.

6. Money Embezzled by Agent—Commission of Agent—Where one is shown to have embezzled money which he as agent collected for his employer, he can not be excused because he was entitled to a part of the money as his commission as such agent.

7. Amount Charged—Proof of Less Sum—Sufficiency—One may be convicted for embezzlement although the evidence may show that the amount embezzled was less than the sum named in the indictment.

B. F. Graziani for appellant.

James Breathitt and Tom B. McGregor for appellee.

Appeal from Kenton Circuit Court.

Opinion of the court by Judge Carroll, affirming.

The appellant was indicted under section 1202 of the Kentucky Statutes, providing in part that.

"If any officer, agent, clerk or servant of any bank or corporation shall embezzle or fraudulently convert to his own use or the use of another, money * * * belonging to such bank or corporation * * * which shall have come into his possession * * * as such officer, agent, clerk or servant. * * * he shall be confined in the penitentiary for not less than one nor more than ten years."

The indictment charged that appellant, who was indicted as Homer Marion, alias Homer Morris, alias P. Homer Morse, while acting as the agent of the Consumers Distilling Company, a corporation under the laws of Kentucky, had by virtue of his agency collected and received \$59.95 from Henry Staggenburg, for whisky sold and to be delivered, and did unlawfully, fraudulently, and without the consent of the Consumers Distilling Company, embezzle and convert to his own use the said sum of money, with the fraudulent and felonious intent then and there to convert the same to his own use, and to permanently deprive the company of its property therein.

Upon a trial under this indictment, he was convicted and his punishment fixed at two years confinement in the State penitentiary. We are asked to reverse the judgment of conviction, chiefly because the court erred in the admission and rejection of evidence and also for error in the instructions given to the jury.

A brief statement of the facts will aid in understanding the force of the objections raised.

The Consumers Distilling Company is a Kentucky corporation, with its principal place of business located at Louisville. It was engaged in the manufacture of whisky, and the sale of it direct to the saloon trade. The whisky sold was in bonded warehouses. Its sales were made by agents who delivered to purchasers warehouse certificates for the amount of whisky they desired to buy. These warehouse receipts specified the serial numbers of the barrels of whisky the purchaser bought, which was deliverable to bearer upon the payment of the purchase price, tax, and other charges.

Appellant was employed by the company to solicit trade and was furnished a supply of blank warehouse receipts, and sale order blanks. He was not personally known to the company, but was employed by it upon the recommendation of his cousin, Bradford Morse, who had been acting as its agent in the territory assigned to the appellant after Bradford Morse quit its employment. These agents were not authorized to collect money on sales made, but were authorized to receive from the purchaser their commission upon sales, which was five per cent. Appellant made sales to H. P. Murphy and H. C. Davis, and from these persons he collected more than his commissions, but remitted to the company the amount collected from them less commissions. He did not remit any money collected from other persons or send in any other orders or notify the company of any other sales.

Henry Staggenburg testified that he was a saloon keeper in Covington, and that on July 22, 1907, a man named Homer Marion, came to his place of business with samples of whisky, order blanks and certificates, and that he bought from him three five-barrel certificates, for which he paid him, at the time, \$29.95, and in about a week afterwards, thirty dollars more. He identified the appellant, Morse, as being the person who sold him the whisky under the name of Henry Marion, and also produced the receipts signed by Homer Marion. The warehouse receipts delivered by Homer Marion alias, P. H. Morse, recited in substance that the Consumers Distilling Company had sold to Staggenburg, fifteen barrels of whisky in a bonded warehouse, naming it, which it agreed to deliver to him on the payment of the United States government tax, and other taxes and storage, and the price at which the whisky was sold. The total amount of the purchase was \$126.65.

Upon the trial, persons by the name of Hennessy, Dennis, Sidler and Schutte were introduced as witnesses for the Commonwealth. Each of them was permitted to state, over the objection of appellant, that while representing himself to be Homer Marion, and an agent for the Consumers Distilling Company, appellant sold to them warehouse receipts for whisky in bond and collected from each of them a part of the purchase price. They positively identified the accused as the person who sold them the whisky and collected from them the money under the name of Homer Marion; and were permitted to relate all the details of the transaction each of them had with him. The treasurer of the Central Savings Bank & Trust Company also identified the accused as representing himself to be Homer Marion when he cashed the checks given to him by Staggenburg. Other witnesses were introduced who identified the appellant as having trans-

actions with them under the name of Homer Marion; and yet others who knew him when he was going under the name of E. B. Morse.

The president of the company testified that he employed the accused upon the recommendation of his cousin, Bradford Morse, to act as agent in his place during his absence from the State. That he had never seen the accused until after his arrest. That agents of the company were not authorized to collect from persons to whom whisky was sold any part of the purchase price except their commissions. That no report was made to the company by the accused, of whisky sold to Staggenburg, Hennessy, Dennis, Sidler or Schutte, nor did he remit to it any money on account of sales to these parties.

The appellant, when introduced as a witness in his own behalf, testified that he had acted as agent for the Consumers Distilling Company for a short while, and during the time had sold whisky to Murphy and Davis, but had not sold or attempted to sell any whisky to either Staggenburg, Hennessy, Dennis, Sidler or Schutte, nor had he collected from them any money. He attempted, in the course of his examination, to place these transactions upon Bradford Morse, and denied that he ever assumed the name of Homer Marion, or Homer Morris, but admitted that at one time he had assumed the name of E. B. Morse. Over his objection, the Commonwealth was permitted to ask him if he had not been indicted and convicted in the Federal court as E. B. Morse for a fraudulent use of the mails. He was also required to state that as E. B. Morse he had rented property, some years before the trial, from a man named Rolsen, and was also interrogated concerning other incidents in his life that had no bearing upon the offense he was charged with, except to show that at various times he had assumed different names. The defense of appellant was rested entirely upon the fact that the crime he was charged with was committed by Bradford Morse. In other words, that the Commonwealth had instituted the prosecution against the wrong person.

The first question presented is the competency of the evidence of Hennessy, Dennis, Sidler and Schutte. The trial court admitted the evidence of these persons for the purpose of showing a criminal intent upon the part of the accused, and admonished the jury that this was the only purpose for which their testimony was received. Considering the defense interposed by appellant, we are of the opinion that, although the evidence was competent, the reason for its admission given by the trial judge, was erroneous. It was relevant and admissible for the purpose of establishing the identity of the accused, but not, as we will presently show, for the purpose of showing a criminal intent upon his part. The grounds upon which it was admitted are not however material; it was competent evidence and the appellant was not prejudiced by the erroneous reason assigned by the lower court. The accused denied that he had ever assumed the names of Homer Marion, or Homer Morris, and that he had any transactions with Staggenburg. It was, therefore competent to prove not only by Staggenburg, but by the other witnesses, who, about the same time knew him or had similar transactions with him, that in dealing with them he represented himself to be Homer Marion, and to prove by them that appellant was the identical person whom they knew as Homer Marion. This evidence might have been made by as many persons as were able to identify him without reference to whether they had business transactions with him or not. In the examination of these witnesses, for the purpose of fully identifying the accused, it was also permissible to allow them to relate the circumstances under which they knew him, and the business transactions they had with him. In addition to this, and as a corroborative and relevant fact tending to show that the accused had assumed

the name of Homer Marion, it was competent to prove that he had assumed other names, and that, under another name he had been indicted and convicted in the Federal court. When the defense of a person is that it was not himself but another who committed the crime, the evidence in behalf of the Commonwealth may be permitted to take a wide range for the purpose of developing the past life and history of the accused, and the names he has assumed, to the end that he may be identified under these assumed names as the person who committed the offense under investigation. But, if in the course of the evidence brought out in the elucidation of these facts, it should appear that the accused had been guilty of some other offense, the court should at the time admonish the jury that they should not consider evidence of other offenses as even tending to show his guilt of the crime for which he was being tried, but that it was only competent for the purpose of establishing the identity of the accused and to illustrate that, at different times, he had assumed various names.

As the evidence of Hennessy, Dennis, and the others was relevant and competent upon the question of identity, the admonition of the court that the jury could not consider it as evidence that the accused was guilty of embezzling the money secured from Staggenburg had the same effect as if he had in terms directed them that it was only admitted to establish the identity between Homer Marion and P. H. Morse. We might rest the opinion here upon the question of the relevancy of this evidence, but in view of the importance of the question raised, we will endeavor to state the reasons why we think the trial judge committed a technical error in the reasons assigned for the competency of the evidence.

Under an indictment for embezzlement, it is necessary that the Commonwealth should prove (1) that the accused was an officer, agent, clerk or servant of a bank or corporation, (2) that as such officer, agent, clerk or servant, and in the course of his employment, he received money or property of the bank or corporation, (3) that he embezzled or fraudulently converted to his own use the money or property so received. If the accused was the agent of the Consumers Distilling Company, a corporation, and as such agent, in the course of his employment, or within the scope of his duties, he received or collected from Staggenburg, money due the company and failed to pay it over, the crime was complete. It was not necessary to introduce other evidence to show a fraudulent intent upon his part to convert it to his own use. That he so intended might be reasonably inferred from the other facts proved. The case for the Commonwealth was made out by the testimony of Staggenburg, and the president of the company, and if no evidence had been introduced for the defense a judgment of conviction might have followed. And under the circumstances it would have been not only unnecessary, but highly prejudicial to admit evidence of other distinct embezzlements from other persons. But, as the accused denied that he had secured any money from Staggenburg, it was, as we have endeavored to show, competent to admit other evidence to establish his identity, although this evidence developed the offenses committed in connection with Hennessy, Dennis, Sidler and Schutte. The peculiar defense interposed by the accused rendered necessary evidence of his identity, and at the same time made it unnecessary to introduce collateral facts to show intent. The question of intent was not particularly put in issue by the accused. His defense was not grounded upon a lack of intent and therefore, on this point, it was only required that the Commonwealth should show the facts directly connected with the Staggenburg transaction. It is not indispensable that the Commonwealth should introduce evidence to show a guilty

intent before a conviction can be secured for embezzlement. An evil intent is a necessary ingredient in the commission of arson, burglary, larceny, murder, and almost every other felony, including embezzlement, and must be charged in the indictment, but the law will imply the intent from the acts of the accused when they are sufficient to establish his guilt, and this, upon the ground that every accountable person is responsible for the consequences that flow from his acts. (*Snapp v. Commonwealth*, 82 Ky., 173.) Intent, however, often becomes a material factor in determining the guilt of the accused, and when this state of case is presented, it is competent to show the guilty intent by relevant evidence connected with, or that throws light upon the transaction under investigation. But, it is not often that it is permissible, in order to show intent to introduce evidence of other and distinct crimes. And it may be said to be a rule of general application, in the trial of criminal cases, that the Commonwealth will not be permitted to introduce evidence showing that the accused has committed other and distinct crimes than the one for which he is being tried. The justice of this rule can not be denied. Evidence of the commission of other offenses is very prejudicial to the accused, has a tendency to divert the mind of the jury from the case under consideration, and often may find the accused entirely unprepared to meet the new issues presented. For these reasons the practice in this State has been against the admissibility of evidence of this character, unless it is necessary to establish identity or guilty knowledge or intent or motive for the crime under trial or be so interwoven with it that it can not well be separated from it, in the introduction of relevant and competent evidence, or the independent offense was perpetrated to conceal the crime for which the accused is on trial. The exceptions to the general rule against the admissibility of evidence of other and distinct offenses, are in a general way stated as follows in Underhill's work on Criminal Evidence, page 107:

"1. If several similar criminal acts committed by the person on trial are so connected with respect to time and locality that they form an inseparable transaction, and a complete account of the offense charged in the indictment can not be given without detailing the particulars of such other acts, evidence of any or all of the component parts thereof is admissible to prove the whole general plan.

"2. When the commission of the act charged in the indictment is practically admitted by the accused, who seeks to avoid criminal responsibility therefor by relying on a lack of intent or want of guilty knowledge, evidence of the commission by him of similar independent offenses, before or after that upon which he is being tried and having no apparent connection therewith is admissible to prove such intent or knowledge.

"3. If the facts and circumstances tend to show that the person committed an independent, dissimilar crime to enable him to perpetrate or to conceal the offense for which he is being tried, evidence of the independent crime is admissible against him when the intent to perpetrate or conceal the independent offense furnished a motive for committing the crime for which he is put upon trial.

"4. When a crime has been committed by the use of a novel means or in a particular manner, evidence of the defendant's commission of similar offenses by the use of such means or in such manner is admissible against him as tending to prove the identity of persons from the similarity of such means or the peculiarity of the manner adopted by him."

These admirably stated exceptions are supported by a multitude of cases and text writers, from which we may select as examples, the following: *State v. O'Donnell*, 61 Pac. Rep., 892; *Shaffner v. Com-*

monwealth, 13 Am. Rep., 649; *Peeples v. Corbin*, 15 Am. Rep., 427; *Bishop's New Criminal Procedure*, volume 1, sections 1125-6; *Greenleaf on Evidence*, volume 1, section 53; *Elliott on Evidence*, volume 4, section 2720; *People v. Molineux*, 62 L. R. A., 193; *People v. Seaman*, 61 Am. St. Rep., 326; *State v. Brady*, 62 Am. St. Rep., 560; *McGlasson v. State*, 66 Am. St. Rep., 842; *Calkins v. State*, 98 Am. Dec., 121; *Devoto v. Commonwealth*, 3 Met., 418; *Clarke v. Commonwealth*, 23 Ky. Law Rep., 1029; *O'Brien v. Commonwealth*, 89 Ky., 354; *O'Brien v. Commonwealth*, 24 Ky. Law Rep., 2511; *Bess v. Commonwealth*, 25 Ky. Law Rep., 1091; *Barnes v. Commonwealth*, 19 Ky. Law Rep., 803; *Denham v. Commonwealth*, 27 Ky. Law Rep., 171; *Raymond v. Commonwealth*, 29 Ky. Law Rep., 785; *Snapp v. Commonwealth*, 82 Ky., 173.

The authorities also agree that evidence of independent crimes is more particularly admissible when the charge under investigation is uttering forged paper, counterfeiting, receiving stolen property, and embezzlement, the reason for this being that the defense of mistake or ignorance or lack of guilty knowledge is more frequently interposed as a defense by the accused in cases of this character than in prosecutions for other offenses. Hence it is well settled by the authorities before cited that in prosecutions for embezzlement, when the defense is that the accused did not intend to commit the embezzlement or that the act alleged to constitute the crime was the result of accident, mistake or oversight, evidence of other embezzlements is admitted for the purpose of showing an evil intent and a guilty knowledge in the commission of the crime under investigation. But in the case before us, as there was no attempt to rely upon a defense of this character, evidence of other acts of embezzlement by the accused was not necessary to establish his guilty knowledge, evil intent, or bad motive, nor were they so inseparably connected with the Staggenburg transaction as to be a part of it. The only issue in the case was whether or not the accused had sold whisky to and collected money from Staggenburg. He said he did neither. If his identity had not been a question in the case, we are unable to perceive upon what theory evidence that he collected money from other persons and failed to pay it over, would be relevant under a prosecution for embezzling money collected from Staggenburg, any more than evidence of other offenses would be relevant in prosecutions for larceny, or burglary, or arson, where the defense was an alibi. The issue did not present a case of accident, mistake, oversight, error in book-keeping, or other facts tending to prove lack of evil intent. Leaving out of consideration the identity of the accused, the embezzlements from Hennessy, and others, at different times and places, did not throw any light upon the embezzlement from Staggenburg. Nor were they necessary to establish an evil intent in the Staggenburg transaction, because, as we have seen, it was a separate, disconnected transaction. It stood alone. The question of evil intent or guilty knowledge was in no wise involved in view of the defense made.

In this connection it may be asked at what stage in the trial can the Commonwealth introduce evidence of other offenses, when such evidence is competent. In answer, we say that evidence of this character may be offered whenever the nature of the defense is disclosed that will permit it. If, in the opening of the case it appears that the accused will rely on any of the defenses before mentioned, to show lack of evil intent, or guilty knowledge, then the Commonwealth may put in its evidence in chief—but if the nature of the defense is not disclosed, until the evidence for the accused is offered, it may come in rebuttal, and this we consider the safer practice.

It may also be remarked that if the appellant had denied that he was acting as agent for the company, it would be competent to prove

by other witnesses than Staggenburg, that he had represented himself to them as its agent.

Another objection is that it was not shown by competent evidence that the Consumers Distilling Company was an incorporated concern. It is argued that in cases of this character it is necessary that the original articles of incorporation, or a copy of the record, showing that incorporation, should be produced. Under the statute, the crime of embezzlement can only be committed in connection with the property, money or effects of a bank or corporation. It is, therefore, essential that there should be sufficient evidence of the incorporation of the concern, the money, property or effects of which is embezzled. The question then is, can the facts of incorporation be shown by parol evidence, or is it necessary that the record should be produced. We do not think that record evidence of the incorporation is essential to show that fact. It may be shown by parol evidence. In Thompson on Corporations, section 7713, it is said:

"In criminal prosecutions, when the question arises whether a company is incorporated, for instance, in a case of a prosecution for larceny of the property of an alleged corporation, or for a forgery of the bills of an alleged banking corporation, it is only necessary to show that the corporation exists *de facto*, and this may be proved by general reputation; in other words, by proving by parol testimony, that it is a corporation *de facto*, doing business as such."

This general principle is fully supported in *Calkins v. State*, 18 Ohio St. Rep., 307, 98 Om. Dec., 121; *Thalheimer v. Florida*, 38 Fla., 169; *State v. Thompson*, 23 Kas., 338; 33 Am. Rep., 165.

In *Standard Oil Company v. Commonwealth*, 29 Ky. Law Rep., 5, the court, in considering this question, said:

"However, it is not necessary to offer in evidence the articles of incorporation. The *de facto* existence of a corporation may be established by evidence tending to show that it acted and was accepted in the community as a corporation under the name alleged. In fact, any evidence tending to show that it is a corporation is sufficient." (*Geo. H. Goodman Co. v. Commonwealth*, 30 Ky. Law Rep., 519.)

Under the sound rule announced in these authorities, in a prosecution against a corporation, or in a prosecution against a person for embezzlement, or other crime committed against a corporation, the corporate existence may be shown either by the record or by evidence of persons, who are able to state that the concern in question is a corporation, or by other facts or circumstances showing that it is a corporation. In a prosecution for embezzlement, the money or property of a bank, insurance company or of a railroad, doing business in this State, it would not be necessary to prove, in any way the fact of incorporation, because under the statute these institutions can not conduct business until they have been incorporated. But, as to other concerns that may do business either as corporations, partnerships or individuals, the fact of incorporation may be shown in the manner before stated.

On the trial, appellant introduced as witness for the purpose of proving by him that he was qualified as an expert in the examination of handwritings and that a letter purporting to have been written by Bradford Morse to the company was in the same handwriting as the receipts Staggenburg and others testified were given them by the accused. The trial judge refused to admit this evidence, and this ruling is complained of. The reason for the ruling does not appear in the record, but we assume it was because it was not shown that the letter purporting to have been written by Bradford Morse, was in fact written by him, and that the statute in relation to disputed handwriting was not complied with. Looking at the matter from this standpoint, the ruling was correct. If writings, admittedly made by Bradford Morse, had been offered or introduced on the trial, it would have

been competent to prove by a person qualified to express an opinion upon disputed handwritings that the genuine writings of Bradford Morse and the papers produced by Staggenburg and others, appeared to have been written by the same person. The rule as to the admissibility and comparison of disputed handwritings is prescribed by the act following section 604 of the Civil Code, and when it is proposed to introduce evidence of this character, these statutory provisions must be followed.

It is further urged that as agents of the company were allowed to collect and retain commissions, appellant could not be guilty of embezzlement, because he had the right to collect a part of what he retained, and having the right to collect a part thereof, was not guilty of the statutory offense of embezzlement in collecting and retaining the whole of what he collected, although he might have converted the same to his own use. This precise question was settled adversely to the contention of the appellant in *Commonwealth v. Jacobs*, 31 Ky. Law Rep., 921. In that case, Jacobs was employed by the Western & Southern Life Insurance Company to solicit insurance and collect premiums. His contract with the company provided that he should receive as a salary fifteen per cent. of what was actually collected each week and paid to the company. He collected from a number of policyholders money which he failed to pay over. The trial court being of the opinion that as Jacobs was entitled to fifteen per cent. of the money, he was not guilty of embezzlement in retaining the whole of it; but this court, in reversing the judgment, said:

"Although the defendant was entitled to 15 per cent. of the fund as his commission, he held the remaining 85 per cent. as the agent of the company. And when he embezzled it, his act was as much within the purpose of the statute as if he had been entitled to nothing for commissions and had embezzled the whole fund."

Nor is the point well taken, that because, under the contract, appellant was not permitted to collect anything except commissions he could not be guilty of embezzlement in collecting and converting to his own use, money which, as agent, he had no right to collect. It would be giving a very narrow and inefficient construction to the statute to hold that when an agent of a corporation, by virtue of his agency, was placed in a position where he might collect money for the corporation, that he could not be charged with the crime of embezzlement if his contract provided that he should not have the right to collect. It is manifest that if appellant did in fact obtain any money from Staggenburg, he was enabled to get it because he represented himself as the agent of the company. And if, as such agent, and in the course of his employment, he collected money for the company represented by him, and converted it to his own use, he committed the offense denounced by the statute. The money collected by him, if any, came into his possession by virtue of his agency, and he will not be allowed to escape the penalty of converting it to his own use upon the ground that he was not authorized by the company to collect it, although in fact he did collect it as agent.

In Bishop's New Criminal Law, section 363, it is said on this point:

"A case of embezzlement not only may, but must, show a departure by the servant from the line of his duty. And it is contrary to the entire spirit of our law, as well in the criminal department as the civil, to permit a man to set up his own wrong in justification or evasion of any charge against him, or, in this instance to say that because he added another wrong to the one made penal by the statute, therefore he should escape all punishment. * * * In reason, whenever a man claims to be a servant while getting into his possession the property to be embezzled, he should be held to be such on his trial for the embezzlement."

The instructions are also complained of, but they are not open to criticism or objection, although the indictment charged embezzlement of \$59.95, a conviction might be had on proof of the embezzlement of a less sum. And the court properly so instructed the jury.

After a careful examination of this record, we have been unable to discover any error prejudicial to the substantial rights of the accused, and the judgment of the lower court is affirmed.

The whole court sitting.

Judge Hobson dissenting, only upon the ground that in his opinion the evidence of other crimes was competent upon the question of intent.

REGISTER NEWSPAPER CO., &c. v. WORTEN,

(Filed June 18, 1908—Not to be reported.)

1. Libel—Actions For—What Petition Should Charge—Publication In Newspaper—Where the effect of a publication in a newspaper is to hold a person up to contempt and ridicule, it is not necessary that the petition in an action seeking damages for a libelous publication should allege that the bringing of a suit without authority was unprofessional. When the article complained of charged appellee with bringing an unauthorized suit, the libel was complete.

2. Same—Libelous Character of Publication—A publication referring to one as "the lawyer, a fellow with a license to practice," and containing the charge that such person is the friend and companion of criminals is libelous, and a demurrer to the paragraph of the petition pleading it was properly overruled.

3. Same—Charge in publication that attorney solicited business—The fact that it is unprofessional for a lawyer to solicit business is not only recognized by the bar, but by the public, and a newspaper publication containing such a charge is libelous.

4. Pleading—Part of Publication Pleaded—In pleading a libelous publication, it is only necessary for the plaintiff to set out that part of publication which he considers libelous. He makes out his case when he proves the publication of the libelous matter.

5. Same—Instructions—After setting out the alleged libelous articles, the instructions directed the jury to find against the defendants unless they believed from the evidence that all of said publication were true, or in substance true. Held—That the words "or in substance true," were sufficient to exclude from the consideration of the jury all immaterial statements of fact having no real bearing upon the case. (Louisville Press Company v. Tennelly, 20 Ky. Law Rep., 1231.)

Hendrick, Miller & Marble for appellants.

Breathitt & Bell for appellee.

Appeal from Livingston Circuit Court.

Opinion of the court by Wm. Rogers Clay, Commissioner, affirming.

J. M. Worten is an attorney at law. He was born and reared in Livingston county, which adjoins the county of McCracken. Prior to his removal to Paducah, he was county clerk of his native county and had practiced law in that county for six or seven years. When he moved to Paducah he formed a partnership with Hon. Charles K. Wheeler, who had just been elected to represent the first district of Kentucky in the Congress of the United States. Some time after his removal to Paducah, he became city solicitor for that city. While occupying that position he rendered an opinion unfavorable to the interests of the appellant, Register Newspaper Company, which

was an applicant for the city printing. From that time on there seems to have been considerable feeling of enmity between Worten and the editor of the Register Newspaper Company. That paper published various articles concerning him, and he at times instituted libel suits against it.

After appellee vacated the office of city solicitor, he brought a great many suits against the city of Paducah, on behalf of persons who had been fined in the police court and required to work on chain gangs in improving the streets of Paducah. The Register Newspaper Company, taking the position that the institution of these suits by a former city officer was unprofessional, and claiming that it was acting in behalf of the public interests, published numerous articles concerning appellee, reflecting more or less upon his character and integrity as an attorney.

Appellee thereupon instituted this action to recover damages for certain alleged libelous articles published in the Paducah Daily Register, from November 22nd, 1904, to October 24th, 1905. The petition, exclusive of the preamble and conclusion, contains nine distinct paragraphs, each setting out distinct and different publications upon which appellee sought to recover. The second paragraph originally set out a number of distinct publications, but before the trial the plaintiff dismissed his action as to all of the publications set forth in that paragraph except that of March 21, 1905, entitled "Mark Worten Heard From." Appellants, Register Newspaper Company and James E. Wilhelm, its editor, answered separately, admitting the publications as explained and corrected by them; but denied all malice or bad intent in the publications, and alleged that they were made as a matter of news; that the same as criticisms were privileged; and they attempted to justify such publications by pleading that they were all literally true except one small and unimportant mistake in respect to the publication set forth in the ninth paragraph of the petition, which will be noticed hereafter. Appellee, Worten, denied these matters by reply, and on the issues thus made, the case came on for trial in the Livingston Circuit Court. Upon submission of the case the jury rendered a verdict in favor of appellee for \$1,000. From an order overruling the motion and grounds for a new trial, the Register Newspaper Company and Wilhelm prosecute this appeal.

The articles alleged to be libelous will be set forth in the order in which they appear in the instructions of the court. In Instruction No. 1, will be found the following, which appeared in the Paducah Daily Register, October 24th, 1905:

"Mark A. Worten in the circuit court yesterday, lost another of his suits filed against newspapers of this city, this one being that of J. R. Duncan against the News-Democrat Publishing Company. * * *

"Worten got J. R. Duncan to let him file a suit against the paper in which Worten formerly owned stock. The suit was instituted, but Markie loses."

In Instruction No| 2, will be found the following publication, which 15, 16):

"The Paducah Register is to be congratulated on the result of its latest libel suit. It was brought by a pestiferous damage suit lawyer without foundation, in a county in which neither the plaintiff nor defendant had ever lived, and in which the publisher of the Register had never been.

"There ought to be some way to punish the unprincipled sharks who, with or without a grievance, file suits of the character of that against the Register. One of these creatures was once asked his object in filing such a suit. He replied, 'This paper will make a great fuss about it, and I will get the benefit of the advertisement.' It is a bad sort of notoriety, but seems suited to bad men."

In instruction No. 3, will be found the following article published in said newspaper on the 22nd day of November, 1904, and being the same article set forth in paragraph 1 of plaintiff's petition (Record, page 3.):

"Sult Unauthorized.

"George Wright, colored, went to Chief Collins yesterday and stated that he had seen where a lawyer, Mark Worten, had sued the city of Paducah for \$10,000 in Wright's name on account of the latter being worked upon the street chain gang while serving out fines imposed in the police court. Wright said he wanted the officers to understand that he had not authorized any lawyer to bring suit in his name."

In paragraph 2, of the petition, and in said instruction No. 3, will be found the following article published in said newspaper on the 21st day of March, 1905:

"Mark Worten Heard From.

"Mayor Yeiser informed the board that five more \$10,000 damage suits had been filed against the city by ex-prisoners for damages on the ground that they had been worked illegally on the street chain gang while serving out lockup sentences. These suits were filed for the prisoners by the lawyer who is so popular with them and draws so much clientele from those quarters, Mark Worten, the lawyer, or fellow with a license to practice, who sues the Register, which considers it a compliment to be sued from such a source."

In paragraph 3. of said petition, the following article appears, and which is copied in instruction No. 3, of date, April 22nd, 1905:

"In the years 1902 and 1903, J. Mark Worten served the city as the legal adviser of the administration, composed of the mayor and council and general counsel. For the alleged services Worten was paid \$75 a month, or \$900 a year, or \$1,800 in all, which he no doubt drew with commendable regularity. Among the 'decisions' which he rendered from time to time, the Register was convinced that he lacked considerable of being a reliable lawyer, or well up in the profession, and had no hesitancy in saying so through these columns. Some of his 'decisions' were the laughing stock of the community, and it is a known fact that the mayor, on several occasions, when he wanted legal advice, went to a first class lawyer and got it, and paid for it out of his own pocket.

"The police department is authority for the statement that Worten, while still in office and drawing a salary from the city treasury and taxpayers, made frequent visits to the office of the city judge and made notes from the docket book of the city court. The police aver that it was their belief that Worten was obtaining the names of the persons convicted in the city court and who had been worked on the chain gang, and that he was getting data for some of the suits he afterwards instituted."

And on the 23rd day of April, 1905, in the paper of that date. appeared the following article contained in paragraph 4, and said instruction No. 3:

"The verdict rendered yesterday at Smithland in favor of the Register, in the case in which it was sued for \$10,000 for alleged libel, placed the seal of disapproval, according to our belief, upon one of the most malicious and infamous suits ever instituted against a newspaper.

"Mark Worten, the attorney, was born and reared in Livingston county. For some years he practiced law at Smithland, and until he emigrated to Paducah, which fact, as we are informed, almost caused some of the people at Smithland to meet and congratulate themselves over his departure.

"The scheme to take the case to a county where it would be before strangers and there to attempt to prejudice their minds against 'one of the greatest corporations of Paducah' was well laid, but it failed.

"Worten can attribute his defeat to but one of two causes, to-wit: Either he had no case or it was his prime unpopularity; and if he has any doubt on the latter proposition the sentiment in Paducah and Smithland should be enough to convince him, beyond a doubt, that it is time for him to take an inventory of his standing and act accordingly.

"In 1902, Worten was elected city attorney and prior thereto this paper had never had anything to say in regard to the man. One of his first acts as a sworn officer, either through ignorance or purposefully, was to give the city council a piece of legal advice that was not the law, in order to prevent the Register from obtaining the city printing.

"Worten has the right to dislike this paper and the people connected with it, but as a sworn officer, at that time, it was his duty to give the law as it really existed. But no, with that vindictive spirit, which seems to be a cardinal characteristic, he took advantage of his official position and did not give the council the law.

"Convinced of his enmity, spleen and incompetency, we took the stand which we were forced to take, and according him the right to do and say what he pleased, we took unto ourselves the same privilege. That we have made him smart at times is quite certain.

"Yet we believe that we can hold our own with Worten and his kind of people. He is at liberty to do and say what he pleased of a lawful nature, for this is a free country, and he will likewise find that there are some people who will stay with him until sheol freezes over.

"Men who engage in such questionable practices are a menace to the peace and welfare of a community. Worden was afforded every opportunity to mulct the Register for any amount up to \$10,000, which no doubt was to be divided between him and Stone, but it will be some days before he gets his hands on any of the dollars of 'one of the greatest corporations in Paducah.'"

In the issue of said paper of date, the 15th of August, 1905, the following article was published, and which is set up in paragraph 6 and copied into said instruction No. 3. (Record, page 17):

"J. M. Worten Sues The Register Some More.

"Another One of His Kind of Law Suits Instituted

"Against The Paper in Another County For Elden Stone.

"Wants Only \$5,000 This Time."

"It will be remembered that several months ago this same fellow, Worten, brought suit against the Register for \$10,000, in Livingston county, where he, Worten, was reared, and at the trial of the case a jury of his former fellow-citizens—not friends, for it is understood that where Worten is best known he has few, if any, friends—gave a verdict in favor of the Register.

"Worten, in order to harass the paper, filed the suit in another county.

"Worten was the only man with a license to practice law in Paducah who got mixed up with the ex-chain gang suits, and this conduct about cooked his goose in Paducah. More than one good citizen was heard to say that Worten ought to be run out of the city, and a little agitation at that time would have brought trouble to him, for it was a species of work that had never before been attempted on such a large scale.

"The Register is no doubt blamed by Worten for some of the sentiment against him, and just for revenge, he is now making a special-

ty of suing the Register in another county, and resorting to tactics that reputable lawyers eschew.

"In the \$10,000 suit Worten brought against the Register for Sam Stone, and last at Smithland, he deliberately omitted part of the language used in the Register so as to mislead the court and jury by distorting what was really published. The public may draw its own conclusions as to such reprehensible acts."

In the issue of said paper of September 15th, 1905, the following articles appeared, and are set forth in paragraph 7, of the petition and copied into said instruction No. 3, (Record, page 20):

"The verdict of the Livingston county jury yesterday, against this paper, for \$350, came as a surprise to the good people of Paducah, where the Stones and their attorney, Mark Worten, are so well known.

"That there was a sinister motive in bringing this suit in Livingston county can not be denied, for it is a fact that in December last, Mark Worten brought a suit for Sam Stone in the McCracken Circuit Court against the editor of another Paducah newspaper and also another suit for Sam Stone against the newspaper itself in this county three weeks ago for alleged libel. Those cases are yet to be tried. Therefore, it may be assumed that these suits are really Worten's and that the Stones are merely being used as his tools in the matter.

"When Worten struck this city we were on friendly terms, but it was not long before he saw fit to take up another's differences and begin to denounce this paper, but no attention was paid to it. Finally, as city attorney, he either ignorantly or maliciously gave the council the wrong advice to keep this paper from obtaining the city printing and deprived us of \$1,000 worth of business."

In the issue of said paper of September 27th, 1905, appears the following articles, which are copied in said instruction No. 3, and in paragraph 8, of the petition, (Record, page 22):

"The public has not forgotten that only six months ago this same Paducah Sun was backing up a so-called lawyer, who, after drawing a salary from the city as its legal adviser, became the attorney for a lot of ex-chain gang prisoners and filed nearly a million dollars worth of damage suits against the city for that class, many of whom are the scum of the city.

"The Sun did all in its power to bluff the city into cease working the fellows on the chain gang and predicted that the city would lose the suits, and distorted reports of peonage cases and used every effort in its power to aid in the dirty and contemptible scheme to hold up the city.

"The tenor of the Sun's articles was for a surrender on the part of the city to the criminals and their patron saint of a lawyer, but the city stood pat and the courts decided favorable to the city, and instead of housing that element up in the city jail, to be fed at a dead loss to the city, those convicted in the city courts are still worked on the chain gang and no more detestable suits are being brought.

"According to the court dockets, the lawyer who brought the contemptible suits 'has got his'n,' and if the Sun persists in fighting the best interests of the city, the decent citizens should cut it out and let it look to the ex-chain gang prisoners for patronage, just like some other people are doing.

"The Sun failed to pull Mark Worten and his clients through and it will also fail to fasten the bitulithic contract on the people. The stuff's off."

It is the contention of counsel for appellant that there is considerable doubt as to whether any of the articles published are libelous. Many of these articles we deem it unnecessary to discuss at

all. We shall take up and consider only those which are claimed by counsel for appellant not to be libelous.

Counsel insist that the matter complained of in the first paragraph of the petition, under the heading of "Suit Unauthorized," is not libelous. Following the heading the article proceeds as follows: "George Wright, colored, went to Chief Collins yesterday and stated that he had seen where a lawyer, Mark Worten, had sued the city of Paducah for \$10,000 in Wright's name, on account of the latter being worked upon the street chain gang while serving out fines imposed on the police court. Wright said he wanted the officers to understand that he had not authorized any lawyer to bring suit in his name." Counsel for appellant argue that there is nothing in this article authorizing the conclusion that it charges appellee with unprofessional conduct; that there was no allegation to the effect, nor was there proof of the fact, that the bringing of a suit without authority is unprofessional in Paducah or elsewhere. We can not agree to this view. We know of nothing that would be more damaging to the reputation of a lawyer than to create the impression on the public that he was so unprofessional as to bring a suit without being employed for that purpose. No man has a right to bring a suit in another's name without being authorized so to do.

The law is well settled, that a written or printed publication which is false and defamatory, and calculated to expose one to ridicule or contempt, or to render him odious, or injure him in his business or calling, or in his social standing, is a libel. The publication of the article complained of would necessarily have the effect of holding appellee up to the contempt and ridicule of his associates and acquaintances. Where the effect of the language is to hold a person up to contempt and ridicule, we do not deem it necessary that the petition should have alleged that the bringing of a suit without authority was unprofessional in Paducah or elsewhere. According to the ordinary rules of common sense and reason, it is unprofessional to bring a suit under such circumstances. When the article in question charged appellee with bringing an unauthorized suit, the libel was complete. It was unnecessary to add the words which counsel for appellants insist should have been in the petition. We are, therefore, of opinion that the demurrer to the paragraph containing the above quotation should have been overruled.

The next article referred to by appellants' counsel is the one which is contained in the second paragraph of the petition, and is headed in bold letters: "Mark Worten Heard From." In this article the public are told that Mayor Yeiser "informed the board that five more \$10,000 damage suits had been filed against the city by ex-prisoners for damages on the ground that they had been worked illegally on the street chain gang while serving out lockup sentences." To this extent there is nothing objectionable in the article complained of; it contains simply an item of news in which the public would have taken more or less interest. Had the publication stopped there, it could not be said to contain anything libelous. The article, however, proceeds in the following language: "These suits were filed for the prisoners by the lawyer who is so popular with them and draws so much clientele from those quarters, Mark Worten, the lawyer, or fellow with a license to practice, who sues the Register, which considers it a compliment to be sued from such a source." We think that mortification and shame would necessarily follow the reading of the above article. No self-respecting lawyer, would care to be referred to as "the lawyer, or fellow with a license to practice." Such a reference could not fail to bring into contempt, ridicule and ill repute, the one so spoken of. The article contains the further information that Worten was the friend and companion of criminals,

and that by reason of his intimacy and popularity with them he secured a large part of his practice. There can be no doubt that this article was libelous, and the court did not err in overruling the demurrer to the paragraph in which it was contained.

The only other article especially commented upon by counsel for appellants is the one published in paragraph 9, of the petition, which is couched in the following language: "Markie Worten, in the circuit court yesterday, lost another one of his suits filed against newspapers of this city, this one being that of J. R. Duncan against the New-Democrat Publishing Company. * * * Worten got J. R. Duncan to let him file a suit against the paper, in which Worten formerly owned stock. The suit was instituted, but Markie loses." From time immemorial it has been considered unprofessional for a lawyer to solicit business. This fact is recognized not only by members of the bar, but by the public in general. When, therefore, a news article charges an attorney with soliciting business, we necessarily conclude that it is libelous. Its effect is to charge him with unprofessional conduct, and thus expose him to ridicule or contempt, and injure him in his calling. We are, therefore, of opinion that the court did not err in overruling the demurrer to that paragraph containing the publication complained of.

We shall next consider the instructions.

The court, after setting out the alleged libelous articles in the instructions, directed the jury to find against the defendants unless they believed from the evidence that all of said publications were true, or in substance true. Inasmuch as the articles complained of contained several alleged statements of fact which were immaterial in so far as the libels themselves are concerned, it is insisted by counsel for appellants that, under the instructions, the jury were authorized to find for the plaintiff if the immaterial averments were not true, or in substance true, although they might believe that the libelous portions of the articles were true, or in substance true. We do not see any merit in this contention. The jury could not have failed to understand the case which they were called upon to try. The question was, whether the plaintiff was libeled or not. No jury, under the circumstances, would have found for the plaintiff, simply on the ground that the defendants had failed to prove that some immaterial statement contained in the libelous articles, and which contained nothing that reflected upon the character or reputation of the plaintiff, was true, or in substance true. The instructions given were in effect the same as those approved by this court in the case of *Louisville Press Co. v. Tenny*, 20 Ky. Law Rep., 1231. Manifestly the expression "or in substance true" was sufficient to exclude from the consideration of the jury all those immaterial statements of fact which had no real bearing upon the case. The instructions contained the correct measure of damages, as approved by this court in the case of *Louisville Press Co. v. Tenny*, *supra*. The jury were furthermore told that, if all the alleged libels were not proved to be true, but that some parts of them were proved to be true, or in substance true, they should consider such as were proved to be true, or in substance true, in mitigation of damages, should they find for the plaintiff. The court also defined compensatory and punitive damages and libel. There was a further provision in the instructions, that the jury should not find for the plaintiff any sum in damages on account of any statements referring to his acts, qualifications or conduct as attorney or solicitor for the city of Paducah, unless they believed that one or more of such statements were not substantially true as published, or were not reasonable and fair criticism of plaintiff's acts, conduct or qualifications as such officer, and were not made in good faith and without malice.

Instruction No. 11, was as follows: "The court instructs the jury that if they believe from the evidence that any part of the damage which the plaintiff has sustained, if any, resulted from the filing by him of the actions called the 'chain gang suits,' they will not award him any sum in damages to compensate him for any of the injury or damage caused by plaintiff's said acts." Counsel for appellants complain of this instruction, but it is manifest that it is much more favorable to appellants than it should have been.

We are of opinion that the instructions fairly presented the law of the case, and are not subject to the criticisms contained in the brief of counsel for appellants.

Further complaint is made of the fact that plaintiff below did not declare upon and set forth the entire articles containing the alleged libelous matter. We think the rule is well established, that in pleadings of this character it is only necessary for the plaintiff to set forth that portion of the publication which he considers libelous. The plaintiff makes out his case when he proves the publication of such libelous matter. If, as a matter of fact, the publication contains other matter which has the effect of giving a different meaning to the libelous portion, the defendant has the right, of course, to present to the jury the other portion of the publication so declared upon by the plaintiff, for it may affect the question of malice, and, consequently, the amount of damages.

The record contains many objections and exceptions to the testimony introduced by the plaintiff below. These objections relate principally to the introduction of other publications by the defendants than those upon which this action is based. It is insisted that such other publications are not properly admissible. It has long been the law, that any other words written or spoken by the defendant of the plaintiff, either before or after those sued on, or even after the commencement of the action, are admissible to show the animus of the defendant; and for this purpose it makes no difference whether the words tendered in evidence be themselves actionable or not, or whether they be addressed to the same party as the words sued on or to some one else. (Pearson v. Lemaitre, 5 M. & Gr., 700; 12 L. J. Q. B., 253; 7 Jur., 748; 6 Scott, N. R., 607; Mead v. Daubigny, Peake, 168.) Such other words need not be connected with or refer to the libel or slander sued on; provided they in any way tend to show malice in defendant's mind at the time of publication. (Barrett v. Long, 3 H. L. C., 395; 7 Ir. L. R., 439; 8 Ir. L. R., 331; Bolton v. O'Brien, Ir. L. R., 97, 483.) And not only are such other words admissible in evidence, but also all circumstances attending their publication, the mode and extent of their repetition, &c.; the more the evidence approaches proof of a systematic practice of libeling or slandering the plaintiff, the more convincing it will be. (Bond v. Douglas, 7 C. & P., 626; Barret v. Long, supra.)

In the case of Smith v. Lovelace, 1 Duvall, 215, the rule is thus stated:

"As, in such a case, the degree of malice prompting a slander either aggravates or mitigates the wrong, and consequently may either augment or diminish the rightful damages, proof of reiterated utterances of the same or other defamatory words may be admissible to show the malignity which impelled the publication charged in the suit, and the spirit and intention of its utterance." (1 Greenleaf, section 52, and the cases therein referred to.)

In admitting such evidence, however, the jury should be told, whenever the other words so tendered in evidence are in themselves actionable, that they must not give damages in respect of such other words, because they might be the subject-matter of a separate action. The record in this case shows that all the articles

admitted to be read in evidence to the jury, by the trial court, on behalf of the plaintiff that were prior or subsequent in point of time to the articles sued on, were read under proper admonitions of the court. In each instance the jury were told that the articles in question should be considered by them as affecting the question of malice only, and that they should disregard such articles in estimating the damages, should they find for the plaintiff.

Upon the hearing of this case the plaintiff introduced evidence which tended to show that prior to the time of the publications by the defendants, he enjoyed a good law practice; that because of these publications his practice fell off to almost nothing. On the other hand, the defendants' witnesses testified that the falling off of plaintiff's practice was due to his own conduct in filing the 'chain-gang suits against the city of Paducah. Appellants earnestly insist that all the publications made concerning the plaintiff were shown to be true. Under our system, however, questions of fact are for the jury. As the court committed no errors in the admission of testimony, and, as the instructions properly presented the law of the case, the questions, whether or not the publications were true, or in substance true, whether or not they were maliciously made, and whether or not plaintiff was thereby damaged, were all peculiarly within the province of the jury. Being unable to say that their conclusion is flagrantly against the evidence, their finding will not be disturbed.

For the reasons given, the judgment is affirmed.

MILLER v. JONES, &c.

(Filed June 18, 1908—Not to be reported.)

Partnership—Notice to Partner—(32 Ky. Law Rep., 1078.)—There being no evidence that M. was a partner of O. in the purchase of the timber involved in this controversy, that part of the former opinion in this case embodying that idea, is withdrawn. While notice to one partner is notice to the other of any transaction occurring after the formation of the partnership, it appears that the parties were not partners at the time O. conveyed the timber.

Lewis McQuown, W. L. Brown, Eli H. Brown and McQuown & Brown for appellant.

Sam C. Hardin for appellees.

Appeal from Laurel Circuit Court.

Opinion of the court by Judge Nunn, reversing.

An opinion was delivered by this court, in the above styled action, affirming the judgment of the lower court on Feb. 21, 1908 (32 Ky. Law Rep., 1078), which is referred to and approved with the exceptions hereinafter stated.

It is conceded that M. A. Miller and her husband and agent, H. E. Miller, did not have notice of the re-conveyance of the timber on the one hundred and sixty-two-acre tract of land made in January, 1883, which deed was not recorded until 1905. This court, in its opinion, held that notice to one partner was notice to the other of any transaction occurring after the partnership was formed, which is a correct rule of law, and then concluded that there was sufficient evidence to authorize an affirmance of the judgment upon the ground that Miller and Owsley were partners from the beginning, and that

Owsley, while a partner, re-conveyed the timber on this land to Wardrupe, and Miller was presumed to have had notice of the transaction, although he in fact did not know it. After a careful re-consideration of the record, we are of the opinion that in this we erred. Appellant purchased this timber from Owsley in 1903, for a valuable consideration, and as appellees' claim to the timber was evidenced by an unrecorded deed, it was necessary for them to show, by a preponderance of the evidence, that appellant, or her agent, had actual notice of their right to the timber before appellant purchased it, to enable them to hold the timber against appellant. The only evidence introduced on this point was given by Uthank Jones, who gave his deposition in 1905, and stated that he had cut timber upon this land for appellant, Miller, and he 'thought' it was twenty-two years before the date he testified, and he 'guessed' that Miller and Owsley were partners. The witness, Merrit Whit, testified that he worked for Miller, at his mill, situated at Hazelpatch, several miles from the land, and that Miller was getting out timber on this tract of land to saw at the mill, and his 'recollection' was that this was between the years 1883 and 1885. Ezekiel Wardrupe testified that Miller got some tan bark on the land about the year 1889. These two witnesses fix the date after the re-conveyance of the timber by Owsley to Wardrupe. The witness Uthank Jones only made a 'guess' as to the time, and he put it twenty-two years prior to September, 1905, the time at which he gave his deposition, which would have placed it September, 1883, and the re-conveyance by Owsley to Wardrupe was made in January, of 1883. This is very slight evidence that Owsley and appellant were partners in this timber from the beginning, and as against this the deed from Wardrupe to Owsley, of 1882, made Owsley the sole vendee, and the conveyance by Owsley, to appellant and Hutchings recited that Owsley was the sole owner of that timber, and the conveyance was made in compliance with a written agreement between Owsley and Miller dated 1886; and the presumption is that if Owsley and Miller were partners, it commenced at that date. In fact, there is no evidence that Miller was a partner of Owsley in the purchase of the timber, nor until after Owsley had re-conveyed it to Wardrupe in January, 1883.

Having arrived at this conclusion that part of the former opinion referred to is withdrawn, and the judgment of the lower court is reversed, and remanded, with directions to the lower court to give judgment in behalf of appellant for the timber on the land referred to.

THOMAS v. COMMONWEALTH.

(Filed June 18, 1908—Not to be reported.)

Housebreaking—Evidence—Motion For New Trial—On the trial of appellant for housebreaking, there was but one question before the jury, and that was one of fact, and the evidence was sufficient to warrant their finding that appellant was guilty. Under section 281, Criminal Code, this court can not reverse for any matter arising on the motion for a new trial, and therefore, affidavits as to newly discovered evidence, filed after the trial, can not be considered on appeal.

J. Franklin Wallace for appellant.

James Breathitt, Tom B. McGregor and Chas. H. Morris for appellee.

Appeal from Fayette Circuit Court.

Opinion of the court by Judge Hobson, affirming.

Alvin Thomas was indicted for housebreaking. He was found guilty and his punishment fixed at one year in the penitentiary. The proof by the Commonwealth, on the trial showed that W. C. Thomas, the father of Alvin Thomas, had a blacksmith shop in Lexington, Kentucky; a man named Green kept his horse in the shop at night. One morning in January when Green went to get his horse, the harness was gone. The door was locked, but one of the windows, which was ordinarily fastened on the inside by a hook, was open about six inches. The staple upon which the hook rested had been drawn out; the plank showed signs of the window having been prized open. The window was closed the night before. The harness was sold that morning by the defendant, Alvin Thomas(to a man named Lawrence, for \$2. The defendant admitted, on the trial, that he had stolen the harness and sold it; but pleaded that he had done this while he was drinking. He said that he did not break into the shop; that he had a key to the shop with which he unlocked the door and that he had spent the night there; that in the morning, when he went out he took the harness with him and sold it. He produced on the trial the key with which he said he unlocked the shop; but the officer who arrested him testified that he had searched him and that he had no key. The father of the defendant said that he had tools in the shop, and had a key to it and had the right to go in whenever he wanted to. It however, appeared from the father's evidence that he had no key to the shop at the time of the trial, and it was evidently the claim of the Commonwealth that the father had given the son the key which he had and produced on the trial. Under the instructions which aptly submitted the question to them, the jury found the defendant guilty. Under the instructions and the evidence there was but one question before the jury and that was: Did the defendant break into the shop by going in through the window or did he have a key to the shop and go in regularly through the door, having a right to enter the shop? There was sufficient evidence before the jury to warrant them in their finding although the evidence was by no means conclusive. There was no error of the circuit court in the admission or the rejection of evidence. After the trial was over the defendant filed with his motion for new trial, numerous affidavits as to newly discovered evidence. If this evidence had been produced on the trial, the verdict of the jury might have been different, but under section 281, of the Criminal Code, this court can not reverse for any matter arising on the motion for new trial; and therefore, we can not consider these matters at all.

Judgment affirmed.

LOUISVILLE & NASHVILLE R. R. CO. v. BERRY.

(Filed June 20, 1908—Not to be reported.)

1. Railroads—Injury to Pedestrian on Track—Run Over by Hand Car—Evidence—Incompetency—On the trial of an action against a railroad for damages by one run over by a hand car, while walking on a railroad track, evidence that the foreman told the men in charge of the handcar to make a quick trip was incompetent as the mere direction to make a quick trip is not evidence of excessive speed.

2. Lookout Duty—Incompetent Men—Defective Appliances—Wherever a lookout duty is imposed, the further duty is imposed to have

the train properly manned and properly equipped. A lookout duty would avail nothing, if, because of incompetent men or defective machinery, and appliances, the train or car could not be stopped.

3. Same—Punitive Damages—Erroneous Instructions—In an action for damages by one injured by being run over by a hand-car while walking on a railroad track, the instructions were erroneous that did not impose on the plaintiff the duty of exercising ordinary care for his own safety, and an instruction authorizing punitive damages is erroneous where there was no evidence tending to show gross negligence in the railroad company's employes.

Benjamin D. Warfield and J. D. Black for appellant.

J. M. Robsion for appellee.

Appeal from Knox Circuit Court.

Opinion of the court by Wm. Rogers Clay, Commissioner, reversing.

Appellee, W. F. Berry, instituted this action in the Knox Circuit Court against appellant, Louisville & Nashville Railroad Company, to recover damages for injuries alleged to have been due to its negligence in running a hand-car over him. The jury returned a verdict in favor of appellee in the sum of \$2,150, and the railroad company appeals.

Appellant asks for a reversal on the following grounds: First, the admission of incompetent evidence; second, errors in giving and refusing instructions; third, the verdict is not sustained by the evidence; fourth, the verdict is excessive. Before passing upon these questions, it will be necessary to give a brief statement of the facts.

Corbin is a town of 4,000 inhabitants. Appellant's depot is located near Center street. On each side of the depot, but some distance therefrom, a street is located. As appellant's two main tracks approach Corbin from the north, they diverge as they get near to the depot; then one track passes to the east, and the other to the west of the depot. After passing around the depot, they converge as they approach Center street. The main track on the east is called the "C. V." track, while the main track on the west is known as the "K. D." track. Connected with each of these main tracks is a switching track, thus making two tracks on each side of the depot. There was testimony to the effect that the public in general had been accustomed, for a long time to use the railroad tracks, between Center street and the depot, in going to and from the depot, and that this customary use of the tracks was with the knowledge and acquiescence of the company.

On the occasion of the accident, appellee had been to the express office, which is located in appellant's depot. After attending to the business which he had in hand, he started toward Center street, between the "C. V." and "K. D." tracks. As he approached Center street, the space between these tracks became gradually less. At this moment, a freight train approached on the "K. D." track. Appellee, claiming that he felt unsafe between the tracks, moved over on the "C. V." track and had proceeded southward about twenty or thirty steps when he was struck from the rear by appellant's hand-car. He also claims that he looked to the north before he crossed over to the "C. V." track, and did not see the hand-car. Appellee alleges that he was badly bruised across the small of his back; that his hip was dislocated and his knee turned in, and that his thigh and knee were bruised all the way down. The other knee was cut two and a half inches to the bone. He was also bruised on the back of his hand

and on the side of his neck, and had some little bruises on his head. His thigh-bone was pulled out of the socket. He suffered for a long time from his injuries, and is still suffering from them.

Without detailing the facts more at length, we shall consider appellant's objections to the evidence.

The court permitted the men in charge of the hand-car to testify that the foreman told them to make a quick trip. This evidence was clearly inadmissible, as the mere direction to make a quick trip can not be considered as evidence of excessive speed.

The court also permitted several witnesses to testify as to the amount of travel on the various streets of Corbin. This was irrelevant to the issue. On this point the only issue was the amount of travel on appellant's tracks between Center street and the depot, and the evidence should have been confined to this issue alone.

The court further permitted certain witnesses to testify to the incompetency and inexperience of those in charge of the hand-car, as well as to the defective condition of the brakes on the hand-car. It is true that this court has laid down the rule that a trespasser upon the tracks of a railroad company, who is injured by the company's train, can not complain of the size or weight of the train, or of the insufficiency of its machinery or brakes, or of the fact that it was improperly manned. (*Brown's Adm'r v. Louisville & Nashville R. R. Co.*, 17 Ky. Law Rep., 144.) It does not appear, however, that the railroad company in that case owed a lookout duty.

Wherever a lookout duty is imposed, we are of the opinion that the further duty to have the train properly manned and equipped is also imposed. A lookout duty would avail nothing, if because of incompetent men or defective machinery and appliances, the train or car could not be stopped. We therefore, conclude that the court did not err in admitting the testimony complained of.

The court instructed the jury as follows:

"No. 1. If you shall believe from the evidence that the plaintiff was walking on or near the defendant's railroad track between its station and Center street, in Corbin, Kentucky, and that the people of Corbin and vicinity, as well as the traveling public, generally, had been in the regular habit of walking along and over the defendant's railroad tracks at that point and along the same between its depot and express office and Center street in Corbin, Kentucky, for many years and for a time sufficient as that the agents and servants of defendant and its superintendent in charge of its depot grounds and railroad tracks at that point knew of such regular and habitual use of the public generally and had known same before the time complained of herein, and that plaintiff moved from the space between the defendant's railway track on to another railroad track, in order to avoid a passing freight train and that while such train was passing and while he was on such other railroad track, the defendant by its agents and servants, ran a hand-car up behind plaintiff at a time when he was not noticing and did not know of the approach of such car and could not hear the approach thereof by reason of the noise made by such passing freight train, and that the agents and servants of defendant in charge of such hand-car saw the plaintiff and saw and understood that he did not know of the approach of such hand-car in time to have stopped such hand-car and in time to have thereby prevented its running over or against the plaintiff, or that they might have seen and understood that the plaintiff did not know of the approach of such hand-car, by the exercise of ordinary care and prudence, in time to have avoided running the same against him, or that the agents of the defendant saw the plaintiff and saw and understood that he did not know of the approach of such hand-car and that the brake on such car was defective or broken and

useless so as that those in charge of the car, after they had seen the peril of the plaintiff, in time to stop the same and prevent his injury, if they did so do, but could not do so by reason of the defect of the brake on the car, then you ought to find for the plaintiff such a sum in damages as is a fair equivalent in money for the mental and physical pain, if any, as it is reasonably certain, from the evidence, that he will hereafter endure by reason of such injury, if any, and a fair equivalent for the permanent impairment of his ability to earn wages by work or labor as is the proximate result of his injuries, and such a sum as the plaintiff may have expended for medication, not exceeding one hundred and fifty dollars in that behalf, and if you shall further believe from the evidence that the agents and servants of the defendant in charge of such hand-car were grossly negligent in running the same against the plaintiff, if they did so do, then you may in your discretion, give the plaintiff a such further sum by way of punitive damages and by way of punishment for the wrongs and injuries done the plaintiff, if any, as may seem just and proper to you, not exceeding in all, the sum of ten thousand dollars for damages and one hundred and fifty dollars for medication, the amount claimed in the petition.

"No. 2. (A.) Gross neglect, or gross negligence, within the meaning of the terms as used in instruction No. 1, above, is the absence of slight care.

"(B.) Ordinary care and prudence, within the meaning of the terms as used in instruction No. 1, above, is such care as an ordinarily prudent man usually exercises under the same or similar circumstances.

"No. 3. Unless you shall believe as required by instruction No. 1, above, you will find for the defendant; or if you shall believe from the evidence that plaintiff went upon the railroad tracks of the defendant at a place he knew the defendant was in the habit of running its cars and trains, and that while walking thereon, he saw or heard the approach of the hand-car, mentioned in evidence, in time to have stepped off the track and prevented the injury, and failed to do so, then he was, himself, negligent, and you ought to find for the defendant.

"No. 4. If you all agree upon a verdict, you will sign it by your foreman. If you do not all agree, but as many as nine or more of you and less than twelve can agree, then you may bring a verdict, but those who bring it must sign it. Less than nine of you can not bring a verdict."

It will not be necessary to discuss these instructions at length. Suffice it to say that they did not impose upon appellee the duty of exercising ordinary care for his own safety. Instruction No. 1, authorizes the jury to give punitive damages. This instruction was erroneous, because there was no evidence tending to show that appellant was guilty of gross negligence. Upon the next trial the court will instruct the jury as follows:

No. 1. If you believe from the evidence that the defendants tracks between Center street and its depot in Corbin, Kentucky, were habitually used by the public in going to and from Center street to its depot, with the knowledge and acquiescence of the defendant, then it was the duty of the defendant to use ordinary care to discover the presence of such persons on its said tracks, and to use ordinary care to avoid injuring them after discovering their peril. And if, upon the occasion in question, you believe from the evidence that while plaintiff was walking along defendant's said tracks, the defendant, its agents or servants, failed to use ordinary care to discover the presence of plaintiff, or failed to use ordinary care to avoid injuring plaintiff after the discovery of his peril, and that by reason

of such failure, if any, on the part of the defendant, its hand-car was run against plaintiff, and plaintiff was thereby injured, you will find for the plaintiff. If, however, you believe that plaintiff went upon defendant's tracks at a time and place when defendant, by the exercise of ordinary care, could not have discovered plaintiff's peril in time to avoid injuring him, you will find for the defendant.

"No. 2. It was the duty of the plaintiff in going upon and walking along defendant's tracks, to exercise such care as may be usually expected of an ordinarily prudent person to learn of the approach of defendant's cars or hand-car, and keep out of their way; and if he failed to exercise such care, and, but for this, would not have been injured, the law is for the defendant, and the jury should so find.

"No. 3. If you find for the plaintiff, you will award him such damages as will fairly compensate him for his physical and mental suffering, if any; for his reasonable physician and medical bills, if any, not exceeding the sum of one hundred and fifty dollars; and for the permanent impairment, if any, of his power to earn money, that may have directly resulted from his injuries, but not exceeding in all, the sum of ten thousand dollars—the amount claimed in his petition.

"4. Ordinary care, within the meaning of these instructions, is such care as an ordinarily prudent person usually exercises under the same or similar circumstances."

In view of the conclusion of the court, it will be unnecessary to discuss the other errors assigned.

For the reasons given, the judgment is reversed and cause remanded, for a new trial consistent with this opinion.

MCCORMACK v. CITY OF HENDERSON.

(Filed June 18, 1908—Not to be reported.)

A city ordinance providing for the sprinkling of streets, at the expense of abutting lot owners, the cost being made a lien upon the abutting lots, according to their frontage on the street, is unconstitutional and void. (City of Henderson v. Sweeney, decided June 17, 1908.)

Thos. E. Ward for appellant.

Jas. W. Clay and Clay & Clay for appellee.

Appeal from Henderson Circuit Court.

Opinion of the court by Judge Settle, reversing.

This appeal involves the validity of an ordinance of the city of Henderson, providing for the sprinkling of certain streets of that city at the expense of the owners of lots abutting thereon, the cost of such sprinkling being made a lien upon the abutting lots at the rate per front foot, apportioned to each by a proper survey and assessment. It is admitted that the street in front of each of the appellant's lots was sprinkled as provided by the ordinance; that the cost thereof was properly assessed against and apportioned to each lot as therein required, and that the bills against appellants were required by the tax collector for collection. Appellants contending that the ordinance was unconstitutional and void, brought suit to enjoin the collection of the tax. The circuit court held the ordinance con-

stitutional and the assessment valid; therefore, the injunction was dissolved and the action dismissed. To reverse that judgment this appeal is prosecuted.

In the case of *City of Owensboro v. James J. Sweeney*, decided June 17, 1908, an ordinance of the city of Owensboro, identical in its provisions, meaning and object with the one before us, was involved. It, too, was assailed upon the ground here urged. This court held the ordinance unconstitutional. The reasons for so holding are set forth by the opinion with exceptional force and clearness. The case was considered by the whole court. Not only are the two ordinances alike, but the cities of Owensboro and Henderson belong to the same class, both being in the third class. The decision in that case is conclusive of this and the elaborateness of the opinion exhausts the subject and makes it unnecessary to extend this opinion beyond its present limits.

Upon the authority of the opinion in the case, *supra*, the judgment herein is reversed, with the directions to the circuit court to set aside the former judgment and in lieu thereof enter one perpetuating the injunction.

L. & N. R. R. CO. v. COMMONWEALTH.

(Filed June 20, 1908—Not to be reported.)

1. Intoxicating Liquors—Shipping to Local Option Territory—Package—Quantity—Druggists—Under the act of March 21st, 1906, in reference to public or private carriers, or other persons bringing intoxicating liquors into local option territory in unbroken packages not to exceed five gallons at one time, a druggist, may have an unbroken package, not exceeding five gallons shipped to him, and at the same time a five gallon package of alcohol or wine to be used in his business as druggist.

2. Same—Object of Act—Construction—Evasion—The purpose of the act was not to prevent the druggist from keeping up his stock but to prevent him from buying at any time, more than five gallons of any one intoxicant. If he should have more than one package of the same liquor shipped to him at one time, it would be an evasion of the act, but he may have as many packages as he needs of the different kinds shipped to him at the same time.

Chas. H. Moorman, Benjamin D. Warfield and Sims, DuBose & Rodes for appellant.

James Breathitt and Theo. B. Blakey for appellee.

Appeal from Barren Circuit Court.

Opinion of the court by Judge Hobson, reversing.

The act of March 21, 1906, contains among other things, these provisions (Act of 1906, page 320):

"It shall be unlawful for any person or persons, individual or corporation, public or private carrier to bring into, transfer to other person or persons, corporations, carrier or agent, deliver or distribute, in any county, district, precinct, town or city, where the sale of intoxicating liquors had been prohibited, or may be prohibited, whether by special act of the General Assembly, or by vote of the people under the local option law, any spirituous, vinous, malt or other intoxicating liquor, regardless of the name by which it may

be called; and this act shall apply to all packages of such intoxicating liquors whether broken or unbroken."

"Provided, Individuals may bring into such district, upon their person or as their personal baggage, and for their private use, such liquors in quantity not to exceed one gallon: And Provided, The provisions of this act shall not apply to licensed physicians or druggists, to whom any public carrier may deliver such goods, in unbroken packages, in quantity not to exceed five gallons at any one time.

"2. Each package of such spirituous, vinous, malt or other intoxicating liquor, regardless of the name by which it may be called, whether broken or unbroken packages, brought into and transferred to other person, corporation, carrier or agent, delivered or distributed in such local option territory, shall constitute a separate offense."

The Louisville & Nashville Railroad Company was indicted under this act for delivering to Leach & Ellis, licensed druggists at Glasgow, Ky., where the local option law is in force, a consignment consisting of five boxes of drugs, two boxes of ink, one box of whisky, and one box of grain alcohol, the box of whisky containing five gallons and the box of grain alcohol containing less than five gallons; but there was in the consignment more than five gallons of whisky and grain alcohol altogether. On these facts the circuit court fined the railroad company \$60, and it appeals.

The question for decision is whether the delivery of the alcohol and whisky in unbroken packages which each contained not more than five gallons was a violation of the law because both of the packages were delivered at one time?

In construing a statute we must look to the reason for its enactment, and the evil which it was intended to remedy. It is a matter of common knowledge that where the local option law was put into effect in many communities whisky was sold largely in the drug stores, so that the trade was simply shifted from the saloonkeeper to the druggist. To remedy this, restrictions from time to time have been made by the Legislature upon the power of druggists to sell intoxicants in local option districts. The Legislature recognized that grain alcohol, whisky, brandy, wine and other intoxicating liquors were often necessary in time of sickness, and so, in the act in question, licensed physicians and druggists were excepted out of its operation. But it was seen that if there was no limit to the exception, druggists might evade the statute and so the carrier was only allowed to deliver the goods in unbroken packages in quantity not to exceed five gallons at one time, and by the second section each package should constitute a separate offense. The unit which the act has in mind, is the package, and the provision is that the package must not exceed five gallons. If a druggist might have shipped to him: a barrel of whisky at one time, there would be much more temptation to him to violate the local option law, than if he was required to have the goods shipped to him in small quantities. A properly supplied druggist must keep on hand alcohol for the compounding of medicines. He often needs whisky or brandy or wine in the filling of prescriptions. It was not the purpose of the act to cripple the drug stores and thus disable them from properly fulfilling their duties to the sick; and if a druggist could have no more than one kind of intoxicating liquor delivered to him at one time, hardship might result. This is not the meaning of the act. A druggist may have an unbroken package, not exceeding five gallons of whisky shipped to him and at the same time a five gallon package of alcohol or wine. The purpose of the act was not to prevent the druggist from keeping up his stock, but simply to prevent him from buying at any time, more than five gallons of any of these intoxicants. If a druggist should have more than one package of the same

liquor shipped to himself at one time, this would be an evasion of the act; but he may have as many packages as he needs of the different things shipped to him at one time.

Judgment reversed and cause remanded, with directions to dismiss the prosecution.

EASTERN KY. COAL LANDS CORPORATION v. COMMONWEALTH.

TWYMAN v. COMMONWEALTH.

GILL v. COMMONWEALTH.

(Filed June 20, 1908—Not to be reported.)

Lands—Failure to List for Taxation—Forfeiture of Title—Act of March 15, 1906, Ky. Legislature—Constitutionality—The questions involved in this action have heretofore been fully considered in former appeals of Eastern Kentucky Coal Lands Corporation v. Commonwealth (32 Ky. Law Rep., 129), and Ky. Union Company v. Commonwealth, decided March 25, 1908, to which reference is made. In conformity with those opinions we hold that article three of the act of the Kentucky Legislature of March 15, 1900, as construed by this court, does not violate the provisions of the Federal Constitution denying the passage by any State of ex post facto laws, or laws impairing the obligations of contracts, or laws denying in any person the equal protection of the law or depriving any person of his property without due process of law.

C. C. McChord, Edward W. Hines and McChord, Hines & Norman for appellant Twyman.

Wehle & Wehle and L. B. Wehle for appellant Gill.

Hopkin & Bernard, James H. Hazelrigg, Wm. Jackson Hendrick and R. L. Miller for appellant Eastern Ky. Coal Lands Corporation.

Kohn, Baird, Sloss & Kohn, Hager & Stewart, Thos. H. Paynter, James Breathitt and J. Morgan Chinn for appellee Commonwealth.

Appeals from Pike Circuit Court.

Opinion of the court by Judge Lassing, affirmed in part and reversed in part.

These appeals were sued out upon the same record, involve the same questions, were argued, and will be considered together. Under the provisions of article three of the act of the Legislature, entitled, "Revenue and Taxation," approved March 15, 1906, the Commonwealth of Kentucky filed its petition in equity in the Pike Circuit Court against appellants, Eastern Kentucky Coal Lands Corporation, J. C. Twyman, and others, seeking to forfeit the title of appellants to the lands described in the petition upon the alleged ground that they had not complied with the provisions of the article with respect to the listing of the same and payment of taxes thereon as of September 15, 1901, September 15, 1902, September 15, 1903, September 1, 1904, and September 1, 1905. Appellants, Eastern Kentucky Coal Lands Corporation and J. C. Twyman were served with process. Appellants, G. B. Gill, &c., were made defendants as unknown defendants, owners and claimants, as authorized by the article and were constructively served with process by warning order, as required by

the Code against non-resident and absent defendants, and also by publication, as required by the Act.

The petition described the land, the title to which was sought to be forfeited, by giving the patents, their dates, where recorded, and number of acres contained in each. It also described the land by metes and bounds, courses and distances; and there was filed with it copies of each of the patents, containing in the aggregate over 300,000 acres. It was further alleged that the defendants, Eastern Kentucky Coal Lands Corporation, J. C. Twyman and the unknown and absent defendants were the owners or claimants of the land under the patents named, and that neither the original patentees nor any person in privity with them, nor the Eastern Kentucky Coal Lands Corporation, J. C. Twyman, nor the other named but not appealing defendants, nor the unknown defendants had ever listed the land, or any part of it, for taxation, or paid any taxes thereon, alleging specifically that they had so failed to list or pay taxes thereon levyable and assessable as of the dates above named. Appellants, Eastern Kentucky Coal Lands Corporation and J. C. Twyman, filed general demurrers to the petition. After these had been overruled they filed separate answers; the former setting up claim to all of the land described in the petition; the latter claiming, in connection with the other heirs of one Reuben Twyman, one of the three patentees named in one of the patents to be the owner of the land described in that patent, containing about 7,500 acres.

The answer of the corporation, in addition to traversing some of the allegations of the petition, pleaded affirmatively that, in compliance with the provisions of article three, it had filed its petition in the County Court of Pike county before January 1, 1907, seeking to have the land claimed by it assessed as of said dates, and filed therewith copies of the proceedings, in that action in the county court and upon appeal in the circuit court. By this record it was shown that the corporation appellant, in December, 1907, had filed its petition in the Pike County Court, claiming to comply with the provisions of the act, and at the same time attacking its constitutionality; that the county court, denying the sufficiency of the petition, but sustaining the validity of the act, dismissed the petition; and that a similar judgment had been entered in the circuit court upon appeal to it.

The answer of J. C. Twyman was similar in all material respects, but he prosecuted no appeal to the circuit court from the judgment of the county court. While the action of the Commonwealth v. Eastern Kentucky Coal Lands Corporation, J. C. Twyman, and others, seeking to forfeit their title was pending, and before trial and judgment, this court, in the case of Eastern Kentucky Coal Lands Corporation v. Commonwealth of Kentucky, 32 Ky. Law Rep., 129, affirmed the judgment of the Pike Circuit Court in dismissing the petition of said corporation to list, upon the ground that it did not comply with the mandatory provisions of the act, and sustaining the constitutionality of article three, upon which this forfeiture proceeding is now based. The suit in equity was thereupon tried before a jury, as the act provides it shall be, and a verdict having been rendered in favor of the Commonwealth against all defendants, judgment was entered forfeiting the title of appellants and each and all defendants to the land described in the petition under the patents named. From that judgment this appeal is prosecuted.

It is shown by the evidence that neither appellants nor any of the defendants, nor the original patentees, nor any person in privity with their title, either listed the property as of September 15, 1901, September 15, 1902, September 15, 1903, September 1, 1904 and September 1, 1905, or paid any taxes thereon levyable and assessable as of said dates, nor paid any taxes whatever thereon since the year 1825, although the patents were issued prior to the year 1800, in fact

the majority of them were issued by the State of Virginia prior to the year 1792, when Kentucky became a State. Prior to the year 1825 there was only an intermittent listing and payment of taxes upon some of the patents, the whole amount so paid not exceeding, perhaps, \$100.00.

The various objections to the act upon constitutional grounds were urged in the original appeal of Eastern Kentucky Coal Lands Corporation v. Commonwealth, 32 Ky. Law Rep., 129, and in the case of Kentucky Union Company v. Commonwealth, decided March 25, 1908, not only upon oral argument, but also in exhaustive briefs filed on behalf of appellants upon the appeal, and again with the petition for re-hearing. Because of the importance of the questions involved, the time for oral argument was extended in each case, and the questions presented in argument and brief received careful consideration. In each of these cases we concluded that the act in question violated no provision of the Constitution, either Federal or State. This conclusion is not shaken by the able re-argument on this appeal, and we now approve of and adhere to the opinions in those cases. In conformity with those opinions we hold that article three, as construed by this court, does not violate the provisions of the Federal Constitution denying the passage by any State of *ex post facto* laws, laws impairing the obligations of contracts, or laws denying to any person the equal protection of the law, or depriving any person of his property without due process of law. This construction of said article is abundantly supported by the following authorities:

Polk v. Mutual Reserve Fund Life Ass'n, &c., 207 U. S., 310; *Soper v. Lawrence Bros.*, 201 U. S., 359; *Kelly v. City of Pittsburg*, 104 U. S., 78; *Fay v. Crozier*, 156 Fed., 496; *Asbill v. State of Kansas*, U. S. Supreme Court, March 23, 1908; *King v. Mullins*, 171 U. S., 404; *Reed v. Dingess*, 60 Fed., 21-24.

The opinions in the former appeal of Eastern Kentucky Coal Lands Corporation and Kentucky Union Company v. Commonwealth, do not conflict with the cases of *Commonwealth v. Ingalls*, 28 Ky. Law Rep., 164, and *Spalding, Revenue Agent v. O'Callahan's Executrix*, 25 Ky. Law Rep., 629, relied upon by appellants. In those cases, the effort was to list the same property for the same years in the name of different persons in privity with each other—a pure sample of double taxation. It was held that such was not the intention of the Legislature and that the Commonwealth, like any other litigant, would not be allowed to play fast and loose. In argument it was admitted by appellee that the lower court erred in sustaining a demurrer to the answer of Twyman. This answer set out at length the petition filed by him in the county court. In this the land which he sought to have listed was specifically described so it could be identified. He sought to list the whole tract, without indefinite exclusions or exceptions; he did not seek to shift to the court the burden imposed upon him by the act; so far as his petition disclosed, he was the owner of the entire tract which he sought to list, and not merely such parts thereof as were not owned by others. His petition was unlike that of appellant, Eastern Kentucky Coal Lands Corporation. He was seeking to avail himself of the provisions of the act and had done all that could be reasonably required of him.

Appellants, G. B. Gill, &c., did not appear in the lower court, but sued out an original appeal in this court. The action against them not only conformed to the provisions of the Code as against non-resident and absent defendants, but also to the additional requirements of the act as against such defendants, and they are bound by it.

For the reasons indicated, the judgment of the lower court is affirmed as against appellants, Eastern Kentucky Coal Lands Corpora-

tion, G. B. Gill, &c., but reversed as to appellant, J. C. Twyman, and remanded, for further proceedings consistent with this opinion.

Judge Hobson does not dissent from the opinion because he deems the matters concluded by the former opinions of the court, although he adheres to the conclusions stated in his dissenting opinion in those cases.

RENSHAW v. COOK.

(Filed June 20th, 1908—Not to be reported.)

S. Y. Trimble, Downer & Russell, Trimble & Bell for plaintiff.

McQuown & Beckham and John C. Duffy for defendant.

Appeal from Christian Circuit Court.

Dissenting opinion by Judge Hobson.

The facts of the case are these: David Smith was elected Sheriff of Christian county at the November election, 1905. He qualified and gave bond. In the fall of 1907, the fiscal court appointed Frank Rives as commissioner to settle with Smith as sheriff. Smith got his papers ready; but before the settlement was made, Rives, who was a member of the State Senate, came to Frankfort to attend the session of the Legislature. He remained in Frankfort until the Legislature adjourned, something after the middle of March. Smith being unable to get his settlement made, as Rives was absent, saw the county judge. A new act had been passed requiring a sheriff to have a quietus from the fiscal court. Smith could not get his quietus as the settlement had not been made; so he went to the county judge asking if he would allow him to renew his bond before he got his quietus. The county judge said no, but he would give him time after the first of March to execute his bond. Smith, relying upon this statement of the county judge was waiting until his settlement was made so that he could get his quietus, when without notice to him, the county judge made an order removing him from office, and appointing Renshaw in his place. When this was done, the bonds that Smith had given were amply good for all the liabilities which he was under and he was prepared on that day to execute a bond if he had been allowed to do so. The county judge denies that he told Smith what Smith says; but Smith is sustained by the oath of two bystanders and so as the case stands, it must be concluded at least that Smith was misled by the county judge. In Mechem on Public Offices, sec. 454, after stating the rule as to offices held at pleasure, the learned author says:

"But on the other hand, where the appointment or election is made for a definite term or during good behavior, and the removal is to be for cause, it is now clearly established by the great weight of authority that the power of removal can not, except by clear statutory authority, be exercised without notice and hearing, but that the existence of the cause, for which the power is to be exercised, must first be determined after notice has been given to the officer of the charges made against him, and he has been given an opportunity to be heard in his defense."

In no State in the Union has this doctrine been maintained with more vigor than in Kentucky. In *Page v. Hardin*, 8 B. Mon. 648, where the Governor had removed the Secretary of State without notice the order was held void. This opinion was followed in *Todd v. Dunlap*, 99 Ky. Law Rep., 460, and was recognized in *Stokes v. Fitz-*

patrick, 1 Met. 142, and Johnson v. Ginn Co., 105 Ky., 654. The court undertakes to distinguish this case from those cases by saying that failure to execute a bond makes a vacancy in the office. Unfortunately for the court the statute does not so provide. The statutes now on the subject are the same as when the case of Schuff v. Pflanz, 99 Ky., 97, was decided. This is shown by the opinion by Judge Barker which is copied into the opinion of the court. One section of the statute provides that on the failure of the sheriff "to execute bond and qualify as hereinbefore provided he shall forfeit his office." Another provision of the statute is in these words:

"It shall be the duty of the county court to cause the sheriff, annually, to renew his bond required by this chapter, and oftener, if the court may deem proper; and upon his failure to do so, the court shall enter up an order suspending him from acting until he gives said bond, or the court may vacate his office."

With these two provisions of the statute, before it, this court, in schuff v. Pflanz, thus construed it:

"Section 4143 provides: 'On the failure of the sheriff to execute bond and qualify, as hereinbefore provided, he shall forfeit his office.'

"The right of forfeiture under this section is made to depend upon his failure to qualify; and, by section 4130, he is permitted to execute bond at any time before the first of January, Pflanz, as appears, did qualify in the proper time, by giving bond satisfactory to the county court, and entered upon the discharge of his duties, but failed to execute his annual bond on or before the first Monday in January, 1896, and it is maintained that the failure to execute this bond worked a forfeiture and authorized the county judge to declare the office vacant.

"Pflanz was still in the office of sheriff; had qualified with the execution of a bond that afforded ample protection to the State and the county for all the revenue that might come to his hands. The sureties on his bond at the date of his qualification, bound themselves as such for and during the entire term of his office. This bond, provided for by section 4133, was not for the collection and payment over of the revenue for the year 1895, but stipulates that 'we, A. B., sheriff, and C. D. and E. F., his sureties, bind and obligate ourselves jointly and severally to the Commonwealth of Kentucky, that the said A. B., sheriff, shall faithfully perform his duties, &c.' And the next sections (4134) empowers the county to require the sheriff to give an additional bond or bonds where the interest of the State or county demands it. And the sureties on all the bonds shall be jointly and severally liable, for any default of the sheriff during the term in which said bond may be executed, whether the liability accrued before or after the execution of the bond or bonds. These bonds are not taken for one year, but bind the sureties for any default during the term for which they may be executed; and it can not well be said the sureties in these additional bonds are liable for the whole term and those on the original bonds are liable for one year only. So we have a case where the qualification has been perfect and complete and a statute providing only that a failure to execute bond and qualify shall forfeit the office. Qualification means the execution of the bond, the oath of office. The question then arises, if the sheriff fails to give this annual bond for the collection of the revenue, can the county judge declare the office vacant?

"The sheriff is required to give two bonds—one for the collection of the revenue and the other known as the general official bond.

"Under the title of 'Sheriffs,' section 4557, it is provided: 'It shall be the duty of the county court to cause the sheriff, annually to renew his bond required by this chapter, and oftener if the court

may deem proper, and upon his failure to do so, the court shall enter up an order, suspending him from acting until he gives said bond, or the court may vacate his office.'

"This statute should be construed in connection with the revenue statute, and it is manifest that a fair interpretation of the legislative meaning is that, upon the failure to execute any bond required of this official, for the protection of the State, county, or citizen, the county court may remove him from office; and particularly where by statute it is made the plain duty of the official to execute the bond on a particular day. The duty then devolves on the sheriff and he must comply with the law; but it does not follow because the sheriff fails to renew his general bond or to give an annual bond for the collection of the revenue, that the county judge is powerless to accept a bond after the first Monday in January. He may, it is true, vacate the office but before he does this, he accepts a bond that is in addition to or a new bond, upon which the last sureties became jointly liable with the sureties on the first bond. It is a bond sufficient to satisfy the court that all will be protected who are interested in its execution, and when accepted, the sheriff having previously qualified, it is then too late to enter an order vacating the office."

The Legislature has since re-enacted the statute, and so must be conclusively presumed to have re-enacted it under the construction which it received from this court. If the Legislature had been dissatisfied with the statute as construed by this court, it must be presumed that it would have changed it. Nothing can be plainer than that what we have quoted from *Schuff v. Pflanz*, shows that the sheriff's office was not rendered ipso facto vacant or forfeited by his failure to execute the renewal bond. Smith did not fail to execute bond and qualify. As he had executed bond and qualified two years before this trouble arose, his whole failure here was to execute a renewal bond. The statute plainly recognizes that his office does not become vacant upon his failure to execute the bond; for the language is "upon his failure so to do, the court may enter up an order suspending him from acting until he gives said bond, or the court may vacate his office." That the court has power under this statute to vacate his office is admitted; but that is a very different thing from saying that his office is vacant when he fails to execute his bond and before the court makes any order. The power of the court to vacate his office depends upon its jurisdiction over him. His office is not vacated until it is vacated by the court, and the court has no jurisdiction to make any order until it obtains jurisdiction over him by notice to him. I concede the doctrine that where the statute so provides an officer may be removed without notice, because he takes the office subject to this condition; but the statute in this case does not so provide. The county court is given a discretion. It may suspend the sheriff until he executes bond, which plainly implies that he may execute it after the time has passed in which it should have been given. The power given the county court to suspend the sheriff "from acting until he gives said bond," necessarily implies that the sheriff acts unless suspended; and, as the statute confers upon the county court a discretion, manifestly, the defendant must have notice that he may show to the county court how that discretion should be exercised. The cardinal error of the court is in this, that it overlooks the rule that the officer is entitled to notice unless the statute expressly otherwise provides. The statute here not only does not expressly or otherwise provide, but its provisions show, beyond controversy, that it contemplates judicial action by the county court; and judicial action can not be taken against any one unless he is before the court. The case in hand well illustrates this. Who can believe that any self-respecting county judge would have re-

moved a sheriff from office when the sheriff proved to him by two witnesses, that he had told him that he could not execute his renewal bonds until he got his quietus, and that he would give him time to execute the bonds and also showed him that he had his sureties at hand and was prepared to give the bonds. Under the former statute the sheriff was required to execute his bonds by a certain time, and if he failed to execute his bonds, the office became vacant. The Legislature intentionally changed the rule and this court so declared in *Schuff v. Pflanz*. The statute, which was then in force, having been since re-enacted, should now receive the same construction as was then given it by the court.

The case which Judge Cook had before him when he granted the injunction now complained of, was entirely a different case from that before Judge Barker. An appeal had been taken from the order of the county court to the circuit court. If the circuit court had jurisdiction, the county judge had no authority to make any orders in a matter that had been appealed to the circuit court. The county judge was a defendant to Smith's suit, and was, therefore, not qualified to sit in the case in which he proposed to act. The circuit court made his order under facts which were not before Judge Barker at all. That an appeal may be taken to the circuit court under section 978, Kentucky Statutes, from an order of the county court vacating the office of a sheriff depends upon whether the amount in controversy is over \$50. The court draws a distinction between "amount" in controversy and "value" in controversy. This is too fine to be substantial. The meaning of the Legislature is the same, the only reason that "amount" is used the second time in place of "value" is that the writer wished to avoid tautology. There is no substantial difference in the sense. Under a precisely similar provision the United States Supreme Court has repeatedly sustained appeals. The question was fully discussed by the Supreme Court of West Virginia in the case of *Dryden v. Swinburne*, 15 W. Va., 246. Many authorities are collected in that opinion, and no contrary authority has been referred to. In *Boyd Co. v. Ross*, 95 Ky., 167, an appeal was taken from the county court to the circuit court from an order approving a sheriff's bond and from the circuit court it was brought to this court, this court taking jurisdiction and affirming the judgment of the circuit court which had set aside the order of the county court. Certainly there is no distinction, so far as section 978 goes, between an order approving a sheriff's bond and an order removing a sheriff. If an appeal may be taken in one case because the amount in controversy is over \$50, how can it be said that an appeal can not be taken in the other, under the same statute? To say that the statute does not contemplate an appeal in such cases is to beg the whole question; for there is nothing in the statute except the general provision, and a provision that in certain other cases appeals may be taken from the orders of the county court without regard to amount.

The sheriff's sureties in his old bond continue bound, and, in order to appeal, he must execute a bond that he will perform the judgment of the court so there can not possibly be any loss.

The holding in the opinion that a circuit judge is bound by the opinion of a judge of this court where the facts are the same, leads to some very peculiar consequences. If the circuit court does what he is required to do, his judgment can not be reversed on appeal; for certainly it would not be held that a circuit court should do the vain thing of entering a judgment so that it might be reversed in the Court of Appeals. If the circuit court decides as he is bound to decide, his judgment is right, and can not be reversed by this court; but certainly the court does not mean that the opinion of one judge of this court would be binding upon this court, if the case, in the re-

gular course of events, reaches this court. The rule has heretofore been that all decisions of the court on interlocutory motions were subject to be changed by the court in entering a final judgment. Thus it has been held that if the court sustains or dissolves an injunction, he may, when he comes to enter his final judgment, disregard his order entered on the injunction; although made on a motion to dissolve the injunction on the whole case. The order of a judge of this court in dissolving an injunction granted by a circuit court, is of no more authority than a similar order made in the first place by the circuit court. The circuit judge may not, in that action by an interlocutory order, disregard the order of a judge of this court; but when he comes to enter his final judgment, this interlocutory order is no more binding on him than any other interlocutory order made in the case. (Matthews v. Rogers, 21 Ky. Law Rep., 905.)

For these reasons I dissent from the opinion of the court.

Judge Nunn and Judge Settle concur in this dissent.

McGLONE, SHERIFF, &c. v. WOMACK, &c.

(Filed June 17, 1908—To be reported.)

James Breathitt, J. S. Morris, N. B. Hays, C. H. Morris and Hazelrigg, Chenault & Hazelrigg for appellant.

Jas. Andrew Scott and W. C. Marshall for appellees.

Appeal from Carter Circuit Court.

Chief Justice O'Rear delivered the following dissenting opinion:

While admitting the scope of the police power in the State to regulate the ownership and control of property within its borders so as to minimize the injuries that may be inflicted on others because of the predatory nature of the property, still I am unable to go as far as the majority opinion does in this case. One man's property may need regulation for the public safety, but that is far from meaning that it may be taken from him and given to somebody else. Admitting that the Legislature has the power to impose a tax upon dogs as a police regulation, the tax can not be imposed, in my judgment, for the benefit of a few persons, or for any special class of persons, for the State is as powerless to take one citizen's property and confer it upon another, under the guise of police regulation, as it is under the tax regulation. By whatever name you call the act it is the same, if the inevitable result is the same. It will not be maintained that a tax could be levied upon sheep, and the sum realized given over to those who raise horses alone, upon the idea that the horse-raising industry was of more benefit to the State than sheep husbandry. Nor would the fact that the State could appropriate its general revenues to fairs at which horses alone were exhibited, as a means of stimulating an enterprise that would be beneficial to the whole State, affect the question, in my opinion. Dogs are personal property. (Section 66, Kentucky Statutes; Commonwealth v. Hazelwood, 84 Ky., 681; 8 Ky. Law Rep., 586.) The State may regulate their ownership, as it may any other property; but I deny that it can regulate the ownership so as to confer the sole benefit directly and exclusively upon any other class of property. Nor can the fact that one class of property sometimes preys upon another class justify such legislation. Hogs are also a danger to other property. They may break into fields of corn and other grain and destroy them. Consequently, the State

may regulate the ownership of hogs, by requiring them to be kept up by their owners; and may impose a liability on such owners for their depredation; but has the State the power to impose a license tax on hogs for the benefit of all who raise corn, or even of those engaged in raising corn who suffer damage by breachy hogs? The imposition of a tax upon a class of property is to that extent the taking of that much of the property taxed, whether the tax be for revenue or for police regulation. And whether one or the other, it must be for the public. The exercise of every power of government is necessarily for the public. Hence, private property can not be taken by the government for any other than a public use. The exercise of the police power is as subject to this overruling principle of our government as is any other governmental power. When the Legislature exercises its power of police regulation of the ownership of dogs, as it may do, it must exercise it in behalf of the whole public, but has not the power to do so for the exclusive benefit of a special or favored class. If the principle be admitted that the only test of such legislation is whether it is within the police power to regulate the ownership of a particular species of property, no matter what may be done with the proceeds of the license fees collected by virtue of such statute, then it would be competent for the Legislature to bestow that much of the citizens' property upon any object which the Legislature might choose. I think that all such legislation is subject to two tests: First, is the subject one which the State, under the police power, may regulate; second, if it is, is the regulation imposed for the benefit of the public, i. e., does the public receive the benefit? Not indirectly, but directly. For it may be assumed that the public is, in a sense, benefited by every industry carried on in the State, which adds to the sum of the wealth, or contributes to the happiness of any of its citizens. The State has not the power to tax one class of property and give the proceeds directly to owners of another class, upon the idea that the latter contribute more to the good of society. I submit that the State could not levy a tax, or appropriate money out of the treasury (which is the same thing) for the benefit of unfortunate sheep owners who had lost their sheep by ravages of dogs or disease; nor for one any more than for the other. Nor does the State propose to do so in this legislation. It is attempting to compel all men who own dogs to pay to those who own sheep the loss sustained by the latter from some of the dogs of some of the former. It visits vicariously a penalty which some ought to bear, upon many nowise responsible for it, merely because it is difficult to say who ought rightfully to bear it. The real effect of the statute is to make all of one class of property holders pay the losses incurred in a private business by another class, because this loss has been occasioned by the property of some of the first class. I do not believe such legislation is a valid exercise of the police power. We all recognize that sheep husbandry is a business of great value to the State. It may be admitted that the ownership of dogs is of doubtful value. The interests of the former, as weighed against the latter, may overwhelmingly preponderate from an economic standpoint. Notwithstanding all which, the principle of the law must be the same. It is unsafe to allow mere utilitarianism to bear down those safeguards of the citizens' rights—those checks imposed by the people in their Constitution against the power of the majority and in favor of the individual, that which gives, if anything gives, one man a right safe from the encroachment of all other men; that which recognizes the supreme right of individual taste and judgment in the matter of acquiring property and in the pursuit of happiness. The legislation here involved makes a breach, I fear, in the dyke of the people's

liberties—makes one class of people contribute to the business success of another class by the fiat of government without any direct benefit received by the former.

Hence, I feel constrained to dissent from the opinion delivered by the court in this case.

Judges Nunn and Carroll concur in this dissent.

SOMERSET WATER, LIGHT & TRACTION CO. v. HYDE.

(Filed June 20, 1908—To be reported.)

1. Injunctions—Granting or Refusing—Discretion of Court—The granting or refusing of an injunction depends upon the facts of each particular case and rests in the sound discretion of the court.

2. Same—Public Interest—Public Inconvenience—Consideration—Where the interests of the public are to be taken into consideration by the court and when the issuance of an injunction will cause serious public inconvenience or loss without a correspondingly great advantage to the complainant, no injunction should be granted.

3. Same—Interests of Complainant—Where an injunction would have the effect of greatly injuring or inconveniencing the public it may be refused even though as against the defendant, the complainant would be entitled to its issuance.

4. Application to Close Sewer—Long Continuance—Absence of Complaint—Damages Ascertainable—Refusal of Injunction—Where it is made to appear that a sewer in a city had been constructed for many years with the consent of the then owner of the property, that it was afterwards extended at the request of one of the joint owners of the property; that many years elapsed without any action looking to its abatement being taken, that its discontinuance would work a great hardship upon a large portion of the public in the city and would be a menace to the health of the inhabitants; that the injury to the plaintiffs is of a permanent character for which she may, in one action, recover for all damages past and present, the injunction sought was properly refused by the court.

O. H. Waddle & Son for appellant.

Sharp & Cooper for appellee.

Appeal from Pulaski Circuit Court.

Opinion of the court by Wm. Rogers Clay, Commissioner, reversing.

This is an action on the part of appellee, Mattie T. Hyde, wherein she seeks a mandatory injunction requiring appellant to abate a nuisance caused by the discharge of sewage on appellee's premises, through pipes constructed and maintained by appellant. The injunction was granted by the trial court, and from that judgment the Somerset Water, Light & Traction Company prosecutes this appeal.

The facts, briefly, are as follows: A number of years ago certain citizens of Somerset formed a company for the purpose of constructing a sewer for the drainage of the principal business portion of the city. The sewerage system so constructed finally became the property of the Somerset Water, Light & Traction Company, and this company is now operating the same. The system drains the principal hotel of Somerset, the courthouse, jail, Somerset Sani-

tarium, other public buildings, and a few of the principal business houses of the central portion of the city. At the time it was constructed, an arrangement was made between the Somerset Water Company and the city, whereby the water company was authorized and agreed to construct a system of sewerage that would accommodate the central portion of the city. The agreement provided that the sewer should be constructed exclusively by and at the cost of the Somerset Water Company, and that those of the inhabitants of the town who desired to connect therewith, should pay the water company such proportionate amount as would be reasonable and fair considering the cost of the sewer and the use to be made thereof. The district in which the public buildings were located, and to be accommodated by the sewer, and, in fact, a large portion of the city, is so situated that the natural drainage flows into a large depression of the earth's surface or deep hollow, from one side of which flows a large spring known as the "Town Spring." This spring creates a branch which flows southward until it connects with Sinking Creek. The latter creek flows through the town and on for several miles until it empties into Pittman Creek. Pittman Creek flows into the Cumberland River.

At the time it was proposed to construct the sewer, J. B. McBeath, was the owner of a parcel of ground lying in the hollow above referred to, a short distance below the town spring, and through which the town spring branch flowed. The water company, conceiving that McBeath might raise some objections to or claim some damage on account of, the discharge of this sewage into the branch just above his property, advised him of what it proposed to do, and he thereupon consented to the construction of the sewer and the deposit of the sewage in the branch above his property. The situation thus remained for several years, during which time McBeath sold his parcel of land to J. E. Tomlinson and T. V. Ferrell; Tomlinson being the father of appellee, Mrs. Hyde, and holding the title to one-half of the lot as her trustee. Thereafter Tomlinson and Ferrell erected a number of small houses on the property in question, for the purpose of renting them to negroes. After the erection of these houses, Ferrell, who was one of the joint owners and who knew of the location and use of the sewer before the purchase was made, applied to the water company to extend the sewer under the street in front of their property and under one of the houses built over the branch, so as to discharge the sewage into the branch below the building. This was accordingly done, and conditions so remained until the Somerset Water, Light & Traction Company purchased the property of the Somerset Water Company in 1905. At this time Ferrell sold and conveyed his half interest in the property to Mrs. Hyde, the deed being made to Tomlinson as her trustee. At the time Mrs. Hyde purchased the property she knew of the location and use of the sewer. Soon after her purchase she demanded of appellant that it should either pay to her \$1,000 in damages on account of the construction and maintenance of the sewer as connected with her property, or it should discontinue the use of the sewer altogether. Appellant declining to accede to her proposition, she instituted this action.

The evidence shows that the natural flow of sewage is towards the point where appellee's property is located. It would be practically impossible to construct a sewerage system that would drain in any other direction. While it is true, that by far the greater portion of the inhabitants of Somerset use cesspools, constructed on their premises, and that the sewage system in question covers only a small portion of the thickly populated part of the business district of the city, it appears from the evidence of several reputable

physicians, that the discontinuance of the sewerage system would work great hardship, annoyance and inconvenience, upon those occupying the hospital, public buildings and principal business houses, as well as constitute a menace to the public health. A cesspool may be constructed upon the premises of a residence, but in the case of a public or other building, occupied by a large number of persons, such cesspool would fill up very rapidly and become injurious to the health of the occupants.

While Mrs. Hyde claims that she did not know of the location and use of the sewer at the time she and T. V. Ferrell originally purchased the property, it is, nevertheless, true, that Ferrell, who jointly owned the property with her, did know of such location and use. Furthermore, she admits that, after owning the property for a period of three years, she did learn of the fact that the sewer was located and deposited sewage upon her property. At the time of the institution of the suit she and Ferrell had owned the property for about seven years. Thus, it will be seen that, during a period of about four years, she failed to apply to the courts for any relief. The evidence further shows that the construction of a sewer pipe through appellee's premises, and the deposit of the sewage thereon, is offensive in the extreme and constitutes a nuisance.

It can not be doubted, that, in many instances where municipal corporations discharge, or assist the discharge of sewage, directly on to private land, from the outlet of a permanent sewer without having acquired the right so to do, the owner is entitled to restrain the injury committed, by the judgment of a court of equity, and is not confined to a recovery of his damage in actions of trespass. (*Beach v. City of Elmira*, 22 Hun., 158; *Chapman v. City of Rochester*, 110 N. Y., 273; *Stoddard v. Village of Saratoga Springs*, 127 N. Y., 261; *Story's Equity Jurisprudence*, section 928.) In all such cases, however, the injury must be irreparable and such as can not be compensated for in damages. (*Palestine Building Association v. Minor, &c.*, 27 Ky. Law Rep., 781.) After all, the granting or refusing of an injunction depends upon the facts of each particular case, and rests in the sound discretion of the court. (*City of Logansport v. Uhl*, 99 Ind., 531.) Where the interests of the public are to be taken into consideration by the court, and when the issuance of an injunction will cause serious public inconvenience or loss without a correspondingly great advantage to the complainant, no injunction will be granted. If the injunction would have the effect of greatly injuring or inconveniencing the public, it may be refused even though as against the defendant the complainant would be entitled to its issuance. The doctrine has been applied where the issuance of the injunction asked would result in cutting off the public water-supply, or the supply of electricity for lights and power, or where it would deprive the public of a necessary highway, or prevent the necessary discharge of sewage or interfere with the public system of taxation. (22 Cyc., 784.) In the case of *Louisville & Nashville Railroad Co. v. Smith, &c.*, 25 Ky. Law Rep., 1459, this court said: "An injunction ought not to be granted where the benefit secured by the party applying therefor is comparatively small, whilst it will operate oppressively and to the great annoyance and injury of the other party and to the public, unless the wrong complained of was so wanton and unprovoked as to properly deprive the wrongdoer of all consideration for its injurious consequences."

And citing with approval the case of *Stanford Water, Light & Ice Co. v. Murphy*, 20 Ky. Law Rep., 2001, which was an action to obtain an injunction to prevent the diversion of water from its natural channel, to the injury of plaintiff, and wherein it was said: "If

the appellants' damage is clearly shown to be caused by the appellee, still, we think there is an ample legal remedy, and this great public benefit should not be crippled or hindered, unless it be absolutely necessary to protect appellants' rights." In the recent case of *Devou v. Pence, &c.*, 32 Ky. Law Rep., 697, this court said: "The trial court was warranted in refusing to grant the injunction. Besides the injury or damage which will result to appellant can be easily ascertained, as the property is real estate. The value of this real estate before the construction of this sewer, and its value since the construction of it, can be as easily ascertained as can be any other damage to real estate. Nor is this such an injury as would require a multiplicity of suits. This sewer, by its construction, will necessarily empty all of the water which passed through it upon appellant's property, and the damage to her property is, therefore, of a permanent nature, and is easily ascertained. As the injury to appellant's property is not an irreparable one, but one for which the damages can be ascertained, and appellees are solvent, she was not entitled to the relief sought."

Furthermore, this court has held that an injury to property, such as the facts of this case show, that appellee's property has sustained, is of a permanent nature, and the party whose property is so injured may, in one action, sue and recover for all damages, past and present. (*City of Madisonville v. Hardman*, 29 Ky. Law Rep., 253.)

In view of the particular facts of this case, wherein it is made to appear that the sewer in question was constructed many years ago, with the consent of the then owner of the property; that it was afterward extended upon the request of one of the joint owners of the property; that several years elapsed without any action looking to the abatement of the nuisance being taken; that the discontinuance of the sewer would work a great hardship upon a large portion of the public in the city of Somerset, and would prove a great menace to the health of its inhabitants; that the injury to appellee's property is of a permanent character, and she may, in one action, recover for all damages, past and present, and will not be required to go the trouble of bringing a number of suits, we are of opinion that appellee was not entitled to an injunction. Upon the return of the case the court will impanel a jury and submit to it the question of the extent of the damages to appellee's property.

For the reasons given, the judgment is reversed and cause remanded, for proceedings consistent with this opinion.

THE NEW GALT HOUSE CO. v. CITY OF LOUISVILLE.

(Filed June 20, 1908—To be reported)

Hotels — Restaurants — License — Tax Required — Changed From "American Plan" to "European Plan" — Liability to Double Tax — Under the statute requiring first-class hotels to pay a license of \$150 per year, and a like tax on all restaurants or eating houses where the yearly sales amount to \$50,000, the fact that a first-class hotel changed its plan of serving meals from the "American Plan" to the "European Plan" would not make it amenable to a license tax of \$150 for the hotel and separate tax of \$150 for keeping a restaurant, where all the meals are served from the same table.

Henry W. Sanders for appellant.

A. E. Richards and Elmer C. Underwood for appellee.

Appeal from Jefferson Circuit Court, Criminal Division.

Opinion of the court by Judge Barker, reversing.

The appellant, The New Galt House Company, and its predecessors have for many years conducted a hotel in the city of Louisville known as the Galt House. Formerly this hotel was conducted on what is called the "American Plan;" that is, meals were provided at regular hours for its patrons who paid a stipulated sum per day, which included both meals and room rent. Some time prior to this litigation, the management of the hotel changed the manner of conducting it from the "American Plan" to what is known as the "European Plan;" the difference being simply, in the fact that under the latter the guests patronize the hotel table or not, as they please, and, when they do so, pay for what they order. The proprietors of the hotel in question, have always paid a hotel license, but the city, after the change in the management above mentioned, conceiving that the appellant was conducting and operating a restaurant in addition to the hotel, demanded an additional license for the operation of the former. This being refused, an ordinance warrant was sued out with the result that the appellant was fined sixty dollars in the circuit court; and of this judgment it now complains.

There is no contrariety whatever about the facts of the case. The appellant has paid the hotel license of one hundred and fifty dollars for the year 1907. It provides no table or meals for its guests other than the restaurant in question, and any person, whether he be a lodger or not, may visit the restaurant and obtain such food as he desires upon payment of the price charged therefor; and undoubtedly it is true, that many persons who do not lodge in the hotel patronize the restaurant. The question is, therefore, whether or not the change in the management of the hotel from the "American Plan" to the "European Plan" authorizes the city to charge a restaurant license in addition to the hotel license.

Section 46 of the license ordinance of the City of Louisville, relating to the subject in hand, is as follows:

"Every person, firm or corporation operating or conducting a tavern, hotel * * * in the city of Louisville shall pay a yearly license as follows:

"First-class. One having one hundred and fifty rooms or over, one hundred and fifty dollars per year. (Remainder of grading omitted.)"

Section 37 of the ordinance is as follows:

"Every place where food or refreshments of any kind—not including spirituous, vinous or malt liquors—are prepared for casual visitors, and sold for consumption therein, shall be deemed a restaurant or eating house, and every person, firm or corporation conducting or operating any such place shall pay a license as follows:

"All restaurants or eating houses, wherein the yearly sales amount to the sum of fifty thousand dollars and over, the license shall be one hundred and fifty dollars per year. (Remainder of grading omitted.)"

Undoubtedly, if the city's contention is upheld, the appellant must pay two licenses of one hundred and fifty dollars each. It may be admitted that, if the restaurant, as conducted by appellant, were separate from the hotel, the owner would be required to pay a restaurant license therefor; but the question remains, whether or not the mere change from the "American Plan" to the "European Plan" authorizes the city to impose upon the appellant two licenses of one hundred and fifty dollars each—one for keeping a hotel and the other for operating a restaurant; and assuming that this may

be done, are we authorized to conclude that such was the intention of the municipality when the ordinance above set forth was enacted? We do not think such a deduction is maintainable. It is a matter of common knowledge that hotels or taverns, whether conducted upon the "American" or "European Plans," permit persons other than the regular guests to purchase meals whenever desired. The main business, of course, is the conducting of the hotel or tavern. The furnishing of meals to persons other than the regular guests is a mere incident to the business. This incidental business does not change the nature of the regular business, or impose upon the proprietor a double license. It is immaterial whether the hotel is conducted on the "American" or "European Plan." Hotels as they are ordinarily conducted (perhaps universally so) furnish both lodging and food to their patrons. Indeed, a hotel could hardly be conducted, successfully, if the proprietor did not afford the guests an opportunity to obtain food within the building. Some men might readily lodge in a hotel and secure their meals at another place; but the general traveling public, including women and children, could not do this; and we may assume that no hotel could be successfully conducted, which did not provide food for its guests. If the appellant operated on the "American Plan," and, in addition, conducted a restaurant in connection with its business, there would be some ground to claim that a double license was due. But it must be assumed that, when the city imposes upon appellant the payment of a license of one hundred and fifty dollars for conducting a hotel, that it intends that it shall have the privileges ordinarily included in the business of the hotel; and certainly, if this was not the intention, it was incumbent upon the city to declare a contrary intention in clear and unmistakable language. If appellant is required to pay a restaurant license of one hundred and fifty dollars per annum, then it will have paid twice the sum that any other first-class hotel in the city of Louisville pays which simply conducts a hotel on the "American Plan." We do not feel authorized to assume that the city intended to segregate the different parts of the business of keeping a hotel, and charge a separate license for each.

The conclusion we have reached—that the city did not intend, by the ordinances under discussion, to impose upon the proprietor of a hotel, who had paid the regular license, the additional burden of a restaurant license, when that constitutes the only means adopted for furnishing his guests with food—renders it unnecessary that we should discuss or decide whether or not, under the charter, the city has the power to separate the different parts of the hotel business and charge a license for each; and, therefore, this question is not decided. We simply hold that, putting a reasonable and just construction upon the ordinance under consideration, the appellant is not required to pay the additional license under the facts as developed in this record.

Judgment reversed, with directions to dismiss the warrant

JAMES, AUDITOR v. HELM.

(Filed June 20, 1908—To be reported.)

1. Special Counsel—Employment by Governor—Assisting County Attorney—Refusal of Commonwealth Attorney to Act—Compensation Recoverable—Section 118, Ky. Stats., provides that the Governor may employ counsel to assist the Commonwealth's attorney in civil cases, the fees to be paid out of the State treasury, upon a

voucher signed by the Governor. Section 127 provides that, in the absence of the Commonwealth's attorney, the county attorney shall attend to all the Commonwealth's business in circuit court. Where, upon the application of many good citizens of the city the Governor was urged to enforce the Sunday closing law in the city of Louisville, he called upon the Commonwealth's attorney to enforce the law, who declined to do so and the county attorney offered to do so with the assistance of employed counsel, the Governor had a right to employ a competent attorney to assist the county attorney in enforcing said law and agree with him for compensation therefor.

2. Enforcement of Law—Duty of Governor—It is the policy of the Commonwealth to see that the laws are enforced and this is the proper duty of the executive who acts through officials subordinate to himself.

3. Same—The primary object of the statute in authorizing special counsel is to see that the State's interests are properly looked after, and in the management of the State's civil suits, the county attorney, in the absence of the Commonwealth's attorney is clothed with all his authority, and to say that the governor can employ special counsel to assist the latter and not the former, would place it in the power of the Commonwealth's attorney in declining to act, to prevent the employment of special counsel, no matter how urgent the need therefor might be.

4. Public Offenses—Statutory Provisions—Construction—Section 11, of the Criminal Code, provides that "public offenses of which the only punishment is a fine, may be prosecuted by a penal action in the name of the Commonwealth * * * which trials are regulated by the Code of Practice in civil actions." Section 118, Kentucky Statutes, expressly authorizes the employment of counsel in civil actions. Where a statute is capable of two constructions, one of which is calculated to defeat the ends of justice and the other would be in furtherance thereof, the latter will be adopted.

5. Question Involved—The importance of litigation to the State can not be measured by the amount involved in the controversy; especially is this true where the State is fighting to enforce a principle rather than making an effort to recover money.

6. Action for Penalty—Civil Code Controls—In a proceeding where a penalty only is sought to be recovered the action is civil and is tried according to the Civil Code, although no answer, other than the plea of "not guilty," is required of the defendant.

7. Commonwealth—Anomalous Position—Enforcing Law—Civil Actions—The Commonwealth in this case, occupies an anomalous position. She elected to proceed against the violators of the Sunday closing law, by civil suits, and the Governor, believing that the best interests of the State demanded that special counsel be employed to assist in their prosecution, arranged with appellee to render the Commonwealth certain service. Under his employment he rendered valuable service. Now, when he asks for his compensation, he is met with the answer that, although he was employed to bring civil suits and did so, that the suits were not in fact civil. In our opinion the suits instituted by appellee were civil suits and the Governor acted within the scope of his authority under section 118, of the Kentucky Statutes, and the judgment of the lower court enforcing the contract is affirmed.

James Breathitt for appellant.

Helm Bruce and Alex. P. Humphrey for appellee.

Appeal from Franklin Circuit Court.

Opinion of the court by Judge Lassing, affirming.

This litigation grows out of the efforts of Governor J. C. W. Beckham, to have the Sunday closing law enforced in the city of Louisville. In the early part of 1906, an effort was made to have the statute, which required all saloons to be kept closed on Sunday, enforced. Prosecutions were instituted in the criminal branch of the Jefferson Circuit Court, and in the Police Court of the city of Louisville, under section 1303, of the Kentucky Statutes. Those tried under these prosecutions, upon one ground or another, escaped punishment, and the violations of the Sunday closing law by the saloon-keepers, continued. In May, 1906, a suit was instituted in this court by Paul Barth, Mayor, against John McCann, Judge of the City Police Court, wherein the mayor sought to have the judge of the Police Court directed by a writ of mandamus, to try the violators of the Sunday closing law. This suit resulted in a decision of this court, construing section 1303, of the Kentucky Statutes, which is to be found in 29 Ky. Law Rep., page 707. For a short time after this opinion was delivered, it appears that the saloon-keepers observed the law and the saloons remained closed on Sundays, but about the first of August, thereafter, many saloon-keepers openly refused to observe the law, and kept their places of business open on Sunday, and were guilty of selling liquors on that day as on other days.

It is alleged that evidence of these violations were presented to the grand jury, but no indictments were returned; that when warrants were issued for the offenders and returned to the police court, the judge thereof held that the Commonwealth must show that the saloon-keepers actually sold liquors on Sunday by the evidence of those who drank; that appearances were deceiving, and it was not enough for the prosecuting witness to swear that he saw drinks served which looked like beer, whisky, &c. It also appears that the police judge, during this time, refused to accept the testimony of police officers or detectives, on the ground that they were paid and unworthy of belief. Under this condition of affairs many of the citizens appealed to the Governor for assistance and in compliance with their request, the Governor called upon the Commonwealth's attorney and requested him to enforce the law. The Commonwealth's attorney responded that he stood ready and willing to prosecute any saloon-keeper for violating the Sunday closing law, who might be indicted by the grand jury. As this means of reaching the offenders had proven futile, the Governor urged the Commonwealth's attorney to proceed against the saloon-keepers, who violated the law, under section 11, of the Criminal Code. This the Commonwealth's attorney declined to do, for the reason that he did not believe this was the proper mode of procedure. Upon being further urged to take this step, he stated that while he was unwilling to institute penal actions himself, against violators of the Sunday closing law, he would not object to such steps being taken by the county attorney, and that he would not interfere in the event that the county attorney, and any special counsel employed by the Governor on behalf of the Commonwealth, should proceed against the violators of the Sunday closing law by penal action. Following this announcement on the part of the Commonwealth's attorney, the Governor, at the solicitation of various persons in the city of Louisville, interested in the enforcement of the Sunday closing law, selected appellee to assist the county attorney in the preparation and trial of the penal suits against all violators of the Sunday closing law, and entered into the following agreement with him:

"That, whereas, in the opinion of the Governor of Kentucky, it is advisable, and necessary, that special counsel be employed for and

on behalf of the Commonwealth of Kentucky, to assist the county attorney and other authorities in the enforcement of the State laws relating to Sunday closing of saloons and other places where spirituous, vinous or malt liquors are or may be sold on Sundays.

"And, whereas, the parties of the second part are willing to take such legal action or bring such civil suits as may be found expedient and available to that end; therefore, it is agreed,

"That the second party shall diligently and in good faith assist the county attorney and other local authorities in the institution and prosecution of such civil suits as may be necessary to determine the questions involved and such as may appear reasonably necessary to enforce the law, and therefor shall be paid for such services, upon the termination of the case or cases, the sum of five hundred dollars (\$500), in each case until the total payments for such service in all cases that may be brought or prosecuted amounts to four thousand dollars (\$4,000). But the fee provided to be paid to the party of the second part shall not exceed four thousand dollars (\$4,000), in the aggregate, which amount shall be paid out of the treasury of the State, upon proper warrant."

This contract was signed by the Governor and by appellee.

Thereafter, appellee and the county attorney secured evidence against 102 saloon-keepers of from two to six violations of the law each, and instituted eleven penal actions in the Common Pleas Branch of the Jefferson Circuit Court. Each action contained six paragraphs, and each paragraph sought to recover the penal sum of \$50. Twelve similar proceedings against other persons, containing from two to four paragraphs were instituted in the Jefferson Quarterly Court, and proceedings on notice for a fine and forfeiture of license, and under the law applicable thereto, were instituted against seven hotel keepers in the Jefferson County Court, and thirty-five penal actions, prosecutions by warrants and on information, were instituted in the court of Irvine Hampton, a justice of the peace for Jefferson county, and four warrants were taken out in the City Police Court in the city of Louisville, making a total of sixty-nine proceedings in court, which were instituted by appellee and the county attorney. In some of these proceedings judgments were returned and fines imposed. In the cases in the circuit court, the contention of appellee, and the county attorney, that the saloon-keepers could be proceeded against for keeping open on Sunday without proof of actual sale, was upheld, as was the contention of the county attorney and appellee, that the claims of the Commonwealth for different violations could be joined in one suit, upon the ground that these actions were civil in their nature. Two of the Common Pleas judges held that they might be joined, while one held to the contrary, but agreed with his associates that the suits were civil, and that, if a separate suit was brought in the quarterly court for each violation, an appeal might be taken from the quarterly court to the circuit court. These suits, in the different courts, were prosecuted with so much vigor and zeal that an agreement was reached between the Retail Liquor Dealers Association, representing the saloon-keepers, on the one side, and appellee and the county attorney on the other, whereby the saloon-keepers agreed that if the county attorney and appellee would not further prosecute them, they would cease violating the law as to Sunday closing. This being the end sought to be accomplished by the Governor and by those citizens of Louisville, who were seeking to have the law, as to Sunday closing, enforced, the agreement made by the Retail Liquor Dealers Association and the county attorney was approved by the Governor, and the suits were accordingly dismissed. It appears from the pleadings in the case that the agreement on the

part of the saloon-keepers was faithfully carried out, up to the time of the filing of this suit, on the 31st day of January, 1908.

On November 15, 1907, appellee presented his claim against the State to the Governor for his fee of \$4,000, as per his contract. The claim was approved by the Governor and referred to the Auditor for payment. The Auditor refused payment on the ground that there was no warrant in law for the payment of a claim of this character. Thereafter appellee brought suit against the Auditor in the Franklin Circuit Court, to compel the payment of the fee. The Commonwealth demurred to his petition, the demurrer was overruled, the Commonwealth elected to stand on its demurrer and declined to plead further; judgment was entered in favor of appellee for the amount of his claim, to-wit: \$4,000, and the Commonwealth appeals.

The value of the services is not questioned, but the Commonwealth insists that the Governor had no authority to make this contract. That the statute does not authorize in any state of case, the employment of special counsel to assist the county attorney, but that section 118, under which it is claimed by appellee that authority is given the Governor to make such employment, only authorizes the appointment by the Governor of special counsel to assist the Commonwealth's attorney in the prosecution of civil cases in the circuit courts in which the Commonwealth is interested.

The Commonwealth further contends that even if the Governor had the right and authority to employ special counsel to assist the county attorney where the Commonwealth's attorney declined to proceed, still, in the case at bar, the employment was not authorized as the suits were not civil cases, but were criminal proceedings. On the question of the Governor's right and power to appoint special counsel to assist the Commonwealth's attorney in the discharge of duties which devolve equally upon the county attorney and the Commonwealth's attorney, the following sections of the Kentucky Statutes must be considered:

Section 118, provides:

"It shall be the duty of the Commonwealth's attorney, to attend each circuit court holden in his district and prosecute all violations of the criminal and penal laws therein and discharge all other duties assigned him by law; and he shall also, except in Franklin county, attend to all civil cases and proceedings in the circuit courts of his district, in which the Commonwealth is interested, but in civil cases, the Governor may employ counsel to assist the Commonwealth's attorney, the fees of such counsel to be paid out of the State treasury, upon a voucher signed by the Governor."

Section 127, regulating the duties of the county attorney, provides:

"He shall attend to the prosecution of all cases in his county in which the Commonwealth or the county is interested and, when so directed by the county or fiscal court, institute or defend and conduct actions, motions and proceedings of every description before any of the courts of this Commonwealth, in which the county is interested, and shall, in no instance, take a fee or act as counsel in any case in opposition to the interests of the county. He shall also attend the circuit courts held in his county and aid the Commonwealth's attorney in all prosecutions therein, and in the absence of an acting Commonwealth's attorney, he shall attend to all the Commonwealth's business in said courts."

Section 135, provides:

"The county attorney shall not dismiss or otherwise control any prosecution or proceeding in the circuit court when the Commonwealth's attorney, or the attorney appointed in his place, is present, except by the advice and with the consent of such attorney."

These three sections, when considered together, clearly charge the

county attorney with the same duties as the Commonwealth's attorney. When the latter is present in court, he controls all suits or proceedings in which the Commonwealth is interested, and when he is absent, this duty devolves upon the county attorney.

In the case at bar the Commonwealth's attorney was not absent from the city of Louisville during the time that appellee was employed as special counsel to assist the county attorney, so far as the record shows, but he was absent from the cases which were being prosecuted by the county attorney and appellee, and he was refusing to proceed against the saloon-keepers who violated the law, by penal action, and the management of these suits was, so far as the Commonwealth's attorney was concerned, left entirely to the county attorney and appellee. In fact, it appears that the Commonwealth's attorney consented and agreed, in advance of the employment of appellee, that the county attorney might take charge of all such cases as it was proposed to proceed against by penal action. It is the policy of the Commonwealth to see that the laws are enforced. This is the proper duty of the executive. He acts, of course, through officials subordinate in power to himself, and these, in turn, frequently act through others. In the case of the Commonwealth's and county attorney, each is charged with the duty of looking after the business of the Commonwealth in the circuit court; when both are present, the management and control of suits is, by statute, placed in the Commonwealth's attorney; in his absence, in the county attorney. If, for the purpose of the presentation of this point, it is admitted that the suit in question is a civil suit, counsel for the Commonwealth would admit that the Governor would have a right to appoint special counsel to assist the Commonwealth's attorney, and since, as by statute, it is made the plain duty of the county attorney to take charge of the business of the Commonwealth in the circuit courts in the absence of the Commonwealth's attorney, we are clearly of opinion that if the Governor knew, at the time of making the appointment, that the Commonwealth's attorney was absent, or declining to act, he could appoint such special counsel to assist the county attorney. In fact, in a case like the case at bar, where the Commonwealth's attorney is refusing to act, it would have been idle to have appointed special counsel to act with him. The Commonwealth's attorney, not being in sympathy with the plan which the Governor desired to set on foot, and carry out, in order to try and enforce the observance of the Sunday closing law, he could not look to him for assistance, but was compelled to seek the aid of the county attorney, who was in sympathy with the movement, and who was willing to co-operate with him.

The primary object of the statute in authorizing employment of special counsel at all is to see that the State's interests are properly looked after and protected, and, as it is the duty of the Commonwealth's attorney to have charge of the civil business of the Commonwealth, in the circuit court, the statute authorizing the employment of special counsel to assist in that class of business, referred only to Commonwealth's attorney; but this statute, when read in connection with the statute, defining the duty of the county attorney, shows plainly that the Legislature had in mind that the special counsel, when so employed, should assist the attorney for the Commonwealth in looking after the State's business. In fact, so far as the management and conduct of the State's civil suits are concerned, the county attorney, in the absence of the Commonwealth's attorney, is clothed with all the power and authority of the Commonwealth's attorney, and to say that the Governor may employ special counsel to assist the former and not the latter would, in cases like

the one at bar, defeat the very purpose of the statute, and would place it in the power of the Commonwealth's attorney, by declining to act, to prevent the employment of special counsel, no matter how urgent the need therefor might be. The purpose of the lawmakers evidently was to provide for the employment of special counsel in the conduct of the Commonwealth's civil business, where the exigencies of the case were such as to require it. The object of such employment was the protection of the business of the State, rather than the lending of aid to a particular man, and the only reasonable and fair construction that can be placed upon the statute is that which the lower court evidently placed upon it; that the Governor has authority to employ special counsel in civil cases in the circuit court, to assist the attorney representing the Commonwealth in such cases, be he Commonwealth's attorney or county attorney.

We come next to a consideration of the second objection raised by the State to the allowance of this claim, which is that the suits which it was proposed to prosecute were, while civil in form, criminal and not civil in their nature, and that, therefore, the Governor was without authority to employ special counsel to prosecute same. Section 11, of the Criminal Code, provides:

"A public offense, of which the only punishment is a fine, may be prosecuted by a penal action in the name of the Commonwealth of Kentucky, or in the name of an individual or corporation, if the whole fine be given to such individual or corporation. The proceedings in penal actions are regulated by the Code of Practice in civil actions."

And section 92, of the Civil Code, provides that actions must be brought in the county where the action, or some part of it, arose, for the recovery of a fine, penalty or forfeiture, imposed by statute. It will be observed that the right to an action is given the Commonwealth, and that the Civil Code regulates the proceedings in penal actions. A penal action for the recovery of a fine, where no imprisonment can be imposed, has uniformly been classified by courts of last resort, State and Federal, as a civil action for debt. Our own court, in the case of *Commonwealth v. Avery*, 14 Bush, 627, expressly so held. There suit had been brought in the name of the Commonwealth to recover a forfeiture of the money won on an election bet. The defendant demurred to the jurisdiction of the Common Pleas Court, claiming that the circuit court, which was a court of criminal jurisdiction, alone had jurisdiction. The demurrer was sustained, and, upon appeal to this court, in reversing the judgment of the lower court, it was said:

"It is conceded that the common pleas court has no criminal or penal jurisdiction, and whether it has jurisdiction in this action or not, must depend on the question whether it is a civil action.

"That the Legislature may authorize a civil action to be maintained for the recovery of a forfeiture has not been disputed. The action of debt has always been esteemed an appropriate action for the recovery of a penalty imposed by the statute. This statute, though not in name an action of debt, is such in its nature, and it is an appropriate action for the recovery of the alleged forfeiture, and was within the jurisdiction of the Jefferson Court of Common Pleas. * * *

"This is not a 'criminal prosecution,' nor 'an indictable offense' within the meaning of the Constitution. Betting on an election was never a crime or indictable offense at common law, nor is the offense as prescribed by the statute to be visited with any infamous punishment, and it does not therefore, come within the meaning of the 12th and 13th sections of the Constitution, above quoted, either as a 'criminal prosecution' or as an 'indictable offense.'" * * *

We have seen that the offense in this instance is purely statutory, that the Legislature having limited punishment to a fine, has the constitutional power to prescribe that the punishment should be inflicted by a proceeding in a civil action, or by an indictment, one or both, and that neither was dependent upon the other.

It is urged that in the Avery case, the proceeding was for the recovery of a forfeiture, but, in that case the court dealt with a fine, penalty or forfeiture alike, when it held that the "action of debt has always been esteemed an appropriate action for the recovery of a penalty imposed by statute." We are unable to draw a distinction between a penalty imposed for the violation of the Sunday closing law and a penalty imposed for violating the statute against betting on an election.

In the case of the Commonwealth v. Sherman, 85 Ky., 688; a penal action was instituted in the Common Pleas Court of Jefferson county to recover a fine imposed against an insurance company for the illegal collection of a premium. In that case a demurrer was sustained to the jurisdiction on the ground that it was a criminal proceeding. Upon appeal here, the case was reversed, this court holding that the common pleas court, which was a court of exclusively civil jurisdiction, had jurisdiction to try the case, as the action was civil and not criminal. Not only has our own court held a prosecution for the enforcement of a penalty for the violation of a statute, where no imprisonment is imposed, to be a civil action, but other jurisdictions, as well have, with a degree of uniformity so held. In Mitchell v. State, 11 N. W., 848, an action was instituted to recover a fine for the sale of intoxicating liquors to an infant without the consent of his parents. The point being raised by the defendant that the proceedings should be criminal and not civil, the court said:

"The action on a penal suit to recover money as a penalty is a civil suit."

And, in the case of Brophy v. City of Perth Amboy, 44 N. J. L., 217, an action was brought to recover a fine imposed for a violation of a city ordinance, regulating beer saloons, &c. The ordinance provided for either a fine or imprisonment, and in a civil suit imprisonment was enforced. On appeal, the question was raised as to whether or not appellant was entitled to a discharge under an act providing for the release of persons imprisoned on civil process. In passing upon the right to proceed against the defendant by civil suit, the court said:

"Where such an action is brought, the proceeding is civil and not criminal, and the rules of procedure in civil cases, unless otherwise provided, are applicable to it."

In Campbell v. Board of Pharmacy, 45 N. J. L., 241, an action was brought to recover a fine against a druggist for not complying with the law, as to registering, &c. It was insisted that it was a criminal proceeding, and that the defendant's constitutional guarantees were being invaded, &c. In response to this contention, this court said:

"An action for a penalty is a civil action as much so as an action for money had and received."

In the case of Stearns v. U. S., F. C. 13,341, in passing upon a similar question, the court said:

"This was not a criminal prosecution, but a civil action to recover a penalty for breach of a statute. * * * Actions for penalties are civil actions, both in form and substance."

And, in the case of U. S. v. Elliott, F. C., 15,043, an information in the nature of a debt, was filed by the United States to recover

a fine imposed upon the owner of a vessel for failing to provide medical stores. The defendant insisted that it was a criminal proceeding, and should be on information or indictment. To this contention, the court responded:

"It is well settled that when pecuniary penalties are affixed by statute, to an act or a neglect, and there is no imprisonment provided for, or other reason to suppose that a mere punishment is intended, and no special remedy is pointed out in the statute, a civil action (formerly always debt) will lie for their recovery, although the penalties are for the sole use of the sovereign."

This last opinion was delivered by Chief Justice Marshall, who was then acting as circuit justice.

Section 118, of the Kentucky Statutes, which authorizes the employment of special counsel, expressly says, that in civil actions, they may be so employed. Where a statute is capable of two constructions, one of which would be calculated to defeat the ends of justice, and the other would be in furtherance thereof, the latter will be adopted. The importance of litigation to the State can not be measured by the amount involved in the controversy, it quite frequently happening, as in the case at bar, that the State is fighting for the enforcement of a principle rather than making an effort to recover sums of money. She was seeking to have the law observed, and the local authorities having failed in its enforcement, the Governor was called upon to lend his assistance. He recommended to the Commonwealth's attorney a plan which he thought would be effective. His recommendations were turned down. The plan suggested by him was neither approved, nor acted upon by the Commonwealth's attorney. The law was being openly and flagrantly violated; citizens were appealing to him for assistance; the county attorney offered to proceed against the violators along the line suggested by the Governor, and the Commonwealth's attorney, while declining to act, agreed that he would not interfere. The Governor employed special counsel and, at once, set on foot the institution of the penal actions, as above set out. The wisdom of his course was demonstrated by the success with which the efforts of the county attorney and appellee were attended. The observance of the law was enforced, and it was clearly demonstrated that violations of the character complained of could be stopped by proceeding against the offending parties by civil suits.

But, it is insisted for the Commonwealth that because in civil suits for the enforcement of a penalty, the defendant is entitled to certain privileges and immunities, such as freedom from giving evidence against himself, the benefits of the plea of not guilty, and the reasonable doubt instruction, that therefore, the claim should not be paid. It is true that it has time and again been recognized that the defendant in a civil suit, wherein the enforcement of a penalty is sought, is entitled to certain constitutional guaranties, but these immunities to the defendant can not, in any wise, militate against the nature of the action, and that is the question that we are dealing with. The Legislature clearly had the right to determine the nature of the action, subject to the immunities guaranteed by the Constitution, and where a penalty only is sought to be recovered, the action is civil and is tried according to the provisions of the Civil Code, although no answer other than the plea of "not guilty" is required of the defendant.

The Commonwealth in this case occupies an anomalous position. She elected to proceed against the violators of the Sunday closing law by civil suits, and the Governor, believing that the best interests of the State demanded that special counsel be employed to assist in their prosecution, arranged with appellee to render the

Commonwealth certain service. Under his employment from the Governor, at considerable labor, he rendered the services, which proved valuable. Now, when he asks for his compensation, he is met with the answer that, although he was employed to bring civil suits for the State, and did so, yet, notwithstanding that fact, the suits were not in fact civil. Under the facts stated in this case the position of the Commonwealth is not tenable.

The suits instituted by appellee on behalf of the Commonwealth were civil suits, and we are clearly of opinion that, in making the employment, the Governor acted within the scope of the authority given him by section 118, of the Statutes, and the judgment is, therefore, affirmed.

BOARD OF ALDERMEN OF THE CITY OF COVINGTON v. CITY OF COVINGTON.

CITY OF COVINGTON, EX PARTE v. RENSHAW AND OTHERS.

(Filed June 20, 1908—To be reported.)

Municipalities—Second Class Cities—Superintendent of Streets—Appointment of Street Overseer—Under Sec. 3118, Ky. Statutes, part of charter of cities of the second class, authorizing the mayor to appoint a superintendent of public works, subject to the approval of the board of aldermen, providing that "he can not undertake any improvement or perform any work or make any appointments until said work and improvements * * * and the number and compensation of the employes shall have been fixed by ordinance" it was intended to confer upon the superintendent the right to appoint the employes connected with the improvement of the street, subject to the approval of the council. But while this discretion is lodged in the council it can not take away from the superintendent the naming of the persons he is authorized to employ or appoint.

John E. Shepard, City Solicitor, for appellant.

F. J. Hanlon and Harvey Meyers for appellees.

Appeals from Kenton Circuit Court.

Opinion of the court by Judge Carroll, affirming.

These two appeals, involving the same question of law, will be disposed of together.

The only question in the cases is, can the board of councilmen of the City of Covington create the position of overseer of the street cleaning department, and elect a person to hold such position.

The board of councilmen contend that they may do this, while the mayor and the superintendent of public works contends that the council has no power to create this place or appoint or elect a person to fill it.

Section 3118, of the Statutes, provides in part that:

"The mayor shall appoint a superintendent of public works, subject to the approval of the board of aldermen, for a term of two years; and he shall be subject to removal by the mayor, upon the approval of the board of aldermen. But said superintendent shall not undertake any improvement or perform any work, or make any appointments or employments, until said work and improvements shall have been authorized by ordinance, and until the number and compensation of appointees and employes shall have been fixed by

ordinance, and the city shall not be held to any liability incurred by said superintendent in violation of this provision."

The ordinance creating the place of overseer of the street cleaning department, reads as follows:

"Be it ordained by the general council of the City of Covington:

"That in accordance with the charter governing cities of the second class, it is hereby made the duty of the superintendent of public works to supervise the cleaning, sprinkling, repairing and improving of all streets, avenues, alleys and public places in the city; and in order to assist him in his duties, there is hereby created the office of overseer of the street cleaning department, which office is subordinate to that of superintendent of public works, and created for the purpose of assisting the superintendent in the discharge of his duties. Said overseer shall at all times be subject to the orders and under the authority of the superintendent of public works. It shall be the duty of said overseer of the street cleaning department to superintend and regulate the cleaning of streets, alleys and public places, and catch basins, and the removal of refuse in said city, under the direction of the superintendent of public works; and that for the purpose of carrying out the provisions of this ordinance, the city shall be divided into two districts. * * * Said overseer of the street cleaning department shall be elected as other officials are elected by the general council and shall hold office for the term of two years from the date of his election. He shall receive for his services the sum of \$65.00 per month, payable as other salaries are paid."

After a careful consideration of the record, we have reached the conclusion that, in disposing of the case, it will not be necessary to pass upon many of the interesting and important questions presented by counsel in argument and brief.

The superintendent of public works is a statutory officer, and his powers and duties respecting the streets, alleys and public places are specifically defined and described in the section of the statute relating to this officer. Under section 3118, supra, the superintendent "can not undertake any improvement or perform any work, or make any appointments or employments, until said work and improvements shall have been authorized by ordinance, and until the number and compensation of appointees and employes shall have been fixed by ordinance." It was manifestly intended by this section to confer upon the superintendent the right to make such appointments or employments in connection with improvements and work required to be done upon the streets and public places of the city, as the council gave him the right to appoint or employ. The superintendent has no power to do any work or make any appointment until so authorized by the council, and it is entirely within the discretion of the council whether or not they will adopt the recommendations made by the superintendent respecting the appointments he desires to make or the work he desires to do. But, while this power and discretion is lodged in the council, it can not take away from the superintendent the naming of the persons that it authorizes him to employ or appoint. Charged with the general supervision of the work in connection with the streets, it is proper that he should have the appointment, subject to the approval of the council, of the persons who are to assist him in the performance of his duties. If the city council could make all of the subordinate appointments, the employes might be upon unfriendly or hostile terms with the superintendent, and thus impair the usefulness of the department under his control. This right of appointment in the superintendent, although not expressly conferred, follows, by reasonable implication, from a fair interpreta-

tion of the law, and it is apparent that the interests of the city and public will be better protected by making the superintendent responsible for the efficiency of the employes under him and for the prompt and faithful performance of the duties placed in his keeping. This construction does not in any wise interfere with the right or authority of the council to superintend, control and direct what improvements shall be made, and how many persons shall be employed, and what compensation shall be paid them; nor does it take from the council the power to abolish at its pleasure any appointments authorized. The statute by express terms leaves all these matters in the control of the council. Everything that the superintendent does in making appointments or doing work is subject to the approval of the council. All that he can do is to represent to the council the number of employes necessary, and it is with the council to say whether they shall be appointed. But, when the council, by ordinance, authorizes the appointment and fixes the number and compensation of the employes to perform any work in connection with the streets and public places, the superintendent of public works has the right of their appointment.

Wherefore, the judgment in each case is affirmed.

CHESPEAKE, OHIO & SOUTHWESTERN RAILROAD COMPANY,
&c. v COMMONWEALTH. FOR USE, &c.

(Filed June 20, 1908—To be reported.)

Fiscal Courts—Order Levying Taxes—Failure to Specify—Purpose of Levy—Validity of Order—The following order of the Fiscal Court of Ohio county was made January 9, 1897: "On motion of Esq. Wilson it is ordered that the county levy be the same the ensuing year as the preceding years—50 cts. on one hundred dollars worth of property and \$1.50 poll tax on each poll." Held—That said order is void under sec. 180, of the Constitution, because it fails to specify for what purpose the said levy is made.

Trabue, Doolan & Cox and J. M. Dickinson for appellants.

J. S. Glenn, W. H. Barnes, Ben D. Ringo and E. M. Woodward for appellees.

Appeal from Ohio Circuit Court.

Judge Hobson delivered the following response to petition for rehearing, reversing.

When this case was heard, our attention was not called to the order of the order of the fiscal court levying the tax in controversy, and we did not consider its sufficiency.

Section 180 of the Constitution provides:

* * * "Every act enacted by the General Assembly, and every ordinance and resolution passed by any county, city, town, or municipal board or local legislative body, levying a tax, shall specify distinctly the purpose for which said tax is levied, and no tax levied and collected for one purpose shall ever be devoted to another purpose."

It is insisted that the order of the fiscal court does not specify distinctly the purpose for which the tax is levied. The order is in these words:

"Orders Fiscal Court of Ohio County,

"Regular Term, 9th day of January, 1897.

"On motion of Esq. Wilson. it is ordered that the county levy be, the same the ensuing year, same as the preceding year, 50 cts. on one hundred dollars worth of property and \$1.50 poll tax on each poll.

"JOHN P. MORTON, Judge.

"A copy, attest:

"M. S. RAGLAND, C. O. C. C."

In the case of Commonwealth v. The United States Fidelity and Guaranty Co., 28 Ky. Law Rep. 362, the court had before it the validity of the following order made by the Taylor Fiscal Court:

"Ordered by the court that there be and there is a tax of 37½ cents levied on each \$100 worth of taxable property in Taylor county for the year 1901 and \$1.50 on each poll in Taylor county for the said year."

The order was held void under section 180, of the Constitution, on the ground that it did not specify the purpose for which the tax was levied. The same conclusion was reached in City of Somerset v. Somerset Banking Company, 109 Ky., 49. In that case the order read as follows:

"E. M. Rousseau made a motion to fix the tax levying at seventy-five cents on each one hundred dollars, and one dollar poll. The motion was seconded by R. Kolker, and carried on a call of yea and nay."

Similar levies were held void in United States Fidelity Co. v. Board of Education of Somerset, 119 Ky., 355, and Morrell Refrigerator Car Co. v. Commonwealth, 32 Ky. Law Rep., 1383.

It is insisted that the levy in this case is similar to that in Pulaski County v. Watson, 106 Ky., 505. But in that case the levy contained these words, which are not in the levy before us: "for the purpose of paying claims against the county." These words show for what purpose the levy in that case was made. It is also insisted that, by section 1839, Ky. Stats., the fiscal court is given jurisdiction to levy each year for county purposes a poll tax not exceeding \$1.50, and an ad valorem tax not exceeding 50 cents on each one hundred dollars worth of property. But in Combs v. Letcher County, 107 Ky., 379, it was held that under this section the fiscal court was authorized to levy a tax to build a court house or to do anything else which it was authorized to do for county purposes. Under the provisions of the Constitution, if a tax is levied to build a court house or to maintain the roads of the county under section 4307, Ky. Stats., it should be specified in the order making the levy. In some cases the statute specifies how much taxes may be levied for a given purpose, as in the case of the roads; and if the order does not specify how much tax is levied for this purpose, it can not be determined whether the tax limit has been exceeded. We do not determine that great minuteness is necessary in these orders of the fiscal court. We only determine that the order before us does not show for what purpose the tax was levied, and that when taxes are levied for other purposes than the ordinary current expenses of the county, or there is a road tax, the order should specify the purpose for which the tax is levied. The remedy of the fiscal court for a defect of this sort in its order is pointed out in the opinions referred to.

The opinion herein delivered is extended as above indicated, and to this extent the former opinion and mandate are modified.

The judgment is reversed and cause remanded, for further proceedings consistent herewith.

COMINGOR v. LOUISVILLE TRUST COMPANY, TRUSTEE OF
SIMONSON, WHITESON & CO.

(Filed June 18, 1908—Not to be reported.)

Alfred Selligman and N. M. Smith for appellant.

Geo. Weisinger Smith, Smith & Sprague and Barnett & Barnett
for appellee.

Appeal from Jefferson Circuit Court, Chancery Branch, Second
Division.

Judge Settle delivered the following response to petition for re-
hearing and modification, overruling.

Appellee's petition for modification and extension of opinion herein, insists that this court, on the cross-appeal, should, in reversing the judgment of the circuit court, have directed the entering in that court of a judgment in its behalf against appellant for \$48,000, instead of the amount named in the opinion. We have concluded to adhere to the conclusion expressed in the opinion. Appellee's contention on this point is based on the amount realized for the stock of Simonson, Whiteson & Company, after its purchase by Henry Stern, under the fraudulent arrangement with them. This is not a fair criterion, as the sum thus realized for the goods was obtained by disposing of them in the usual course of trade and by making such additions to the stock as would enable them to be sold to the best advantage.

A fairer basis of valuation was that adopted by the opinion which fixed the value as of the date of sale, at what the stock and fixtures, in view of their condition at that time, should reasonably be expected to bring at a forced sale, such as was ordered. The valuation thus made should stand, as we have not been convinced by anything said in the petition that it was not approximately correct.

It is further insisted by appellee that the affirmance of the judgment on the original appeal entitled it, under section 764, Civil Code, to ten per cent. damages on the amount thereof. In this we concur. The section, *supra*, seems to give damages upon an affirmance, as a matter of right in money judgments to the extent that they have been superseded for the purpose of appeal. On this appeal, prosecuted by appellant, Comingor, the judgment of the circuit court which he superseded was affirmed. The effect of which was that the judgment was proper as far as it went. The appeal and supersedeas prevented appellee from taking out an execution on the judgment pending the appeal.

The affirmance of that judgment, in view of its having been superseded, entitled appellee to ten per cent. damages upon the amount thereof, and the right to such damages is not affected by the additional or increased amount to which appellee will be entitled upon the return of the case to the lower court, by reason of the reversal of the same judgment upon their cross-appeal.

The case of O'Connor v. Henderson Bridge Company and Henderson Bridge Company v. O'Connor and McCulloch, 95 Ky., 633, is in point. O'Connor and McCulloch were original appellants and the Henderson Bridge Company cross-appellant. In response to the petition for re-hearing, filed by the Henderson Bridge Company, the court said:

"Section 757, Civil Code, as amended March 24th, 1888, provided: When a party recovers judgment for only part of the demand or

property he sued for, the enforcement of such judgment shall not prevent him from prosecuting an appeal therefrom as to so much of the demand or property sued for that he did not recover. So that the contractors were entitled to an execution upon the judgment of the lower court for \$61,536.55, at the same time prosecuting an appeal therefrom as to so much of the demand sued for that they did not recover, but the company prevented them obtaining an execution and thereby collecting the amount of the judgment by a separate appeal and execution of the supersedeas bond, whereby it covenanted to pay to the contractors, appellees, all costs and damages adjudged against appellants on that appeal, and also satisfy the judgment appealed from if affirmed. The decision of this court was that, on the appeal of the contractors, they did not recover all the demand sued for they are entitled to, and that the judgment pro tanto be reversed. But upon the appeal of the company, the judgment had to be necessarily affirmed, because it was not erroneous to its prejudice. And, as a consequence, under section 764, ten per cent. damages on amount of the judgment superseded has to be awarded."

The petition of appellee as to the claim for ten per cent. damages is sustained and the damages allowed. In other respects it is overruled

LOUISVILLE & NASHVILLE R. R. CO. v. BLACKABY.

(Filed June 18th, 1908—Not to be reported.)

Railroads—Obstructing Public Highways—Piling Freight Therein—Frightening Horse in Buggy—Injury to Occupant—Damages Recoverable—A pile of sixty sacks of ship stuff out on a pike is calculated to frighten a horse, and where a railroad company received and piled up sixty sacks of ship stuff at a flag station, where it had no depot, extending the pile out to the centre of the pike, at which a horse, in a buggy, took fright, throwing out and injuring the occupant, the company was properly held to be liable in damages for the injury inflicted.

Benj. D. Warfield and Willis & Todd for appellant.

J. C. Beckham & Son for appellee.

Appeal from Shelby Circuit Court.

Opinion of the court by Judge Hobson, affirming.

Gathright is a flag station on the line of the Louisville & Nashville Railroad, between Shelbyville and Bloomfield. There is no depot there and no agent; but only a small platform. Both freight and passengers are received and delivered there. Near the station a turnpike crosses the railroad track. While driving over this turnpike with her husband, in March, 1906, Mrs. Blackaby was painfully injured by the horse taking fright and running away, in consequence of about sixty sacks of ship stuff piled along the railroad and running out into the pike to about the center of it. She brought this action against the railroad company to recover for the injuries, on the ground that the railroad company had put the ship stuff there and thus obstructed the pike and caused the horse to run off. On a trial in the circuit court, she recovered a judgment and verdict for \$500, and the railroad company appeals.

It is insisted for the railroad company that there was no evidence on the trial that it placed the ship stuff where it was; and in answer to this, it is urged by the plaintiff, that there was no issue on the question, the answer not properly traversing the allegations of the petition on the subject. It is evident from the bill of exceptions that the parties treated the matter as in issue on the trial. The instructions offered by both parties so treated it and both parties offered evidence upon the question without objection being taken on the ground that the matter was not in issue. We think the answer a sufficient traverse of the allegations of the petition, and it was properly so treated on the trial. But we also think there was some evidence that the defendant put the ship stuff where it was. It was alongside of the railroad within its right of way, and was evidently either put there to be carried away by the train, or was brought there by the train and left to be hauled away by the consignee. There is proof that the railroad, from time to time, in March, was hauling ship stuff to Mr. Gathright, and unloading it at this station. It not appearing that any ship stuff at that time was being shipped from the station, the jury were warranted in inferring that this stuff had been brought there by the train, especially in view of the fact that the way the sacks were bursted, and piled indicated that they had been thrown there hastily. The defendant, if it had not placed this ship stuff there, could show the fact. The proof indicated was sufficient to make out a prima facie case. The ship stuff piled out to the middle of the pike was an unlawful obstruction of the pike and the person so putting an obstruction in a public highway, must answer for the damages directly resulting from it, where the injury was the proximate result of the obstruction. A pile of sixty sacks of ship stuff out on a pike was calculated to frighten a horse.

The court by its instruction told the jury, in substance, that they could not find for the plaintiff unless the defendant placed the sixty sacks of ship stuff on the pike. The finding of the jury for the plaintiff is a finding that the defendant did place the ship stuff there. The defendant showed by five witnesses that on March 6, it hauled about this quantity of ship stuff to Mr. Gathright, and delivered it to his agents on the platform; that they took away all but 15 sacks, which they left there until they could go home and return with the team, the whole of the ship stuff being more than they could carry away at once. We have no doubt this proof is true, but if this was the shipment at which the horse took fright, there could have been only 15 sacks there. The proof for the plaintiff by three or four witnesses, is that when the horse took fright, which was an hour or two after the train left, there were sixty sacks piled out in the pike. These witnesses could not be mistaken in taking what they saw for the 15 sacks that Gathright's men testified to leaving there. And so the natural conclusion from all the evidence is, that the ship stuff at which the horse took fright was a different shipment from that shown by the evidence for the defendant. The jury evidently so concluded and their verdict is not against the evidence, especially in view of the fact that the proof for the defendant, especially by the last witness it introduced, is by no means conclusive that the shipment they referred to, was the stuff that was on the ground the day that the plaintiff was hurt. Some complaint is made of the instructions of the court, but we can not see how the instructions could possibly have misled the jury; for the question before the jury was simply whether the stuff at which the horse took fright was that referred to by the proof for the defendant or ship stuff it hauled there on some other day in March and left at the station for Mr. Gathright.

Judgment affirmed.

POYNTER, &c. v. PHELPS, &c.

(Filed June 20, 1908—To be reported.)

1. Church Schism—Two Equal Factions—Absence of Church Judicature—Under Ky. Statutes, sec 322, providing that "in case of a schism or division shall take place in a society the trustees shall permit each party to use the church and appurtenances for divine worship a part of the time proportioned to the members of each party. The ex-communication of one party by the other shall not impair such right except it be done bona fide on the grounds of immorality." Where a Baptist church, composed of about 250 members, became divided into two factions of about equal numbers, neither having withdrawn, and both claiming to be in the majority, and there being no church judicatory of appellate jurisdiction to decide the controversy, the case manifests a schism, or division, of the church under the provisions of said section 322. Held—In such case the appellants, even if in the minority, are entitled to the use of the church building for worship one Saturday and the succeeding Sunday in each month. They are not, however, entitled to recover possession of the old book of church record, claimed in the petition, but are entitled to a copy thereof, the cost of making which should be divided between the two factions.

Virgil P. Smith and O. H. Waddle & Son for appellants.

Jas. Denton, T. Z. Morrow and H. S. Robinson for appellees.

Appeal from Pulaski Circuit Court.

Opinion of the court by Judge Settle, reversing.

Appellants claiming to be members of the Flat Lick Baptist Church, and three of them, viz: J. H. Poynter, W. R. Ping and R. M. Testerman, to be trustees of the church, brought this suit in equity in the Pulaski Circuit Court, against appellees, members of the same church, three of whom, Andrew Phelps, Perry James and Arthur Hubble, also claim to be trustees of the church, to obtain, by judgment of the court, the right to use the church building one Saturday and Sunday of each month, for purposes of divine worship, and to recover of appellees a record book containing a list of the members of the church and the minutes of meetings held by the church since its institution in 1779.

The church in question is what is known as a Missionary Baptist Church, and is situated in Pulaski county.

The grounds set forth in the petition for the relief sought are, in substance:

1. That on February 28, 1903, some of the appellees, at a meeting in which only twenty of the membership of 250, composing the congregation of the Flat Lick Baptist Church, participated, by a vote therefor of twelve of the twenty mentioned, procured the adoption of certain resolutions that were and are inconsistent with and contrary to the faith, doctrine and rules of government of the Flat Lick Baptist Church, and to which a majority of the members of that church were and are opposed.

2. That at that and subsequent church meetings appellants, and such other members of the church as were opposed to and failed to comply with the resolutions in question, were refused participation in the church proceedings and threatened with ex-communication.

3. That the then pastor of the church, who was the moderator of its congregational meetings, together with appellees and others who had voted for or continued to favor the resolutions, arbitrarily refused to entertain a motion to rescind them.

4. That although at another and later meeting a majority of the congregation present, including the appellees, voted to rescind the resolutions, appellees did not act in good faith or in the interest of harmony in so voting, but persisted in their mistreatment of appellants and others of the congregation who had opposed the resolutions from the beginning; deprived them of their rights and abridged their privileges as church members to such an extent that they were compelled to organize themselves into a distinct party of worshipers, though of the same faith and same church; which appellants and those associated with them claimed to have accomplished without withdrawing from the Flat Lick Baptist Church.

5. That appellants and their associates, constituting, as alleged, a majority of the membership, by electing as trustees the three persons named in the petition as such, and claiming the possession of the church building and ground, are entitled to control the church property and affairs of the Flat Lick Baptist Church and are equally with appellees entitled to the use of the church for purposes of worship, although appellees locked its doors against them and have since continued to bar them out.

The resolutions referred to are as follows:

"Your committee respectfully submit the following resolutions for the government of the new enrollment of the membership of Flat Lick Church, as recently ordered by said church.

"Resolved, 1st. That said enrollment be on the new church record recently purchased by the church from the Baptist Book Concern, Louisville, Ky.

"2d. That the enrollment be begun at the next regular business meeting of the church, the fourth Sunday in March, 1903, and that it be continued at the regular business meeting the 4th Saturday in April of the same year, and that it be concluded at the following regular business meeting the 4th Saturday in May.

"3d. That at the close of said period of time, and thereafter, Flat Lick Church shall be constituted alone and consist only of such members as have complied with the conditions of these resolutions.

"4th. That all members who desire to enroll be required to subscribe to the articles of faith and the church covenant contained in said new record, and that a request to be enrolled shall be construed as embracing a solemn promise to comply with these resolutions and others.

"5th. That all members who desire enrollment and who may be scriptural subjects of discipline shall be required to make suitable reparation and acknowledgement before they are permitted to do so. Any member may object to such a person enrolling at the time the request is made, and they will not be permitted to enroll until an investigation of the charge has been made by the church. This shall be done at as early date as practicable.

"6th. That any member who may fail to enroll within the proper period of time as fixed by these resolutions may do so any time thereafter by complying with the terms herein set forth.

"7th. That after the 4th Saturday in May, 1903, the old church book shall be regarded as a reference book only, and shall be retained by the church as a historical record of its past.

"8th. That the clerk of the church be directed to correspond with all members who may be absent from the county or State and notify them of this action in order that they may take such steps as they may desire in the matter, the church to pay expenses of such correspondents.

"9th. That all members who wish to enroll be required to be present and make the request themselves, except such as are prevented from being present by sickness, absence from the county or State, or other providential cause. Those who are thus prevented from being present may make the request in writing, or through a suitable proxy.

"10th. That each member enrolled shall give, according to his or her ability, financial aid to the expenses of the church.

"11th. That each member enrolled will abstain from the use of intoxicants as a beverage, and that they will not aid and abet the cause of intemperance by selling apples or grain for distilling purposes, nor labor for or at a distillery or similar institution nor knowingly cast their suffrages for any person for any office who uses intoxicants in above sense, or is a friend in any application of the word to this great evil

"The use of intoxicants in cases of sickness, when prescribed by a regular practicing physician of good character, shall be permitted.

"12th. That a failure after enrollment, to comply with the provisions of these resolutions and the said articles of faith, and covenant, shall constitute grounds for discipline and expulsion from the membership after the necessary scriptural steps have been taken to reclaim the erring brother or sister.

"13th. That the pastor make public announcement of this act from the pulpit, and that the membership seek to notify all who are concerned as they may have opportunity.

"14th. That the pastor or clerk read and explain said articles of faith, church covenant, and resolutions before such enrollment, so that all may have full knowledge of the purpose and scope of same."

Appellees filed a general demurrer to the petition, which the circuit court overruled, and to which ruling they excepted. They thereupon, filed an answer which traversed the averments of the petition, and in substance, averred that appellees, Andrew Phelps, Perry James and Arthur Hubbell, as trustees duly elected by the members of the Flat Lick Baptist Church, held the title to the church grounds and building for the use of the congregation; that they (appellees) and the members of the church associated with them, constitute a majority of the congregation, and by reason of that fact, are entitled to control the church property and rule the church; that appellants and those associated with them have been and are disloyal to the church and are trying to disrupt and destroy it.

All affirmative matter of the answer was controverted by reply. On the hearing the circuit court dismissed the action; hence this appeal.

The record contains a great deal of testimony, much of which is conflicting. It will serve no good purpose to discuss it in detail, but will be sufficient to say that it shows the existence among the members of the Flat Lick Baptist Church, of a serious division. The faction represented by appellants being known as the "Old Book" members, and that represented by appellees as the "New Book" members. This division arose out of the adoption of the resolutions copied above and as to the conduct of the pastor. According to the evidence about half, of the members, including appellees, headed by the pastor, favored the resolutions, and demanded that all the members of the church subscribe to them and obligate themselves to obey them, by re-enrolling their names in a new book, or church record, containing the resolutions and discarding, except for purposes of reference, the old church book containing the names of all the members and the record of all the meetings and proceedings of the church since its institution. On the other hand the evidence also shows that practically an equal number of the members, including appellants, opposed the resolutions, complained that they introduced innovations in the church, imposed unreasonable restrictions upon individual conduct and liberty of conscience, and were otherwise violative of the faith and doctrine of the Missionary Baptist church, and its rules of government; for which reasons, and because of the alleged arbitrary and harsh manner in which their adoption was attempted to be forced upon the congregation of the

Flat Lick Baptist church, appellants and those holding with them, refused to be bound by the resolutions, or to enroll their names in the new church book containing them.

The dissatisfaction existing among the members of the Flat Lick Baptist church on account of the resolutions and the manner of their adoption, manifested itself in an attempt on the part of appellants, made at one of the church meetings, to rescind them, but it proved abortive, because the pastor in his capacity of Moderator, refused to entertain a motion to that effect. Incensed at this action of the pastor, backed as it appeared by the approval of appellees and other members following his leadership, appellants and others of their faction, held a meeting at which action was taken declaratory of their rights as members of the Flat Lick Baptist church. At the same time they elected the appellant, J. H. Poynter, W. R. Ping and R. M. Testerman, trustees to hold the title of the church property and attempted to confer upon them authority to that effect. They then elected a delegate, known as a messenger, to represent the Flat Lick Baptist church at the approaching meeting of the Cumberland Association of the Baptist church, to which the Flat Lick Church belonged, and furnished him a letter to the association which purported to constitute his credentials as a messenger, convey the greeting of the Flat Lick Baptist church to that body and recite the alleged wrongs sustained by appellants at the hands of appellees. The latter, likewise, claiming to represent the Flat Lick Baptist church, also elected a messenger to the same association, and by him forwarded the usual church letter to that body.

The Cumberland Association being attended by the two messengers, and required to determine which of them was entitled to represent the Flat Lick Baptist church in the association, decided the matter in favor of appellant's messenger, who thereupon took his seat in the association as such. In view of this decision and the condition to which appellees had brought the Flat Lick Baptist church, by the adoption of the resolutions in question, they and others of their faction, at the June meeting, 1906, of the congregation of the Flat Lick Baptist church, by a majority vote of the members present, rescinded the resolutions. But the manner in which this action was taken, did not seem to manifest a motive or spirit calculated to remove the dissatisfaction of the opposing faction, for it did not, in rescinding the objectionable resolutions, require their obliteration from the new book, or remand the congregation to the use of the old book. The use of the new book seems to have been continued for recording the proceedings of church meetings and for the enrollment of the names of members, with the understanding, express or implied, that members known to be opposed to the previous action in respect to the adoption of the resolutions, might or might not enroll their names in the new book, at their option; but they were not accorded the privilege of enrolling them in the old book.

In the meantime, and before the action last referred to was taken, appellants requested of appellees and especially Andrew Phelps, Perry James and Arthur Hubbell, who had been elected trustees of the Flat Lick Baptist church before any division occurred in the congregation, that appellants and their faction be allowed to occupy and use the church building one Saturday and Sunday in each month for purposes of worship. A similar request was made of the church janitor, but in each instance the request was refused.

It is contended by appellees that the acts and proceedings of which appellants complained were legal and necessary to rid the

church, without publicity or the scandal of trials, of a few members whose immoral lives and practices had placed them beyond the reach of the ordinary methods of church discipline, while appellants insist that such action was illegal, unprecedented and revolutionary. Thus the warring factions have contended for two years with increasing bitterness and hostility until what was at first a mere breach that might, by judicious handling on the part of the pastor and wiser heads of the church, have readily been healed, has widened into an apparently impassable chasm of dissension and division. In the meantime the cause which the Flat Lick Baptist Church was designed to advance, viz: the propagation of the Christian religion, has been, as in all such cases, the chief sufferer. It is deplorably true, that church dissensions are conspicuously bitter and violent. In such controversies the Christian spirit is too often laid aside for that of mischief or spite; sight being lost of the ultimate fact that it is the mission of the church to prevent and not cause strife among men, and that the individual church which would more nearly approach the divine conception of its mission and constantly keep "its windows open toward Jerusalem," must be founded upon the same brotherly love, though it be of lesser nature, that moved the Savior to sacrifice his life for the redemption of mankind.

It would be profitless to speculate as to whether or by what means the division in the Flat Lick Baptist church might have been averted or healed, or to decide which of the two factions was in the right as to the original grounds of controversy; the fact remains that the division exists, and that the contending factions are about equal in numerical strength and too widely apart to be reconciled at this time by any advice that we may volunteer to give them. It is further apparent that the cause of the division was not removed by the action of appellees in merely rescinding the objectionable resolutions. Appellants contend that they should have been expunged and the old church book restored to use for the enrollment of church members and recording of all proceedings of church meetings; and that members of the church, whose conduct subjects them to church discipline, should be tried and dealt with in due form and according to Baptist usage and precedent, instead of being coerced into withdrawing from the church by such a regulation as would require them to re-enroll their names as church members in a book containing resolutions, however proper, at which it was known they would revolt.

The differences affecting the Flat Lick Baptist church are not precisely of faith or doctrine, nor such as grow out of interpretation of ecclesiastical law, but rather of church polity or government. The Baptist church does not, as a religious sect or denomination, possess a constitution or creed, like the Presbyterian, Methodist and many other churches. Its form of church government is congregational and therefore, purely democratic. Each church is a distinct organization, independent of all others. There are no intermediate judicatories, or a judicatory of final revisory power in Baptist government; consequently, the right of appeal does not exist. Every Baptist church is, therefore, a law unto itself in matters ecclesiastical. While what are known as Baptist associations, both district and State, exist, they possess neither appellate jurisdiction nor revisory power, but may advise the churches without in any way binding the latter to accept such advice.

In the Baptist church, the majority of the congregation is ordinarily entitled to rule, and it is but doing justice to the sect to say that the majority rarely abuses its power. To this fact and the simplicity of its government, much of the evangelistic success of the Baptist church is manifestly due.

The case presented by the record is that of a church divided upon questions of local church government, the opposing factions being of practically equal numerical strength, and each faction so embittered against the other as to make it impossible for them to continue members of the same church organization, yet each having some, if not an equal right, to the use of the church building for worship. Neither faction has withdrawn from the church or been ex-communicated. On the contrary, each claims to constitute a majority of the congregation of the Flat Lick Baptist church, and the right to use the church property for purposes of worship. In view of the situation, what should have been the judgment of the circuit court?

With respect to church buildings and other property of independent self-governing congregations—such as the Baptist—which are controlled in the management by a majority of voices, if there be no specific trust involved, in case of controversy following a division and complete separation of one part of the congregation from the other, the civil courts, will as a general rule, give the property to the majority of the members, without inquiry as to whether there has been any change in the religious views of the congregation. But the rule with respect to the property of churches such as the Presbyterian, Methodist and some others, is different. That is the church building or other property of a denominational church, like the Presbyterian, Methodist, &c., in case of controversy or division, will be given by the civil courts to those persons or members of the congregation who are recognized by the highest ecclesiastical court or judicatory of the denomination as being the church or congregation, though they constitute but a minority of the congregation. (*Gibson v. Armstrong*, 46 Ky., 481; *Lamb v. Cain*, 14 L. R. A., 529; *Watson v. Jones*, 13 Wallace, 679; *Trustees v. Harris*, 73 Conn., 217; *Nance v. Busby*, 91 Tenn., 303.)

In the case before us, however, neither faction having withdrawn from the Flat Lick Church, each claiming to be in the majority and, by reason thereof, the right to rule, and there being no church judicatory of appellate jurisdiction to decide the controversy, we think the case simply manifests a schism or division in the meaning of section 322, Kentucky Statutes, which provides: "In case a schism or division shall take place in a society, the trustees shall permit each party to use the church and appurtenances for divine worship a part of the time, proportioned to the members of each party. The ex-communication of one party by the other shall not impair such right, except it be done bona fide on the grounds of immorality." Appellants, even if in the minority, are entitled, under the statute, to the relief asked in the prayer of the petition, viz: To the use of the Flat Lick Baptist Church, one Saturday and the succeeding Sunday in each month; and this the court should have given them, being careful not to allot them the same Saturday and Sunday of each month now used by appellees for worship. The right here claimed by appellants has been conceded by this court in many similar cases, and in at least one instance, to the minority in a case of division in a Baptist Church, even holding that "the ex-communication of one party by the other does not impair the right of the former to the use of the church and appurtenances for divine worship, unless the ex-communication be on the ground of immorality. The mere refusal of a minority to obey the wishes of a majority, or to subscribe to every view the majority may express as to their religious convictions, does not amount to immorality; but, to have that effect, the conduct must be such as amounts to dishonest, wickedness or injustice, such actions as contravene the moral or divine law." (*Ransom v. Rogers*, 6 Ky. Law Rep., 290; *Brook v. Yaden*, 14 Ky. Law Rep., 863.)

The case of Igleheart, &c. v. Rowe, &c., 20 Ky. Law Rep., 821, relied on by appellees, is not in conflict with the view here expressed. In that case only six or eight persons, who had been excluded from membership on charges of immorality, were claiming a right to the use of the church, under section 322, Kentucky Statutes. The court, therefore, very properly held that this did not constitute a schism or division in the meaning of the statute for which reason the action brought by the minority was dismissed.

Appellants are not, however, entitled to recover possession of the old book or church record claimed in the petition, but are entitled to a copy thereof, the cost of making which should be divided between them and appellees. (Brook v. Yadon, 14 Ky. Law Rep., 863.)

It is not too late for the opposing factions of this congregation to agree upon some just basis for a settlement of the dispute out of which this controversy has grown; that the controversy may soon so result, is "a consummation devoutly to be wished." For the reasons indicated the judgment is reversed and cause remanded, with directions to set aside the judgment and enter in lieu thereof another in conformity to the opinion.

Whole court sitting.

BRASHEARS v. BRASHEARS.

(Filed June 20, 1908—Not to be reported.)

Hazelrigg, Chenault & Hazelrigg, R. O. Brashears and Howard, Howard & Horn for appellant.

J. J. C. Bach and W. H. Miller for appellee.

Appeal from Perry Circuit Court.

Judge Hobson delivered the following response to petition for rehearing, overruling:

The statement of the opinion as to when the defendant learned of the judgment is not material; a clerical misprision is only correctible from the record. No parol evidence can be heard. The purpose of the motion is simply to make the record conform to itself. The opinion is not based on any concession of counsel, but on the record.

Petition overruled.

FALLS CITY WOOLEN MILLS v. PIKE.

(Filed June 18, 1908—Not to be reported.)

O'Neal & O'Neal and T. L. Edelen for appellant.

L. F. Wethers for appellee.

Appeal from Jefferson Circuit Court, Common Pleas Branch, Third Division.

Opinion of the court by Judge Hobson on motion to file additional transcript.

We do not find it necessary to consider but one question on the pending motion. Upon an inspection of the record we find no error to the prejudice of appellant.

The motion is, therefore, overruled without a consideration of the other objections made by appellee.

MORSE v. COMMONWEALTH.

(Filed June 17, 1908—Not to be reported.)

B. F. Graziani for appellant.

James Breathitt and Tom B. McGregor for appellee.

Appeal from Kenton Circuit Court.

Judge Hobson delivered the following dissenting opinion:

In this case the circuit court allowed the Commonwealth to prove other acts of embezzlement committed at about the same time as the principal offense and under the same agency, charging the jury that this proof was only to be considered by them on the question of the defendant's guilty intent; and it is held by this court that in so doing he committed an error. The ruling of the circuit court is in accord with the authorities. In a note to *Calkins v. State*, 98 Am. Dec., 163, the rule is thus stated:

"Evidence of other acts of embezzlement committed at about the same time with the principal offense is admissible to show guilty intent; but such evidence can have no further legitimate effect, and must be confined by the court within its proper scope by means of appropriate instructions; and a failure so to do would be ground for a new trial."

This statement of the rule is sustained by numerous decisions in England, by the courts of the United States, and by the Supreme courts of the different States. In a note to *People v. Molineux*, 62 L. R. A., 227, the rule is thus stated:

"As has been stated, intent is an essential ingredient of all crimes at the common law. In some offenses, the creatures of statute, it is not. Again, in some instances the act by which the crime charged is committed is, in and of itself, evidence of a guilty knowledge or intent, or malice; while in others such act may, of itself, be innocent or justifiable, or guilty; and to show the latter it is necessary to prove that such act was done with guilty knowledge or intent.

"It is in proof of crimes of the latter character that the exception to the rule inhibiting evidence of independent crimes is most liberally extended. These in general are, false pretenses or fraud; forgery; counterfeiting; embezzlement; and receiving stolen property.

"It should not be thought, however, that evidence to prove intent is confined to the class of cases just mentioned, but in those cases first spoken of, where the commission of the act is of itself evidence of intent, the actual existence of intent, like that of motive, may be shown, to amplify and intensify the theory and position of the prosecution." (1 Wigmore on Evidence, section 329; Rice's Criminal Evidence, section 460; 1 Robinson Criminal Law, section 465.)

The court admits that the evidence is competent, but in substance holds that it should be introduced in rebuttal and then only where the defense is that there was no fraudulent intent. There are two objections to this ruling. The first is that the law is not so written. The administration of the law is uncertain enough at best. The circuit courts must be governed by the rules of law as given in the recognized text-books, based upon the course of judicial opinions; and when in so doing they are not sustained by this court, by what principles are they to be governed? The other objection is, that embezzlement is a fraudulent conversion of the principal's property by the agent; our statute makes the fraudulent conversion the gist of the offense. To show a fraudulent conversion is, therefore, a part of the Commonwealth's case, and the Commonwealth should make out its case in chief; not in rebuttal. Where the agent collects the prin-

cipal's money, a fraudulent intent may be inferred from the fact that he does not pay it over, but this is an inference which the jury may or may not make under the proof; and so where the Commonwealth can affirmatively show a fraudulent intent by other evidence, it should do so just as the Commonwealth may show affirmatively expressed malice in a prosecution for murder. In an action for malicious prosecution, the law implies malice from a want of probable cause; but it has not been held that the plaintiff may not show express malice, and certainly such evidence would not be allowed in rebuttal. The fraudulent intent in embezzlement may be shown in chief by the Commonwealth just as express malice may be shown in prosecution for murder or in actions for malicious prosecution.

I concur in the affirmance of the judgment, but I do not concur in so much of the opinion as holds that the circuit court erred in admitting the evidence referred to in chief.

RENSHAW v. COOK, JUDGE.

(Filed June 20, 1908—To be reported.)

1. Writs of Prohibition—Granted by Appellate Court—Restraining Circuit Courts—Legality of Action—Under section 110, of the Constitution, providing that "The Court of Appeals * * * shall have power to issue such writs as may be necessary to give it general control of inferior jurisdictions," whenever any inferior jurisdiction, particularly a circuit court, is proceeding beyond its jurisdiction a writ of prohibition may issue out of the appellate court on a proper application to prevent the exercise of the usurped jurisdiction, or when the inferior court has jurisdiction, but there is not an adequate remedy by appeal, the appellate court may, in its discretion, exercise a supervisory control over the inferior court so as to prevent irreparable injury or injustice.

2. Same—Action of Circuit Courts—Invading Jurisdiction of Inferior Court—Authority of Appellate Judge—In the exercise of discretion vested in them by law, inferior courts will not be subjected to interference by the appellate court merely because its views on the subject may be at variance with those of the lower court. There must, in such case, be such an abuse of discretion as would indicate a failure to hear, or a bias in the consideration of the question by the trial judge. But where there is not a discretion, and the inferior court is proceeding out of its jurisdiction, or is invading the jurisdiction of another court or officer, the appellate court may grant the writ to prevent the unauthorized interference.

3. Sheriffs—Failure to Execute Bond—Under act of 1906, chapter 22, article 8, section 2, Sessions Acts of 1906, and Kentucky Statutes, section 4557, requiring sheriffs to execute bond each year, the execution of a bond each year at the time fixed by the statute is a condition precedent to his right of incumbency, and his failure to give such bond for any one of the years works a forfeiture of his office, subject to the discretion of the county court to allow further time as to the bonds subsequent to the first one and without such extension of time the office becomes vacant and he may be removed from his office by the county judge without notice.

4. County Courts—Record Authority—Individual Action of Judge—A county court must speak through its records. A county judge, when off the bench, has no power to bind the county by anything he says or does in his individual capacity.

5. Interlocutory Injunctions—Granted by Inferior Court—Jurisdiction of Appellate Judge—Dissolution—Re-Instatement—By statute a

judge of the Court of Appeals is given jurisdiction to dissolve an interlocutory injunction granted by a circuit judge or any other inferior officer, and the judgment of the appellate judge in that matter, is the law of that case so long as the facts shown in the record are substantially unchanged, until it is reversed by the Court of Appeals. Interlocutory injunctions, if dissolved by the trial court or judge, when re-instated by a judge of the appellate court, may not thereafter be disregarded by the inferior tribunal where the matter may be pending, so long as they remain interlocutory.

6. Same—Jurisdiction of County Judge—Order Removing Sheriff From Office—Revisory Authority of Circuit Judge—In the absence of the circuit judge from the county, the county judge may hear and grant or refuse motions for interlocutory injunctions of a prohibitory nature (section 273, Civil Code), and where a county judge granted an injunction restraining a sheriff from exercising the duties of an office who had refused to execute his annual official bond, the circuit judge had no jurisdiction to grant a temporary writ of prohibition and could not do so without invading the rightful jurisdiction of the county judge.

S. Y. Trimble, Downer & Russell and Trimble & Bell for plaintiff.

McQuown & Beckham and John C. Duffy for respondent.

Opinion of the court by Chief Justice O'Rear, granting plaintiff's prayer for writ of prohibition.

This is an application in this court for a writ of prohibition against His Honor, Thomas P. Cook, judge of the Third Judicial District of Kentucky, restraining him from interfering by order or judgment of his court, with the trial of an application for an injunction before County Judge Prowse, of Christian county, in an action in the Christian Circuit Court between J. M. Renshaw, as plaintiff, and David Smith, as defendant. The last-named action was brought by Renshaw against Smith to oust the latter from the office room in the county courthouse set apart for the sheriff of the county, and to enjoin his using the furniture, &c., or interfering with plaintiff in the occupancy of the said room and furniture, or the handling of judicial process, the collection of taxes, &c. Smith was elected sheriff of the county and qualified, but having failed to renew his bond, as required by statute, his office was declared vacant and Renshaw appointed sheriff, who qualified by executing the bond and taking the oaths required by law. Smith, conceiving his removal to have been irregular, sued out an injunction against Renshaw's interfering with his incumbency of the office. The injunction was granted by Circuit Judge Cook. Application was made to Judge Barker, of this court, to dissolve the injunction. Upon hearing, Judge Barker did dissolve the injunction. Smith, notwithstanding, refused to give up possession of the office in the courthouse set apart for the sheriff. It was then Renshaw sued him for its possession, and sought an injunction against his continuing to occupy it and thereby interfering with the plaintiff's discharge of his official duties. As the circuit judge was absent from the county, notice of application for a temporary injunction in the case was given to be heard before the county judge of the county. Before that application could be heard, Smith applied to the respondent, as circuit judge of the district, for a writ of prohibition against County Judge Prowse, restraining him from hearing or granting the injunction. In his petition, Smith raises again the question of the validity of the order of the county court declaring his office vacant, claiming it was void, for want of notice to him, of the contemplated action. The respondent granted the temporary writ of prohibition against County Judge Prowse.

By section 110, of the Constitution, it is provided: "The Court of Appeals * * * shall have power to issue such writs as may be necessary to give it general control of inferior jurisdictions."

Whenever any inferior jurisdiction, particularly a circuit court, is proceeding beyond its jurisdiction, the writ may issue out of this court on a proper application to prevent the exercise of the usurped jurisdiction. The party complaining will not, in such case, be put to the annoyance, expense and jeopardy of a trial before the tribunal without jurisdiction. Or, when the inferior court has jurisdiction, but there is not an adequate remedy by appeal, this court may, in its discretion, exercise a supervisory control over the inferior court so as to prevent irreparable injury and injustice. But it does not follow that, because this court may do so, it will, as a matter of right in a claimant, use his extraordinary writ in either of the instances above indicated. The matter rests in a sound judicial discretion, to be exercised upon the merits of the particular case. It is exercised most sparingly. For it is believed that ordinarily the usual process of the law, the remedy by appeal and the like, is sufficient to rectify any error that may be committed in the course of the trial below. There are many cases where no appeal is allowed to this court. It would be rare when this court would feel justified in interfering with the exercise of its jurisdiction by the inferior tribunal in such matter. And in the exercise of discretion vested in them by law the inferior courts will not be subjected to interference from this court merely because our views on the subject may be at variance with those of the lower court. There must, in such case, be such an abuse of discretion as would indicate a failure to hear, or a bias in the consideration of the question by the trial judge. But when there is not a discretion, and the inferior court is proceeding out of its jurisdiction, or is invading the jurisdiction of another court or officer, this court may grant the writ to prevent the unauthorized interference.

In the suit at bar there is raised the question of the validity of the action of the county court of Christian county in declaring a vacancy in the office of sheriff, and in appointing plaintiff Renshaw to fill the vacancy. The facts upon which this question is raised fully appear in the opinion delivered by Judge Barker on the motion to dissolve the injunction above alluded to when the case was before him on that question. We now adopt that opinion as the opinion of this court, and the questions passed upon in that opinion are, for the reasons there given, now similarly approved by this court. That opinion is as follows:

"At the regular November election, 1905, the plaintiff, David Smith, was elected sheriff of Christian county, and thereafter qualified by taking the oath of office and executing the bonds required by law. On the first Monday in January, 1907, he executed the annual bonds required by the statute for the year 1907. On March 1, 1908, he failed to execute either of the three bonds required to be executed for that year, and on March 11, the judge of the county court entered an order declaring the office of sheriff vacant, and appointing the defendant, J. M. Renshaw, to fill the vacancy until the next general election for the office of sheriff.

Thereupon the plaintiff filed this action in equity for the purpose of obtaining an injunction restraining Renshaw from taking possession of the office of sheriff of Christian county, or in any way interfering with the plaintiff in the execution by him of the duties thereof. A temporary restraining order was entered by the judge of the circuit court, according to the prayer of the petition, and thereupon the defendant, upon notice, made a motion before me, as one of the judges of the Court of Appeals of Kentucky, to dissolve the injunc-

tion so obtained. After hearing the oral argument of counsel, I deemed the matter of such importance that I brought it before the eastern division of the Court of Appeals, and submitted the various questions involved in the adjudication of the motion to the judges composing that division as if the motion were a case regularly pending in the Court of Appeals.

"The proper adjudication of the pending motion will involve a construction of the following sections of an act, entitled 'An act relating to revenue and taxation,' enacted by the General Assembly of the Commonwealth of Kentucky in 1906 (Sessions Acts, 1906, pages 152-153), and of the Kentucky Statutes.

"Article 8, section 2. The sheriff or collector shall, on or before the 1st day of March next succeeding his election, and on or before the said day annually thereafter, enter into bonds with surety for the faithful performance of his duties. A quietus by the Auditor of Public Accounts, and from the fiscal court of his county for the preceding year shall be produced by each sheriff or collector to the county court on or before that day, and no tax-book shall be delivered to the sheriff or collector after the first year of his term, who shall fail to exhibit such quietus on or before that date. He may execute bond at any time after he receives his certificate of election up to and including the 1st day of March succeeding his election, and it shall be the duty of the judge of the county court to hold a court at any time the sheriff may request for that purpose. The county judge shall judge of the sufficiency of the surety, and in no case shall sureties be taken who are not jointly worth, subject to execution after the payment of all their debts and liabilities, a sum equal to the aggregate amount of money, which may probably be received by the sheriff or collector during the year succeeding the execution of the bond.'

"Article 8, Section 3. On the failure of the sheriff or collector to execute bond and qualify as hereinbefore provided, he shall forfeit his office, and the county court may appoint a sheriff or collector to fill the vacancy until a sheriff or collector is elected.' * * *

"Section 4557. It shall be the duty of the county court to cause the sheriff, annually, to renew his bond required by this chapter, and oftener, if the court may deem proper; and upon his failure to do so, the court shall enter up an order suspending him from acting until he gives said bond, or the court may vacate his office.'

"Section 1058. There shall be a regular term of the county court held by the county judge in each county once every month, on Monday, and until changed, as herein provided, shall be held on the same day it now is. The time of holding the county court in any county may be changed by an order made by the county judge, and entered upon the records of the county court at the last regular term held in the next year preceding the year in which the change is to be made. Special terms of the county court may be held at any time for the transaction of any business except the probating of a will, or granting tavern, liquor or druggist license; and the court may adjourn from time to time until the business is disposed of, but no adjournment shall be to a time beyond the commencement of the next regular term.'

"Section 4134. The county court may require the sheriff to give an additional bond or bonds, with good surety, to be approved by the county court, whenever it may deem the interest of the State or county demands; and the sureties on all the bonds executed by the sheriff shall be jointly and severally liable for any default of the sheriff during the term in which said bond may be executed, whether the liability accrued before or after the execution of such bond or bonds.'

"There is no difference made by the revenue act of 1906, in the law bearing upon the question in hand, except the change in the date upon which the sheriff is required to execute bonds. In the prior statute the

day fixed was the first Monday in January of each year. The language of section 2, of article 8, of the act of 1906, peremptorily requires the sheriff to execute, on or before the 1st day of March of each year of his term, bonds with sufficient surety conditioned for the faithful performance of his duties; and it is not disputed in this record, that the plaintiff failed to discharge this duty on or before the 1st day of March, 1908.

"Section 4557, of the Kentucky Statutes, provides that it shall be the duty of the county court to cause the sheriff, annually, to renew his bonds, and upon his failure to do so the court is required either to suspend him from acting until he does give bond or may vacate his office. So far as this phase of the case is concerned, I am of opinion that it is concluded by the reasoning in *Schuff v. Pflanz*, 99 Ky., 97. That case is similar in principle in all respects to the case at bar, except that, after the sheriff failed to give bond at the proper time, the county judge accepted his bond and then entered an order vacating the office and appointing a successor. Two questions arose from his proceeding: First, the right and duty of the county judge to declare the office of sheriff vacant upon the failure of that officer to execute the bonds as required by law; and, second, the effect upon this right and duty in permitting the officer to execute the bonds after the time required by law. The court held, construing section 4130 (identical with section 2, article 8, acts of 1906, except as to date of bonds to be given), with section 4557, of the Kentucky Statutes, that the county court had the right to vacate the office of sheriff upon the failure of the officer to execute the bonds as required; but having accepted the bond from him, the court could not afterwards vacate the office. In other words, it was there held that the court, under the language of section 4557, could do either of two things: First, suspend the officer until he executed the bonds; or, second, vacate the office. The first alternative authorized the court to force the officer to give bond without vacating his office, and what the court did was to practically adopt this method, although the order of suspension was not entered; but it was clearly held that the court might have vacated the office for the failure to give the bonds at the proper time. In the opinion it is said:

"This statute (section 4557) should be construed in connection with the revenue statutes (now section 2, article 8, acts of 1906), and it is manifest that a fair interpretation of the legislative meaning is that, upon the failure to execute any bond required of this official, for the protection of the State, county or citizen, the county court may remove him from office; and particularly where, by statute, it is made the plain duty of the official to execute the bond on a particular day. The duty then devolves on the sheriff and he must comply with the law; but it does not follow because the sheriff fails to renew his general bond or to give an annual bond for the collection of the revenue that the county judge is powerless to accept a bond after the first Monday in January. He may, it is true, vacate the office, but before he does this he accepts a bond that is in addition to or a new bond, upon which the last sureties became jointly liable with the sureties on the first bond. It is a bond sufficient to satisfy the court that all will be protected who are interested in its execution, and when accepted, the sheriff having previously qualified, it is then too late to enter an order vacating the office.' In the case at bar the county judge did not accept the bond from the sheriff, or permit him to execute one and this differentiates it from the phase of *Schuff v. Pflanz*; and it necessarily follows from the principle of that case, as applied to the facts of this, that the county judge had the right to vacate the office of the plaintiff upon his failure to execute the bond at the required time, and to appoint the defendant sheriff in his stead.

"It is, however, insisted by the plaintiff that the language of section 4557 requires the county judge to give the sheriff notice that he

has failed to execute his bond. This position is based upon the language of the statute, that 'It shall be the duty of the county court to cause the sheriff, annually, to renew his bond,' &c.; it being said that this language requires the county judge to exercise a supervising oversight as to the sheriff, and, at least, to give him notice, of his failure in regard to the execution of his bonds, and afford him an opportunity to rectify the omission. It seems to me that this would be a very strained construction to place upon the language of the statute. Taking the section as a whole, it is clear that the county court shall cause the sheriff to execute his bond, either by suspending him until he does so, or vacating his office, if he chooses. The duty of executing the bond was upon the sheriff, and he knew whether he had performed this duty or not, and upon his failure to do so, the statute cast upon the county judge the duty of forcing the delinquent officer to execute the bond by suspending him, or of vacating the office and filling it with one who would execute the bond required by law.

"The plaintiff pleaded (and introduced evidence to support it) that in October, 1907, one Frank Rives had been appointed by the county judge (the predecessor of the county judge involved here) as special commissioner to settle his accounts as sheriff as the basis for a quietus to be thereafter obtained from the fiscal court; that the plaintiff did not settle his accounts with Rives in 1907, because he was advised by the county attorney not to do so until after the railroad tax was collected, and that upon the advice of the county attorney, he deferred the settlement; that in January, 1908, Rives, who had been elected to the State Senate, left Christian county and went to Frankfort, Kentucky, in the discharge of his legislative duties, and remained there until March 1, 1908; and that not being able to make the settlement of his accounts, he could not obtain a quietus, and, therefore, did not execute his bond; that anticipating this result, he spoke to the county judge, and that officer told him that if he did not execute the bond on the 1st day of March, as the law required, he would permit him to execute it afterwards and date it March the first. All of this was controverted in the pleadings, and contradicted most emphatically by the county judge in the evidence. But assuming the facts to have been as contended for by plaintiff, can it avail him as a legal excuse for the non-performance of his duty in the premises? In the first place, the obtaining of the quietus required by the statute is not a condition precedent to the execution of the bond, and is entirely separated from it by the statute. The plaintiff was, indeed, required to have the quietus, but the failure to obtain it did not prevent his executing bond, and the execution of the bond in nowise prevented the consequence from the failure to obtain the quietus. Without the quietus the statute provides that the tax book shall not be delivered to the sheriff; but this would be true whether the bond was executed or not. The execution of the bond and the obtaining of the quietus are separate duties, and the failure to perform these duties imposes separate and distinct consequences.

"Furthermore, the county court must speak by its records. The county judge, when off the bench, has no power or authority to bind the county court, and it would entail most disastrous consequences if those having business with the county court could come in and set up conversations had with the judge on the street, or out of office, in bar of the consequences of the judgments of the court. Nothing that the county judge may have said as an individual can be allowed to militate against the judgment of the county court. It is an elementary proposition that even written opinions of the court do not bind; but it is the decree entered upon the judgment roll that has force and effect. Therefore, admitting to be true all that the plaintiff contends took place between the county

judge and himself with reference to the execution of the bond involved here, it can not be allowed to avail him upon this motion.

"It is also said that the regular term of the county court of Christian county commenced on the second day of March, 1908, and there was no order of adjournment to the eleventh day of March, 1908, when the judgment vacating the office of plaintiff was entered. I think the record conclusively refutes this as a matter of fact; but whether it does or not, section 1058, of the Kentucky Statutes, expressly permits the county judge to hold special terms of court at any time he may see fit, for any business but certain named exceptions, of which that involved here is not one.

"It was not necessary that the county judge should give plaintiff notice that he intended to enter a judgment vacating the office. The court only had jurisdiction to enter the order provided the bond had not been accepted and filed. This was a matter of record, and its existence jurisdictional. There was but one question: Had the bond been filed? This could only be established by the record. Upon the failure to execute the bond and file it on the day required by the statute the authority of the county court arose to vacate the office. The record shows (and it could not be contradicted) that no bond was filed. The right to vacate the office was absolute, and the judgment of vacation removed the plaintiff from office.

"For the foregoing reasons, I am constrained to dissolve the injunction granted by the circuit court; and it is so ordered.

"In this conclusion I am authorized to say that Chief Justice O'Rear and Judges Lassing and Carroll, concur."

Just why that opinion was not deemed binding upon the parties to the litigation, and upon the circuit judge, whose official action is reviewed and reversed, we are not told. It was ignored, or attempted to be, by Mr. Smith and his counsel, and seems to have been regarded by the circuit judge as not binding upon him, either because it was not the authoritative action of the Appellate Court, or was made inapplicable by other facts occurring subsequent to its rendition, and which materially affected the status of the case. The circuit judge has not filed a response in this proceeding. Hence we are left in some doubt as to what he based his action upon. If counsel who appear here for him correctly present his views, then we may assume that his action was based upon one or both of the following propositions: First. That the action of the county court declaring the office of sheriff vacant, was had without notice to the former incumbent, Smith, and was a judgment depriving him of his office without a day in court: and for that reason was void; that being void, the opinion of Judge Barker delivered upon the motion to dissolve the injunction in the first action raising the question, holding that it was not void, was erroneous and not binding upon anybody in another action, although the same question might be again raised. Second. That since the opinion was delivered, Mr. Smith has prosecuted an appeal to the circuit court from the judgment of the county court, and has executed the necessary appeal bond, which in appeals in those courts operates as a supersedeas; that the order of the county court appointing Renshaw was therefore suspended until the circuit court should act on the appeal; and that in the meantime Smith was entitled to discharge the duties of sheriff and occupy the room set apart for that office; that Prowse, the county judge, was made a party to the suit enjoining Renshaw from taking possession of the office (the first suit) and was disqualified by that fact from sitting in judgment on the motion in the second suit, the one brought by Renshaw against Smith for an injunction and possession of the office rooms, &c.

The writer feels that nothing can be added to the reasoning in Judge Barker's opinion, delivered upon the motion to dissolve the injunction. But counsel for respondent assail its soundness on the ground that it is in conflict with certain opinions heretofore delivered by this court, and which hold that one elected to an office who has qualified can not be deprived of his office by the judgment or action of any tribunal without having had his day in court—that is, notice of the action in which it is sought to oust him. It is conceded that if the statute authorized his removal without notice, the act would be valid. (Page v. Hardin, 8 B. Mon., 648, and Todd v. Dunlap, 99 Ky., 460, are relied on in support of the respondent's contention.)

Page v. Hardin, supra, was the removal of the Secretary of State from office by the Governor, because of the former's alleged neglect of official duty. The act was done upon the Governor's own motion, and without trial or notice. The Secretary of State was then removable from office by the Governor for cause. The court found the fact to be that the alleged cause did not exist. Aside from certain deficiencies in pleading upon which the court, in a large measure, rested its decision, it was stated, and we think correctly, that an appointment of one to office for a definite term, vests the appointee with such right to its emoluments that he can not be ousted without cause and a hearing, unless the statute provides for dispensing with such procedure.

The same principle was restated in Todd v. Dunlap, supra, where it was averred that the mayor and aldermen of Louisville were threatening to remove certain members of the Board of Public Works, without cause or notice. But we are of opinion that the principle relied on is not applicable in this case. Here the incumbent had not the right to the office at all, unless he first executed certain bonds. The execution of the bonds each year at the time fixed by statute, is a condition precedent to his right of incumbency. The second and third years are not different from the first. If he failed originally to qualify by executing bonds after his election, no one would say that the elected sheriff must first have a notice that the office would be declared vacant before the county court could so declare. The statute is explicit, and the reasons are as important that the second and every subsequent annual bond be executed as the first. The failure to execute one of them works a vacancy in the office, subject to the discretion of the county court to allow further time as to the bonds subsequent to the first one. It is not a forfeiture or a penalty for something done, but is the equivalent of a resignation. The office became vacant, because the statute declares that is the result, unless the county court extend the time. The provisions of the statute are for the benefit of the taxpayers and the public. The office is one of vast importance. That official collects all the taxes, in his county, for the State and county. The Legislature has taken great pains to safeguard the public by exacting the prompt execution of sufficient bonds, and vesting the county courts with large discretion in the matter of seeing that the bonds are solvent and are executed when they should be. The order of the county court did not deprive Smith of his office. It was the statute. The county court was given the power to stay the operation of the statute by extending the time to the sheriff within which to execute the bond. But without such extension the office was vacated and the sheriff and all the world had notice of that fact from the statute itself.

In Schuff v. Pflanz, supra, the court did extend the time by accepting the bond subsequent to the date fixed by the statute; or, in other words, waived the failure by accepting the bond after the time fixed

by statute. That case goes no further, and it should not. Such statutes affect the State revenue and are not to be dealt with lightly, and played with as at shuttle-cock, according to the convenience or partiality of public officials. They should be held to mean what they say, and when the statute says that if the sheriff fails to execute a bond to secure the collection of the public revenue, on or before the first day of March, that the office shall thereupon become vacant, and the county court shall thereupon appoint his successor, there ought not to be read into the statute something different, for instance, that if the sheriff, without good excuse, fails to renew his bond, the county court may, upon notice and after trial, adjudge the office to be vacant, and fill the vacancy by appointment. It does not make any difference under this statute, what the reason was that prevented the sheriff from executing the required bonds; it is his failure that vacates the office. There is nothing for trial. No extraneous fact to be ascertained; no dereliction of conduct to be adjudged. Whether the bond had been executed, the records of the court will show, and if not executed the statute takes effect, unless the court sees proper to extend the time, as it was held in *Schuff v. Pflanz*, it might do under section 4557, Kentucky Statutes. It was suggested in argument that the sheriff might tender a good bond within the time, and the county court might, from partisan or other improper motive, refuse to accept it, or to allow the record to show any fact connected with the tender. It is sufficient to say that the suppositious case is not here; it is quite likely, as is usual, a good tender would be upheld to be the equivalent of doing the act required, and that a court of competent jurisdiction would compel the acceptance of the bond, its solvency being conceded.

We adhere to the conclusion on this point stated in Judge Barker's opinion herein adopted.

By statute, a judge of the Court of Appeals is given jurisdiction to dissolve an interlocutory injunction granted by a circuit court judge, or any other inferior officer. The judgment of the appellate judge on that matter, is the law of that case, so long as the facts shown in the record are substantially unchanged, until it may be reversed, or departed from by the Court of Appeals. The jurisdiction is conferred by statute—as all appellate jurisdiction is—and when exercised, neither the parties to the record, nor the inferior courts, are at liberty to set it aside; for the time being it is as binding upon everybody concerned as if rendered by the Court of Appeals, sitting in banc. Like other judgments, it is binding not only in the particular case, but as between the same parties or their privies, and before whatever judicial tribunal it may come, it is binding upon them all if the same subject-matter is involved. It can not be avoided by bringing a new suit about the same thing, presenting for decision again the same or substantially the same disputed question of law and fact. To allow such practice would bring the authority of the law into disrespect, and unsettle that which it was intended by the statute conferring the jurisdiction should be put at rest for the time being. Final authority in such matters must be vested somewhere. And wherever vested, when exercised it should be respected and must be obeyed. When the circuit judge's action in such matters is final by the operation of the statute, it binds everybody, including this court, till such time as it may be overborne by the means allowed by law. Interlocutory injunctions, if dissolved by the trial court or judge, when re-instated by a judge of the Court of Appeals, may not thereafter be disregarded by the parties or the inferior tribunal where the action may be pending, so long as they remain interlocutory. If upon the complete preparation of the case, the record presents a different state of facts, sub-

stantially, from that made to appear on the interlocutory hearing, the trial court may then refuse to grant the permanent injunction, thereby dissolving the temporary order. When, this court may, in the manner allowed by the Code(section 747, Civil Code) re-instate the interlocutory injunction pending the appeal, or by reversing the judgment on final hearing, order it to be re-instated by the trial court. On the other hand, if the trial court grants a temporary injunction, which, on application to a judge of this court, is dissolved, it must stand dissolved throughout the litigation, and until a final trial in the circuit court, when, if the facts are materially different from those shown on the interlocutory hearing, a permanent injunction may be granted by the trial court. Any other procedure would beget unseemingly conflict in authority and a possible war between jurisdictions.

But it may be that the circuit judge proceeded upon the idea that by the appeal prosecuted by Smith from the order declaring the office of sheriff vacant, and appointing Renshaw to it, that order was superseded, and that Renshaw had no right to the office whilst the order appointing him was suspended.

All appeals are regulated by statute. Those to this court, from judgments of circuit courts include all matters not excluded by the statute: (section 950, Kentucky Statutes); those to the circuit court from county and other inferior courts such only as are expressly named and allowed by the statute. (Section 978, Kentucky Statutes.) The statute conferring appellate jurisdiction upon the circuit court reads as follows:

"Appeals may be taken to the circuit court from all orders and judgments of the fiscal court or quarterly court in civil cases where the value in controversy, exclusive of interest and cost, is over twenty-five dollars; and from all judgments of the county court where the amount in controversy is over fifty dollars, exclusive of interest and cost; and from all judgments and orders of said court in cases of bastardy, or in the settlement of the accounts of personal representatives, assignees, guardians, trustees, curators and other fiduciaries, and from orders granting, revoking or refusing letters testamentary or of administration, or appointing or refusing to appoint, or removing curators, guardians, trustees or committees of estates, or granting or refusing to grant druggist, tavern or liquor license, and from judgments in proceedings to condemn land for any purpose, and in all other cases allowed by law."

It will be observed that in allowing appeals from quarterly and fiscal courts to the circuit court, the jurisdiction is restricted to "civil cases, where the value in dispute" exceeds twenty-five dollars; but the language granting appeals from judgments of county courts is significantly different:

"All judgments of the county court, where the amount in controversy is over fifty dollars, exclusive of interest and cost, may be appealed from."

Then follows a list of other judgments of county courts that may be appealed from, including most of the matters over which that tribunal has jurisdiction, but not including the order of the county court removing or appointing a sheriff. It must be presumed that the Legislature was not so particular in this matter, without intention. Knowing that they were creating an appellate jurisdiction from the county to the circuit courts, and naming specifically so many of the matters over which that tribunal had jurisdiction, most of them of much less importance than the one of appointing or removing a sheriff, it must be taken that they meant to exclude the latter from the appellate jurisdiction thereby created. But it is argued that the value of the office of sheriff is far in excess of fifty

dollars, and we have no doubt that is true. But the value of the thing in controversy is not the test in allowing appeals from the county court, although, it is in appeals from quarterly and fiscal courts. It is the "amount in controversy" that controls the question in appeals from such county court judgments are not otherwise specified. The word "amount" can apply only to a judgment for money, while "value" may be applied to judgments for a number of things other than money. The office of sheriff ought not to be left vacant, nor ought the solvency of the bonds required, or their prompt execution be delayed or determined by any other official than the one upon whom the Legislature has imposed that duty. For a great many years the county courts alone have had that jurisdiction. They are peculiarly qualified, as the Legislature seems to have considered to discharge it acceptably and safely. County judges are elected with that duty in view, and it may be safely supposed, that they are chosen by the electors with some particular reference for their fitness to discharge it. Circuit judges serve a district more frequently made up of a number of counties—they have not generally the acquaintance nor the means of personal knowledge touching the financial standing of the sureties who may be offered on sheriff bonds. Nor are circuit clerks who accept appeal bonds so well qualified, generally, as are the county judges to pass on such questions. The county judge's jurisdiction is mainly over the fiscal affairs of his county. He has many means and opportunities afforded by the daily affairs of his office for knowing who are safe sureties, and the amount that will probably pass through the sheriff's hands, not open to other officials. The situation and the studied language of section 978, Kentucky Statutes, *supra*, and the rule of construction that the expression of some indicates the exclusion of all others, leave us in no doubt that orders of the county courts removing and appointing sheriffs, are not the subject of appeal to the circuit court. Hence the appeal attempted by Smith, did not suspend the county court's order, but being void, left it in full force.

In the absence of the circuit judge from the county, the county judge may hear and grant or refuse motions for interlocutory injunctions of a prohibitory nature. (Section 273, Civil Code.) As Circuit Judge Cook was absent from Christian county when the application was made in the case of Renshaw against Smith, county Judge Prowse had jurisdiction to hear and determine the question, whether the temporary injunction applied for in that case should be granted. Nor did the fact that he had been joined as a defendant in a former action of Smith against Renshaw, disqualify him from acting. His being joined in the other case was merely formal; he had no personal interest in it. Nor has he now any, so far as this record intimates. The action of the respondent in granting the temporary writ of prohibition was beyond his jurisdiction, as he could not do so without invading the rightful jurisdiction of the county judge in the matter, conferred upon him by statute, so long as he was in the county and not disqualified from acting, and the circuit judge was out of the county.

The respondent is directed to forthwith set aside his order prohibiting County Judge Prowse from trying the action for injunction in the action of Renshaw against Smith, pending in the Christian Circuit Court, and the writ of prohibition prayed for in this application is granted.

The whole court sitting.

Judges Nunn, Settle and Hobson dissenting.

ILLINOIS CENTRAL R. R. CO. v. VAUGHN.

(Filed June 20, 1908—Not to be reported.)

1. Railroads—Collision of Trains—Injury to Flagman—Negligence of Company—Contributory Negligence of Employee—A caboose on a work train is the proper place for the flagman of such train to ride. Where a work train which was loaded with railroad track rails, was run into by a freight train, it was not negligence of the flagman to jump off from the rear end of the caboose and the fact that he was injured by the loose rails on the flat car being driven against him in attempting to escape from the caboose, did not make him guilty of contributory negligence preventing his recovery for damages against the railroad company whose negligence had placed him in peril.

2. Same—Evidence—Resumption of Work—Discharge—Cause—In an action by a flagman for damages for an injury in a collision of trains where he testified that he resumed work for the company after he had partially recovered from his injury but was discharged because of his inability to work on account of his injury, it was competent for the company to prove that he was discharged for inebriety and not for inability to labor otherwise.

3. Same—Evidence—Contract of Settlement—Meaning—Instructions to Jury—Where, in an action by an employee against a railroad company for damages for an injury, a written contract was introduced in evidence, purporting to be a complete settlement of plaintiff's entire claim, the court should have told the jury that such writing alone must be looked to for the meaning of the parties, if an intent may be gathered from its terms; and its intent is governed solely by the law and not at all by the mental consideration of one of the parties to it; there being no plea of mistake.

4. Same—Accepting Compensation—Tender Before Suit—Where, in an action for damages by an employee, against the railroad company, a written compromise of settlement was pleaded by the company for the entire claim which the plaintiff claims was intended for and was accepted by him solely for his lost time caused thereby, he was not required to tender back the money he claims was paid for lost time, but if he recovers in his action he should be required to account for the money he received.

5. Evidence—Pleadings of Adverse Party—Competency—Where there is no admission of fact in the pleadings of the defendant against its interest, they were not competent to be read on the trial as evidence for the plaintiff.

Trabue, Doolan & Cox and Lockett & Worsham for appellant.

Dorsey & Stanley and J. Morgan Chinn for appellee.

Appeal from Henderson Circuit Court.

Opinion of the court by Chief Justice O'Rear, reversing.

Appellee was flagman on a work train on appellant's road. The work train, in going into Clarksville, Tenn., ran into a freight train standing on the track, near the city limits of Clarksville. The work train was composed of the locomotive, caboose and a flat car, the latter loaded with railroad track rails, and owing to a defective draw-head, or coupler, was coupled back of the caboose. Appellee's duty was to look after the rear of the train, where the caboose is ordinarily. He was riding in the caboose, when, noticing the engineer, fireman and conductor jump from the engine, he ran to the rear of the caboose to jump off. At that moment the collision occur-

red, some of the rails on the flat car being driven forward by the impact, pinning his body to the car. He claims to have sustained permanent injury to his leg and kidneys, and painful injuries elsewhere upon his person. He sued for and recovered \$2,000 as damages.

The peremptory instruction asked for by appellant was properly overruled. A collision of two trains under the circumstances shown, of itself proves that those operating the trains, or one of them, were negligent. Furthermore, it was gross negligence in those in charge of one or the other of the trains, certainly, and may be of both, to have so disregarded orders, in running on the time of the other, or of the train dispatchers in letting two trains out on the same track running in opposite directions, at the same time, at the meeting point without notifying either of the other's presence. So that, on that score, there was enough evidence of gross negligence in the fact of the collision to have taken the case to the jury. Nor is there any merit in the contention that plaintiff was not in his proper place when he was injured. The company had not the right to injure or imperil him by its gross negligence, wherever he, an employe, rightfully upon the train, may have been upon it. But the caboose was shown to be the usual place for the flagman to ride while the train was running between stations. He was therefore in his proper place. When put in peril by an imminent collision, he was not obliged to exercise a correct judgment as to the course he should pursue for his own safety. His act in attempting to jump from the rear of the car was natural under the circumstances, and he was not negligent in his choice of means to avert or escape from the peril in which his master's negligence had placed him.

Appellee testified on the trial that he was so severely injured that he could not thereafter follow his former avocation, and was indeed physically unfit for hard manual labor. It was shown, however, that some two or three months after his injury he again went to work for appellant railroad company, in his old capacity as a flagman on freight trains. But he testified that he was compelled to quit the job on account of his injuries having so impaired his strength as to make him incompetent for such hard labor. He also testified that owing to his being unable to do the work, appellant discharged him. He was asked, on cross-examination, if he had not been discharged because of his inebriacy, instead of his physical disablement. He denied it. The appellant then offered to prove that he had, on returning to work, after the injury, been as able to perform his duties, and did so as competently as ever before, and was so employed for several months, making the same wages as before his injury; but that owing to his intemperate habits as to the use of intoxicants, he was discharged.

The trial court refused to allow the evidence offered by appellant as to the reason for discharging appellee. We think that was error. If appellee had not by his testimony endeavored to make, and probably had made, the impression on the jury that he had been discharged because of his weakened and impaired physical condition to do the work of a brakeman, the evidence on that point offered by appellant would have been irrelevant. But appellant was entitled to rebut the statement made by appellee on this point. It was not collateral.

Appellant pleaded that some days after appellee's discharge from the hospital, he entered into a compromise agreement with it, by which, in consideration of \$100, then paid to him by appellant, his claim for damages on account of the injuries sustained in the collision was settled, and compromised. The written agreement was filed with the pleading. Appellee replied that he was procured by fraud to sign the agreement; that he did not read it; that appel-

lant's agent, with whom the settlement was made, represented that the only matter that was being settled was the time which appellee had lost from work while laid up by his injuries, and that he was assured that his claim for damages, if any there was, was not affected by the settlement. He also pleaded that owing to his intense suffering and being under the influence of morphine, taken to ease his pain, he did not comprehend what he was doing. The evidence on this issue was, as might be expected, sharply conflicting. Appellee and his brother who was present at the settlement, each in his testimony, sustained appellee's plea. On the other hand, appellant's claim agent denied, positively, that such representations were made. The testimony as to appellee's suffering and his use of the opiate is rather hazy. The court instructed the jury on this issue as follows:

"The court further instructs you that if you shall believe from the evidence that the one hundred dollars mentioned in the evidence as having been paid to plaintiff was paid to and accepted by him in full settlement of all of plaintiff's demands growing out of the alleged injury complained of, then in that event you should find for the defendant, although you may believe that the receipt read in evidence was obtained by fraud or misrepresentation."

This instruction is erroneous. If plaintiff executed the writing understandingly, and without being deceived by the fraudulent misrepresentations of appellant's claim agent, he is bound by it, no matter whether he "accepted the payment" of the \$100 in full settlement or not. The first question is (having admitted its actual execution) did he have mind enough, at the time, to comprehend the nature of his act; then, was he induced by the fraudulent misrepresentations of the agent of appellant to sign it without reading it, being lead thereby to believe it was only a receipt for payment for certain time he had lost and not for his injuries; if he was not so imposed upon, and did have mind enough to have comprehended the nature of the contract, it remains only for the court to construe the writing. The writing purports a full and complete settlement of the plaintiff's entire claim for damages growing out of that injury. The court should have told the jury so. Where parties set down their contract in a written memorial, it alone must be looked to for their meaning, if an intent may be gathered from its terms, and its effect is governed solely by the law, and not at all by the mental consideration of one of two parties to it, there being no plea of mistake. Suppose it were so that plaintiff's mind was not impaired at that time, and that the writing was signed by him without fraudulent imposition. Could he still say "I did not accept the \$100 in settlement of all my demands?" Yet this is what the instruction allows. No; if he signed it in his right mind and without imposition, that should be the end of this case. The plaintiff's weakened physical condition; his state of mind, not yet being accustomed to his maimed condition; his anxiety to return to his work, and unwillingness to believe he was permanently injured; the inequality of the position of the parties to the transaction; the assuring manner and words of the claim agent; perhaps the use of the opiate; all these are evidence which tend to sustain plaintiff's claim of imposition, aside from the direct representations claimed by plaintiff to have been made to him. The situation was such as to relax the rule that a party who signs a contract without reading it will not be heard to say that it does not express his intention; besides the gross inadequacy of the compensation, if the plaintiff was injured to the extent he says he was, requires but slight additional evidence of fraud in its obtention or execution to overturn such a settlement. (Railroad Co. v. Harris, 158 U. S., 331.)

The plea in this case was broad enough and the evidence suffi-

cient, to have authorized the submission to the jury of the question of fraud, as well as of mental condition when the paper was executed, if the pleadings had justified it. But, under the instruction given, the jury might well have found that the plaintiff was not imposed on (the question as to his mental condition was not submitted), and yet that he did not "accept" the \$100 in settlement of all his claim—for he testified that he did not so intend. Then their verdict for the plaintiff not unnaturally followed.

Plaintiff did not tender back the \$100 before his suit. This he should have done (*L. & N. R. R. Co. v. McElroy*, 100 Ky., 158) unless, as he pleads, it was paid to him on account of lost time alone. In that event a tender of repayment was not required. (*McGill v. L. & N. R. R. Co.*, 24 Ky. Law Rep., 1245; *Ingram v. Cov., &c., R. Co.*, 28 Ky. Law Rep., 508; *I. C. R. R. Co. v. Belt*, 29 Ky. Law Rep., 421-3.) But, if he should recover, he ought to be required to account for the \$100, as loss of time from the date of the injury was one of the elements of his damage.

Under the state of pleadings in this case, the question of appellee's mental condition was properly not submitted to the jury. Nor should the fact of fraud practiced by appellant's agent be submitted at all, except as it bears upon the one phase allowed, namely, the alleged substitution by appellant's agent of agreement settling the demand sued on in full for the agreement alleged by appellee of settling only for his lost time. The reason other features of fraud may not be submitted is, that, as the plaintiff failed to tender back the consideration received by him after he became aware of the fraud that was practiced upon him he is deemed in law to have ratified it. Having ratified it, he can not now disregard his ratification. But as to the claim of fraud for which, under the authorities cited, he does not have to tender repayment of the consideration, the question of such fraud may be submitted to the jury. The instruction given without defining fraud, left to the jury every element that they may have supposed constituted it; whereas it should have been limited as above indicated.

Plaintiff was allowed to read the pleadings of the defendant to the jury as evidence. There was no admission of fact in the pleadings of the defendant against its interest which entitled plaintiff to have the pleadings read to the jury. We think the court erred in admitting them as evidence.

For the reasons indicated, the judgment is reversed and cause remanded, for proceedings consistent herewith.

MAYFIELD WATER AND LIGHT CO., &c. v. WEBB'S ADM'R.

(Filed June 20, 1908—To be reported.)

1. Electric Light Wires—Injury to Children—Elevations Beyond Danger—As long as electric light wires are not required to be put under ground, they must be put on poles, and where they are placed as high as eighteen feet above the street, the company should not be required to anticipate that children will climb up to them and get hurt and the company should not be held liable in such a case.

2. Same—Trespassers—Risk Assumed—Children, as well as adults, when they trespass upon the property of another, take the risk, unless, the circumstances bring the case within the principle of what is known as the Turn Table cases, where a dangerous instrumentality is used that is attractive to children.

Robbins & Thomas for appellants.

W. B. Stanfield for appellant Telephone Co.

W. J. Webb, Webb & Seay and Weaks & Weaks for appellee.

Appeal from Graves Circuit Court.

Opinion of the court by Judge Hobson, reversing.

The Mayfield Water and Light Co., maintains a system of electric lights in Mayfield. It erected, along College Cross street, a line of poles eighteen feet high, and at the top of the poles, on a cross-arm, it placed two electric wires, twenty inches apart, and eighteen feet from the ground. After this had been done, the Home Telephone Company put up a line of poles along the street thirty feet high, and on these poles it placed wire cables containing its telephone wires. At the intersection of Sixth street, the telephone poles turned in Sixth street, and to keep its pole straight at this point, it attached two guy wires to the top of the pole and ran them out to a deadman, or log, buried in the ground, the guy wires running down from the top of the pole at an angle of about 45 degrees, being about four feet apart at the ground and coming together at the top of the pole. The guy wires passed in about eight inches of the electric wire. The children of the neighborhood would hold on to the upper guy wire with their hands and walk on the lower wire and then slide down, using the wires to play upon. Charles M. Webb, a little boy eleven years old, was playing upon the wires in this way when his head touched the electric wire thus completing the circuit, and he was instantly killed. This suit was brought against both the electric light company and the telephone company to recover for his death. A recovery was had in the circuit court for \$1,000, and the defendants appeal.

There was proof on the trial that the insulation on the electric light wire was defective; and there was also proof that whatever the condition of the insulation might have been, the result would have been the same, when the little boy's head touched it, while he was standing on the other wire which ran into the ground, the proof, being, that the insulation will not protect from injury when such a high current of electricity is carried as was used on this wire. The ground upon which the recovery is rested is that in the construction of the wires, they were made attractive and inviting to children, and that the defendants were guilty of negligence in so maintaining the wires and permitting them to remain in this dangerous and unprotected condition. This court has in a number of cases held electric light companies responsible where it permitted live wires to hang in the street. Thus in *City of Owensboro v. York's Adm'r*, 25 Ky. Law Rep., 1397, a little boy twelve years old, discovered that a wire was hot, and being dared by one of his companions to touch it, got on a board, took it in his hands and was killed. A judgment for the plaintiff was sustained. (*Macon v. Paducah Street Railway Co.*, 23 Ky. Law Rep., 46; *Lexington Railroad Co. v. Fain*, 24 Ky. Law Rep., 1443; *Thompson v. City of Somerset*, 30 Ky. Law Rep., 131; *Maysville Gas Co. v. Thomas*, 21 Ky. Law Rep., 1690, 25 Ky. Law Rep., 403.)

But in all of these cases the wire was in the street; here the wire was eighteen feet above the street. It could only be reached by a person climbing the electric light pole or walking up the guy wire of the telephone company. In all the cases where a liability has been imposed for what is known as an attractive nuisance to children, the nuisance has been placed within their reach. We know of no case where this has been applied to things put eighteen feet above the ground which may only be reached by climbing a

pole or walking up a wire. Such structures are not an invitation to children to use them. A child may climb a dead tree and thus get hurt, but the owner of the tree can not be said to maintain an attractive nuisance, because he keeps a rotten tree on his land. To climb this pole or walk this wire was as difficult as to climb a tree and no reason would exist for holding one an attractive nuisance more than the other; for if the limbs of the tree were brittle or rotten, there would be no great danger in climbing out on them. In *Simonton v. Citizens Electric Light Co.*, 67 S. W., 530, the defendant had placed spikes in its poles for the use of its men in ascending and descending them. Children in the neighborhood got to using the pole in the same way. One of them went up on the pole and lost his balance and fell to the ground. It was held that the company was not liable. The spikes on the side of the pole would offer a much greater inducement to a child to climb the pole than the guy wire offered in the case before us. In *Johnson v. Paducah Laundry Co.*, 29 Ky. Law Rep., 59, the defendant had upon its open lot an open vat of hot water. The plaintiff, walking upon the lot in the night for a purpose of his own and without right, fell into the vat of hot water and was burned. It was held that he could not recover. In *Schauf v. City of Paducah*, 106 Ky. 228, a little boy wading out into an open pond on the property of the city to catch a bird, got over his depth and was drowned. It was held that there could be no recovery. Other authorities are collected in these opinions. The tendency of the more recent cases is to restrict rather than enlarge the application of the principle laid down in what are called Turn Table cases; and to hold that the defendant is not liable unless he knows or ought, in the exercise of ordinary care, to know that his structure is alluring to children and endangers them (*Barnes v. Shreveport R. R. Co.*, 49 Am. St. Rep., 416 426.) In *Harris v. Cowles*, 107 Am. St. Rep., 847, a child was injured by a revolving door at the entrance to a building, the door being similar to those in common use in winter to keep out the cold. It was held that the trespasser, though a child of tender years, could not recover, on the ground that to extend the rule would be to impose a burden upon the property owners that would be unreasonable. The same principle was applied in *Fitzmaurice v. Connecticut R. R. Co.*, 112 Am. St. Rep., 159, where a child was burned at a pile of hot ashes left upon the defendant's premises; and in *Foster-Herbert v. Cut Stone Co.*, 112 Am. St. Rep., 881, where a child climbed into a low wagon and was there hurt. As long as electric light wires are not put under ground, they must be put upon poles, and where they are placed above the street as high as eighteen feet, the company should not be required to anticipate that children will climb up to the wires and get hurt. Guy wires are necessary on high poles at street corners, where the line turns. A guy wire placed on a high pole to keep it in place, or some such contrivance, can not well be dispensed with. Such a wire is not a dangerous instrumentality, attractive or alluring to children within the meaning of the Turn Table cases. The little boy was a trespasser upon the defendant's wire, and being a trespasser he can not complain that the premises were unsafe. Children, no less than adults, when they trespass upon the property of another, take the risk unless the circumstances bring the case within the principle of what is known as the Turn Table cases, where a dangerous instrumentality is maintained, with knowledge actual or constructive, that it is alluring to children and endangers them. A wire eighteen feet above the ground, which can only be reached as this wire was, can not be said to fall within the exception to the general rule.

Judgment reversed and cause remanded, for further proceedings consistent herewith.

LOUISVILLE GAS CO., &c. v. KENTUCKY HEATING CO.

(Filed June 20, 1908—To be reported.)

1. Actions—Injunction and Damages—Separate Actions—Bar—While an action for injunctive relief and for damages may be joined, they are separate and distinct causes of action and the plaintiff may elect to prosecute each by a separate action, and the fact that he prosecuted an action for an injunction does not bar a subsequent action for damages resulting from the injury he sought to enjoin.

2. Natural Gas—Rival Companies—Owning Adjacent Territory—Damages for Wasting Gas Supply—Appellee, Kentucky Heating Company, owned a natural gas well in Meade county and conveyed its product in pipes to Louisville for sale. Appellant, Louisville Gas Company, manufactured gas in Louisville for sale therein and also owned a gas well in Meade county, adjacent to the well of appellee. Appellee, in an action in equity obtained an injunction against appellant from wasting the Meade county gas by burning it in a pretended effort to make lamp-black, and in subsequent action obtained a judgment for \$60,000 in damages for wasting the gas in the Meade county gas territory from which judgment this appeal is prosecuted. Held—That the burden was on the appellee to make out its case, and it must do this by evidence other than the finding of the jury in the equity case which was incompetent in this action.

3. Same—Gas Reservoir—Reservoir of Adjacent Owners—Wasting Gas Supply—Measure of Damages Recoverable—The right of surface owners to take gas from subjacent fields or reservoirs is a right in common. There is no property in the gas until it is taken. The right of owners of the surface to take it is only limited by its being taken for a lawful purpose and in a reasonable manner, but any unlawful exercise of this right which results in injury to the natural right of any other tenant in common is an actional wrong, and in such case the measure of damages is the difference in money at the point where taken between the value of the natural flow of the gas and that of the diminished flow directly and independently of all other causes attributable to the wrong.

4. Same—Punitive Damages—When Recoverable—In an action by a surface owner against a like owner for damages for wasting the gas under their common territory there can be no recovery for punitive damages unless it is shown that the defendant willfully wasted the gas or acted maliciously with a design to injure the plaintiff's business, in which case punitive damages may be recovered.

5. Same—Argument to Jury—Discretion of Counsel—In an ordinary action no argument should be permitted in making the opening statement to the jury by counsel, but counsel may, with propriety, in the closing argument, discuss such facts as are in evidence without limit or restriction so long as he confines himself to the evidence and its application to the law as given by the court.

Humphrey, Hines & Humphrey, Alex. G. Barret, L. A. Faurest, F. M. Sackett, Fairleigh, Straus & Fairleigh for appellants.

Mat O'Doherty, O'Meara & James and McQuown & Brown for appellees.

Appeal from Hardin Circuit Court.

Opinion of the court by Judge Lassing, reversing.

In December, 1901, the Kentucky Heating Company brought suit in the Meade Circuit Court against the Louisville Gas Company and

others, seeking to enjoin them from wasting the natural gas in that field. This suit proceeded to a judgment, in which the injunction was granted, and, upon appeal to this court, it was affirmed in 117 Ky., 71. After this judgment, the Kentucky Heating Company, in January, 1904, filed the present suit against the same defendants, in which it sought to recover damages for the alleged wasting of gas in the Meade county field. This suit was prosecuted to a judgment in favor of plaintiff for \$60,000. From that judgment this appeal is prosecuted.

The parties, plaintiff and defendant, in the suit for an injunction and in the suit from which this appeal is prosecuted, are the same. The Kentucky Heating Company in the present case, pleaded the recovery of the judgment in the equity suit, which is affirmed in 117 Ky., 71, as an adjudication of the fact as between them, that the appellants, during the time complained of had, in the operation of a certain lamp-black factory, wasted a great quantity of gas, and thereupon laid its damages therefor at \$250,000. The defendants, the Louisville Gas Company and others, answered traversing the allegations of the petition, pleaded the statute of limitation, and also pleaded the judgment in the equity suit as a bar to the maintenance of this action. The plea of the statute of limitation has been abandoned upon this appeal and will, therefore, not be considered.

The judgment in the suit in equity was pleaded and relied upon by the plaintiff as an adjudication between it and the defendants of the fact that the defendants had wrongfully wasted gas in the Meade county field, and the same judgment was pleaded by defendants in bar to the plaintiff's right to maintain the action. The trial court sustained a demurrer to the defendants' plea of the judgment in bar, and held that the judgment in the equity suit was an estoppel against the defendants from proving that they had not wrongfully wasted the gas, and the only issue to be tried was the ascertainment of the damages sustained by the appellee, the Kentucky Heating Company, by reason of the wrongful wasting of gas by appellants. The weight of the argument on both sides is devoted to the respective contentions of the parties as to the force and effect of the judgment in the suit in equity upon the rights of the parties in the present action.

Upon this contention we have had little difficulty, and it is unnecessary to consider at length, the numerous cases cited. It is contended by appellants that the appellee, in its suit in equity to enjoin the appellants from wasting the gas, could have joined with that action their claim for damages, presented in this action; that a court of equity had jurisdiction to grant complete relief, by way of assessing damages, in addition to the relief of injunction, and this being true, appellee had its day in court, and having elected to sue for only the injunction, it is now estopped from maintaining another action against the same parties for damages. In other words, it is claimed that the cause of action for injunctive relief and for damages was one entire cause, and having taken only partial relief, the present action is a splitting of the cause. Some decisions of courts of other States are cited in support of this contention, but such a rule does not apply under the laws of this State. The claims do not constitute a single cause of action. It is true they might have been joined, and a court of equity might, after taking jurisdiction to grant the equitable relief, have retained jurisdiction of the case to assess the damages, but it does not follow that both claims constitute a single cause of action, or that plaintiff was compelled to

present both in the same petition. While they might be jo'nable, they are, nevertheless, separate and distinct causes of action, the one calls for the protection of a right, the other indemnity or compensation for wrongs done. While, under the Code, there is one form of action, they are by title divided into two classes, ordinary and equitable, and had a claim for damages been made in the equitable action it would have required a separate and distinct trial, had either party demanded it, and an issue out of chancery to a jury, as a matter of right. This being true, the trial court properly sustained a demurrer to appellants' plea of the judgment in bar of the action.

It is further contended, by appellants, that if the judgment in the equity suit was not a bar to the action, then it had no probity of relation to any matter at issue in the present action. With this contention we can not agree. While the parties to the two actions are the same, the subject-matter being different, the judgment is not a bar, but the parties being the same it is conclusive proof of any fact at issue and adjudged on the merits. The main issue in the suit in equity was whether or not appellants would wrongfully waste the gas in the Meade county field, and, in order to show that they would do so, appellee introduced proof to the effect that they had theretofore wasted it, and upon this proof the chancellor based his finding, upon which the injunction was issued. The fact that they had wasted the gas was an issue only for the purpose of showing that they would thereafter waste it, but appellants are not precluded in this suit, by the judgment in the equity suit from showing that they did not waste it. They have made an issue upon this point with appellee, and the law casts upon appellee the burden of making out its case. and they must do this by evidence other than the finding and judgment of the chancellor in the equity suit. The equity judgment is not in itself the evidence of any wrongful, willful or malicious act on the part of appellants or any of them in the use which they made of the gas, but is merely the result of the impression which the evidence offered in the equity suit made upon the mind of the chancellor. Upon this same evidence a trial jury might or might not find, as a matter of fact, that the gas in that field was wasted by appellants; at all events appellants were entitled to have the evidence upon which appellee sought to hold them responsible in damages, submitted to the trial jury for their determination.

Had the matter, now in dispute, been tried at the same time that the equity suit was tried, appellants, as above indicated, would, as a matter of right, have been entitled to have submitted to a jury the question of fact which is now involved in this case, and if this had been done at that time it would hardly be contended that the chancellor should have told the jury what effect they should give the evidence. It would not have been proper to have done so in that suit, and he erred in permitting it in effect to be done on the trial of the case at bar by reading the opinion to the jury.

He likewise erred in embodying the opinion in the equity suit, or any part of it in his instructions.

Upon another trial appellee should be permitted to show, if it can, that appellants or any of them, willfully, wantonly or designedly wasted the gas for the purpose of injuring appellee in its business; in other words that they acted in bad faith. On the other hand appellants should be permitted to show, if they can, that they acted in good faith in operating the lamp-black factory.

Appellants also complain that the petition is insufficient in its allegation of damages, and that for this reason, no damages being

alleged, their demurrer should have been sustained. It is true the petition alleges only general damages, but this is sufficient. Under it, however, appellee was entitled to recover only such damages as proximately and naturally flowed from the wrongs complained of, and might not recover any special damages. The trial court erred in admitting any evidence of special damages. The error into which the trial court fell in defining appellee's measure of damage seems to have been brought about by a misconception of the rights of appellee. The gas which appellants were wasting was not the property of appellee, and therefore, appellee could not recover for this gas as a conversion of his property. Appellants had the same right to take gas in the Meade county field that appellee had, as decided by this court in the cases of Louisville Gas Company v. Kentucky Heating Company, 117 Ky., 71; Commonwealth v. Trent, 117 Ky., 34; and, Hamby v. City of Dawson Springs, 31 Ky. Law Rep., 814. The right of the surface owners to take gas from the sub-jacent fields or reservoirs, is a right in common. There is no property in the gas until it is taken; before it is taken it is fugitive in its nature, and belongs in common, to the owners of the surface. The right of the owners to take it is without stint, the only limitation being that it must be taken for a lawful purpose and in a reasonable manner. Each tenant in common is restricted to a reasonable use of this right, and each is entitled to the natural flow of the gas from the sub-jacent fields, and any unlawful exercise of this right by any tenant in common, which results in injury to the natural right of any other tenant or surface owner is an actionable wrong. The damage sustained is only that which results from an improper interference with the natural flow of the gas in the wells and pipes of another. It is not the value of the gas at the point of distribution, or at any point where it enters artificial conduits, but the value in money for the diminution of the natural flow of the gas at the wells, directly and independently of all other causes attributable to the wrongs complained of. In other words, the measure of damages is the difference in money, at the point where taken, between the value of the natural flow and that of the diminished flow, directly and independently of all other causes, attributable to the wrong. Appellants had the right, as had every other surface owner, to take from the field, in its natural flow, gas without stint, and had the same quantity or more been taken in rightful use, and the same damage ensued, or, even had the field been destroyed thereby, appellee would have no just cause of complaint. Its cause of complaint, therefore, against appellants for damages, is due to the diminished flow of the gas, directly attributable to the wrongful act of appellants, independent of any other cause. This is the measure of damages which the trial court should have submitted to the jury.

Appellants also complain because the jury were told that they might award punitive damages, or "smart money." It is insisted for them that as there must have been a willful or wanton waste of the gas to entitle appellee to recover at all, if they are liable they are liable for compensatory damages only.

This objection is without merit for, while it is true appellants are not liable in any event unless it is shown that they willfully or wantonly wasted the gas, still, if in so doing they acted maliciously, and with a design of injuring appellee in its business, a case would be made out which would authorize a recovery of punitive damages as well. Under the allegations of the petition, a punitive damage instruction was authorized if there was any evidence to support it.

Appellants also complain of the conduct of counsel for appellee in his opening statement of the case, and in his closing argument.

A statement of the case in advance of the trial is controlled by section 217, of the Code. This section provides that after the jury has been selected and sworn, "the plaintiff must briefly state his claim, and the evidence by which he seeks to sustain it. * * * The defendant must then briefly state his defense, and the evidence he expects to offer in support of it."

No argument should be permitted in an opening statement, and for the expedition of business, as well as to insure a fair trial to each of the litigants, the court should confine the parties to a substantial compliance with these Code provisions. No statement of evidence which could not possibly bear upon the issue should be permitted. We do not intend to be understood as announcing that a departure from the rule, as stated in the Code, would be a reversible error, but as this Code provision was adopted with a view of dispatching the business of the court in an intelligent and satisfactory manner, the trial judges should, as far as possible, see that it is substantially complied with.

As to the strictures passed by counsel for appellants upon the closing argument of counsel for appellee, we must say that great latitude is necessarily allowed counsel in the presentation of his case, and while it is never his privilege to state in argument, as a matter of fact, anything which is not before the jury in evidence, he may, with perfect propriety, discuss such facts as are in evidence without limit or restriction, and so long as he confines himself to the evidence and its application to the law, as given by the court, his conduct is not open to criticism. Much that is complained of in this case, in the argument resulted, we think, from the errors of the trial court, with reference to the substantive rights of the parties and the issues, as set out in this opinion, and is not likely to be the subject of further complaint.

For the reasons indicated the judgment is reversed and the cause is remanded, for further proceedings consistent with this opinion.

RICHARDSON v. L. & N. R. R. CO.

(Filed June 20, 1908—Not to be reported.)

1. Carriers—Principal and Agent—Contracts—The principal who accepts the benefit of a contract made for himself by his agent not only ratifies the action of the agent, but the ratification relates back to the beginning, and it has been held by this court, in a number of cases, that the second carrier, when it accepts stock from the initial carrier, is bound by the contract made with it.

2. Limitation—The plea of limitation can not be sustained because the contract was in writing and within the meaning of section 2514, Ky. Stats.

Grant E. Lilly for appellant

Benjamin D. Warfield and Fred P. Caldwell for appellee.

Appeal from Madison Circuit Court.

Opinion of the court by Judge Carroll, reversing.

On January 19, 1893, C. Richardson shipped from Irvine, in Estill county, Kentucky, to Cincinnati, Ohio, a car load of hogs. The car was carried by the Richmond, Nicholasville, Irvine and Beattyville Railroad Company to Richmond, Kentucky, and then turned over to

the Louisville & Nashville Railroad Company, to be carried by it to Cincinnati. When the car reached Cincinnati and was delivered, the hogs were in bad condition, and some of them were dead. Richardson thereupon brought an action against the Richmond, Nicholasville, Irvine and Beattyville Railroad Company to recover damages, charging that the loss was due to the negligence of the carrier. That company showed that it transported the hogs to Richmond in due time and turned them over to the Louisville & Nashville Railroad Company in good condition. On this proof, it was held that he could not recover against that company. (R., N., I. & B. R. R. Co. v. Richardson, 19 Ky. Law Rep., 1495, 23 Ky. Law Rep., 2234.) After his action against that company had been dismissed, Richardson, on April 13, 1905, brought this suit against the Louisville & Nashville Railroad Company, charging that the losses were due to its negligence. Among other things, appellee pleaded the five years statute of limitation, the action not having been brought until something over twelve years after the cause of action accrued. The circuit court held the plea good and dismissed the action and Richardson appeals.

The hogs were shipped under a written contract, which is as follows:

"Irvine, Ky., Station, Jan. 19, 1893.

"This memorandum of a special contract of carriage between the Richmond, Nicholasville, Irvine & Beattyville Railroad and C. Richardson, of Irvine, Ky., Witnesseth:

"Whereas, the said Richardson has this day shipped a car load of hogs to be carried by the Richmond, Nicholasville, Irvine & Beattyville Railroad from Irvine, Ky., to Richmond, both points on its own line of road, and by it as agent of shipper to be forwarded to Green and Embury at Cincinnati, Ohio, on the same terms as this contract. In consideration of the special rate of \$36.00 for car guaranteed by said railroad company between said point of shipment and Cincinnati, Ohio, the shipper hereby agrees to load, unload, feed, water and take all proper care of said stock, and insure the said railroad company and all connecting lines over which said stock may pass between point of shipment and destination from all loss or damage which may be incurred by delays in transportation, or delivery, or arising out of its responsibility as master over its agents, or servants (gross and wanton negligence excepted) growing out of this shipment. The shipper hereby further agrees that the actual value of said stock at the time and place of shipment shall govern the settlement of all damages for which the carriers may be liable, and declares the value of the stock herein described does not exceed \$12 for each hog.

"In witness, thereof, the agent of the company and the owner of the stock, or his authorized agents, have fixed their signatures to two copies of this agreement.

"(Signed)

C. RICHARDSON, Owner.

"J. W. ROCK, Agent,

"For R., N., I. & B. R. R. Co."

The plaintiff alleged in his petition that, by agreement between the two railroad companies, freight was received by either, destined to points on the line of the other, and by mutual agreement the rates were made and charged by each for the entire carriage to the point of destination, this charge being, by mutual agreement, divided between the two companies; that the written contract above quoted was made by the initial carrier pursuant to this agreement. That the defendant was to receive, and did receive, its part of the price charged for carrying the hogs. That Rock making the written contract was

acting for, and on behalf of, both roads. That both roads accepted and carried the stock under the written contract and that the defendant company was the only connecting carrier between Richmond, Ky., and Cincinnati, O.

By section 2514, of the Kentucky Statutes, an action upon a written contract may be commenced within fifteen years after the cause of action accrued. By section 2515, Kentucky Statutes, an action upon a contract not in writing, signed by the parties, express or implied, may be commenced within five years next after the cause of action accrued. It is insisted that this action is upon an implied contract, within the meaning of sec. 2515, *supra*, and hence barred by the five years statute. But this action is not based on an implied contract. The contract was in writing, signed by Richardson and J. W. Rock, agent for the R., N., I. & B. R. R. Co. It is made in consideration of \$36.00, which is the entire charge for the transportation of the cattle from Irvine, Ky., to Cincinnati, O. If there was a traffic agreement by which the initial carrier was authorized to make this contract for the Louisville & Nashville Railroad Company, or if the Louisville & Nashville Railroad Company accepted the goods and carried them under the contract with the R., N., I. & B. R. R. Co., its acceptance of the goods would be a ratification of the act of its agent in making the contract, and would relate back to the time it was made. The principal who accepts the benefit of a contract made for him by his agent not only ratifies the action of the agent, but the ratification relates back to the beginning. (1 Parsons on Contracts, side pages 50, 51.) That the second carrier, when it accepted the stock from the initial carrier, was bound by the contract made with it, has been held by this court in a number of cases. (Nashville, & C. R. v. Carico, 95 Ky., 489; P., P. C. & St. L. R. Co. v. Viers, 113 Ky., 526; L. & N. R. Co. v. Chestnut, 24 Ky. Law Rep., 1846; I. C. R. Co. v. Curry, 32 Ky. Law Rep., 513.)

It is insisted that the written contract only obligates the initial carrier to carry the freight from Irvine to Richmond, and to forward it as agent of the shipper from Richmond to Cincinnati. That there is nothing in the contract placing any obligation upon the second carrier. But, when the L. & N. R. R. Co. accepted the freight under the contract made with the initial carrier, it bound itself to transport the freight to its destination, which was upon its line of road. The legal effect of the acceptance was the same as if the connecting carrier had in the first place signed the contract. The initial carrier was the agent of the connecting carrier and it was liable on the contract made with the initial carrier.

As the contract was in writing, this action was upon a written contract made by the defendant within the meaning of section 2514, of the Kentucky Statutes, and the demurrer to the plea of limitation should have been sustained.

Judgment is reversed, and cause remanded, for further proceedings consistent herewith.

The whole court sitting. Judges Hobson and Barker dissenting.

NICKELS v. BOARD OF COUNCILMEN OF CITY OF FRANKFORT.

(Filed June 20, 1908—Not to be reported.)

1. Towns and Cities—Street Improvements—Apportionment Warrant—Assignment—The lot owner having failed to make the improvement required by ordinance, the work was let to James Lillis. In this action by the city against the owner to enforce the lien, he defends

on the ground that the work was done by Ed Lillis and that he assigned the apportionment warrant to Collins and that the title did not pass. Held—That these parties worked together, sometimes taking contracts in the name of one and then in the name of the other, the city discharged a debt appellant owed and is entitled to be subrogated to the rights of the person to whom it paid the money.

2. Ratification—The fact that the city had become the owner of the claim for paving, did not affect the power of the council to ratify the contract.

John W. Ray for appellant.

Wm. Cromwell for appellee.

Appeal from Franklin Circuit Court.

Opinion of the court by Chief Justice O'Rear, affirming.

The Board of Councilmen of the city of Frankfort, by an ordinance adopted Sept. 4, 1900, ordered property holders owning property on both sides of Clinton street, from the colored city school to Wilkinson street to make side walk improvements in front of their respective lots by laying good and sufficient side walks, curbing and gutters in front of their lots, to be of granitoid, and sidewalks to be five feet wide from property line to outside line of sidewalks. The property holders, at least appellant, did not obey the ordinance. After advertising and receiving bids, the contract for certain lots, including that of appellant was made by the city with James Lillis at 60 cents a lineal foot, for curbing and guttering of the walk. The work was completed as contracted for, and was accepted by the city. Lillis assigned his apportionment warrant to Collins, who presented the claim against the city and it paid it. The contract with Lillis was not reported to the council for action before the work was done, but was subsequently reported to and ratified by the council. This suit was brought by the city against the lot owner, appellant, to enforce the lien given by statute for the improvement. Appellant resisted on several grounds, and in this court has presented two or three additional grounds not relied on by pleading in the circuit court. But we confine our notice to such as were raised in the court below.

It is contended that as the evidence shows that the work was done by Ed. Lillis, instead of James Lillis, and that it was he who assigned the apportionment warrant to Collins, the title to it did not pass. Ed. Lillis and James Lillis did work of this class together. Sometimes taking the contract in the name of one, and sometimes in the name of the other. James Lillis was made a party to the suit by amended petition. By answer and in his deposition he disclaimed any further interest in the claim. Collins was paid by the city. So he has no further interest in it. The city was not primarily liable to the contractor, but only in event it failed to so provide by ordinance as that the contractor got a lien upon the property for the work done. The city evidently paid for the work under a mistake as to its liability. It thereby discharged a debt which the appellant owed, and which he ought to have paid. In equity the city is subrogated to the rights of the person to whom it paid the money.

It is next claimed that the council could not ratify the contract in 1906, some years after the work was done. The statute permits the council to ratify legal, but incomplete acts, so as to save harmless those who have contracted through it. Ratification, in its essence, presupposes something done, but incomplete or invalid for want of sufficient authority. It is therefore no argument against the power of ratification to say that the thing ratified had been done. Nor does

the fact that the city had become the owner of the claim in the meantime affect the power of the council to ratify the contract. The council was not acting for itself in the matter, but for the public, including appellant.

It is also contended here that the ordinance provides for the improvement of more than a block, but that the whole of the block in which appellant's lot is situated was not improved. Section 3449, Kentucky Statutes, regulating this matter, provides that the city may order the improvement of an entire street, or any part of it, but not less than a block. But for a re-curb-ing and re-guttering a street, the statute does not require the work to be done in entire blocks. This work was reconstruction. Hence the provision relied on by appellant does not apply.

Appellant asserted as a set-off and counterclaim that the contractor, under the direction of the mayor and city engineer, changed the established grade of his sidewalk, so that it was raised above the level of his lot, which necessitated his filling in his lot to avoid the creation of a pond in it, which cost him \$33, and which he pleaded as a counterclaim and set-off. The plea is not good in form, without going further into its merits. It does not claim that the lot was damaged or impaired in value; or that its natural drainage was interfered with. To say that he was "compelled to bring the grade of the lot up to that of the sidewalk to avoid a pond in his front yard" does not charge that there was not already a pond there. Nor does appellant claim in his pleading that the grade on which the street was re-bult was not the one established by the engineer and council as required by the council.

The contractor used some stone that was in the old gutter and curbing. There was an issue as to its value.

The chancellor found the value under the proof and applied it as a credit. The difference between the sum claimed and the credit given is too small to form a ground of reversal, even if the chancellor was mistaken in the matter.

The judgment is affirmed.

VAN-JELLICO MINING CO. v. ROLLINS.

(Filed June 20, 1908—Not to be reported.)

Greene & VanWinkle for appellant.

C. W. Lester for appellee.

Appeal from Whitley Circuit Court.

Judge Lassing delivered the following response to petition for re-hearing, overruling.

The following statement, to-wit:

"It is most earnestly insisted by counsel for appellant that there was no consideration for this promise. This might have been a good defense had it set up in the answer, and the proof directed in support thereof, but as appellant did not choose to avail itself of such defense by pleading, it comes too late and without force when offered for the first time in counsel's brief. The plea of 'nudum pactum,' like pleas of non est factum, infancy, limitation, and other affirmative defenses, to be available, must not only be specifically pleaded, but supported by proof, if denied."

In the opinion heretofore delivered is not sound in law and is withdrawn. In response to the objection that there was no consideration for appellant's agreement to construct four crossings for appellee's use on its right of way we deem it but necessary to say that the

deed from appellee, under which appellant acquired title to the right of way over appellee's farm, contains the following provision:

"Said second party is to construct the necessary crossing for the use of said Rollins."

Thus, under the very contract by which appellant acquired title to the land the obligation to build and maintain the necessary crossings was imposed. It was a part of the consideration for the conveyance, and appellant, by accepting the deed, is bound by its terms, one of which is to construct the necessary crossing for appellee's use. The proof abundantly shows that four crossings are necessary and that appellant agreed to construct four, there can be no doubt.

The chancellor who tried this case having so held the judgment was properly affirmed.

BRACKETT'S ADM'R v. L. & N. R. R. CO.

(Filed June 20, 1908—Not to be reported.)

1. Railroads—Injury to Person Crossing Track—Gross Negligence—There can be no recovery by appellant in this action for the death of his decedent for the reason that deceased was injured at a place where she had no right to be, and where the railroad company was not required to anticipate that any one might be between the cars. The act of deceased in attempting to pass between the cars was one of gross negligence.

2. Duty of Railroad Company—Presence of Persons About Stations—While it is the duty of the railroad companies to anticipate the presence of persons about their stations when a train is arriving, and to use ordinary care for their safety, this rule does not extend to persons who pass between cars where no invitation has been held out for them to do so.

N. J. Weller and Weller & Points for appellant.

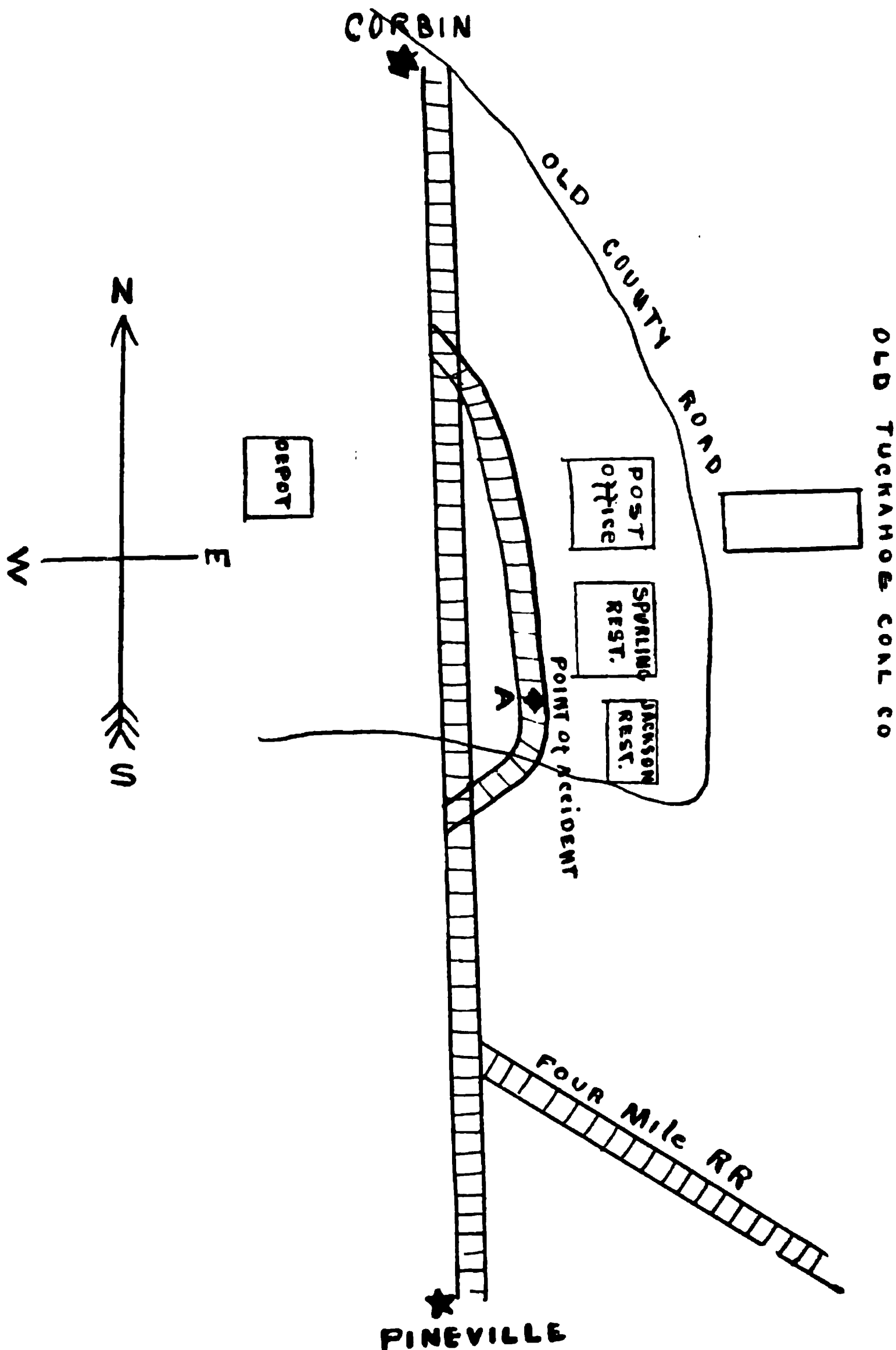
Benjamin D. Warfield, C. W. Metcalf and J. W. Alcorn for appellee.

Appeal from Bell Circuit Court.

Opinion of the court by Judge Hobson, affirming.

Mrs. China Brackett was killed by being mashed between two cars at Four Mile, a station on the Louisville & Nashville Railroad between Pineville and Corbin, Ky. It is a small place; the depot is on the west side of the main track, and the storage track is east of the main track. East of the storage track is the post-office and two restaurants. There are coal mines in the neighborhood at which the coal cars are loaded. They are then brought to Four Mile, and put on the storage track until some train comes along to take them out. On the day on which Mrs. Brackett was killed, the storage track was pretty well filled with loaded coal cars; although there were, at different places along the track, spaces between the cars. About midway between the two restaurants, there was a short space between two coal cars. One witness stated that the space between the cars was six feet; another witness says three feet. Perhaps one meant that the space was six feet from one car to the other, while the other meant that the space was three feet from one of the bumpers to the other. As the passenger train was pulling in from the south, Mrs. Brackett who had been at the post-office, and wished to go over, to the platform, thinking that her husband might come in on the train, walked from the post-office down the track, until she got to this space between the two cars. There she was joined by three

other ladies who were also going over to the platform. Just at this time, a freight train going in the opposite direction was at the north end of the switch, and pulling in on the side track to get out of the way of the passenger train. To do this, it pushed the cars standing on that track ahead of it, and just as Mrs. Brackett was between the two cars, as she was going across the track, the cars closed in on her, catching her between the two bumpers and so injuring her that she died. The situation is shown on the following map, the point A indicating where she was caught between the two cars:



There is a walk way from the post-office out to the track, made of plank, and a similar walk way from the Spurling restaurant out to the track. She did not follow these walks, as there was no opening in the cars at the end of either of them. The space between the two tracks was filled with cinders, so that it was a good place for walking. There was some proof offered by the plaintiff to the effect that no signal for the movement of the cars was heard just at the time they came together; and it is very evident that none of the four ladies who were crossing the track had any idea that the cars were about to be moved. It is also evident from the proof that those in charge of the freight train could not see the ladies on account of the cars obstructing the view, and that they had no idea that anybody was between the cars or would be endangered by their moving them. The freight train had whistled for the station and was ringing its bell as it pushed in on the side track; but the noise of the incoming passenger train, which was then just rolling past, prevented the ladies from hearing the noise or the signals of the freight train. At the conclusion of the evidence the court instructed the jury peremptorily to find for the defendant. The plaintiff appeals.

It is manifest from the proof that the space between the two cars at the point A, was not left as a passway for persons. There was no crossing at that point and the space was so narrow that manifestly it simply was left there by the cars rolling apart when they bumped together as they were not coupled. It is insisted for the plaintiff that in as much as it was train time and persons were expected to be passing about, these tracks going to and from the station, the company should have anticipated the presence of persons between these cars and therefore is liable to Mrs. Brackett. To so hold, would be in effect, to say that before moving cars situated like these, the company should send a man along the cars and warn everybody to get out of the way; for it is manifest that nothing short of this would have done Mrs. Brackett any good. All that occurred was that the short space between these cars was closed up when the freight train came in at the switch and pushed the other cars down in front of it, closing up the other spaces between them, until they ran back against the cars next to Mrs. Brackett. Where the space between cars has not been left as a passway for people, especially where it is as narrow as the one shown here, the company is not ordinarily required to anticipate that persons will be in the space, and persons who thus go between cars take the risk of the space being closed up. The freight train, at the other end of the switch, could have plainly been seen by these ladies before they undertook to pass across the track, and if they had considered at all, they would have known that the train had to come in on the side track to get out of the way of the passenger train. If there had been a public crossing there, or even a private crossing at which the cars had been opened to allow people to pass, the case would be different. But it would be a hard rule to hold the railroad responsible for an accident like this where the person injured had no right to be where she was, and where the railroad company was not required to anticipate that any one might be between the cars. The movement of the cars was made with as little force as it could reasonably have been done. They were simply forced back out of the way of the freight train; and in a number of cases, it has been held that people who go between cars which are liable to be moved, take the risk and can not recover where the danger to them was not known to the servants of the railroad company in time to avert it. In *L. & N. R. R. Co. v. Waide*, 18 Ky. Law Rep., 549, Waide was standing or walking

between the rails of the side track in Woodburn, Ky., at a place very much like that here shown in evidence, and was struck by a piece of timber that was on one of the cars and extended out beyond the car. It was held that he could not recover. In *L. & N. R. R. Co. v. Hocker*, 111 Ky., 707, Hocker, finding the path that he wished to walk along obstructed by cars, stepped in between two cars and while standing there was seriously injured by the cars being moved without a signal. It was held that he could not recover. In *Southern R. R. Co. v. Thomas*, 29 Ky. Law Rep., 79. Thomas was a laborer in the service of the railroad company and was sent to the office for a rake. When he got opposite the office, he found there were some cars between him and the office. He thereupon, climbed between the cars and went over to the office; and as he was returning in the same way a car bumped against the cars which he was on and seriously injured him. It was held that he could not recover, although no signal or notice of the movement of the car was given. To the same effect are the authorities in other States. In 23 Am. & Eng. Cyc. of Law, page 764, the rule is thus stated:

"To pass under or between the cars of a train which one knows, or ought to know, is liable to move at any moment, or between cars to one of which a train in full view is about to couple, is an act of gross negligence. Unless the person attempting it is assured by some one in authority that it is safe to do so."

We recognize the rule that it is the duty of the railroad company to anticipate the presence of persons about its stations when a train is arriving and that it is its duty to exercise ordinary care for their safety but we do not think that this duty extends to persons passing between cars, or under them, or over them, where no invitation express or implied, has been held out to them to do so. The space between the two cars before us was too narrow for a person to understand that it was left there as a passway; and when any one undertook to go between the cars at this place without the knowledge of the railroad company, they took the risk. (*Stillson v. Hannibal, &c. R. R. Co.*, 7 Mo., 671.)

Judgment affirmed.

Whole court sitting.

Judge Nunn dissenting.

C., C. C. & ST. L. RY. CO. v. LOUISVILLE TIN AND STOVE CO.

(Filed June 20, 1908—Not to be reported.)

Railroads—Action Against For Damages—Shipment of Goods—Injury To—Defective Car—In this action against appellant for damages to appellee's goods which it is alleged appellant transported to it in such defective car as that they were damaged, appellant sought to avoid liability on the ground that it did not know of the condition of the car, but that the shipper of the goods did, and that appellant had no right or power to inspect the car. Held—That a demurrer was properly sustained to this plea. A railroad, as a common carrier, is an insurer of goods entrusted to it for transportation and must provide proper cars. The owner of the goods is not required to see that the cars are suitable or safe. He is only required to show the loss of his goods.

Humphrey & Humphrey and Alex. P. Humphrey, Jr., for appellant.

James Quarles for appellee.

Appeal from Jefferson Circuit Court, Common Pleas Branch, Second Division.

Opinion of the court by Judge Hobson, affirming.

The Louisville Tin and Stove Company brought this suit against the Cleveland, Cincinnati, Chicago & St. Louis Railway Company, alleging, in its petition, that on Jan. 8, 1907, there was delivered to the defendant at Muncie, Ind., in good condition, a car load of oil cans, which it agreed for hire, safely to transport and deliver to the plaintiff in Louisville in good condition but that in violation of its agreement, the defendant loaded the cans in a defective and leaky car, by reason of which they were exposed to the elements, became wet and rusted, and thereby rendered unmarketable, to the plaintiff's damage in the sum of \$258. The defendant filed an answer to the petition in two paragraphs. The first paragraph was afterward withdrawn. The court sustained a demurrer to the second paragraph, and there being a stipulation filed that the plaintiff's damages amounted to \$258, the court entered judgment in favor of the plaintiff for that sum and the railroad company appeals.

The only question to be determined on the appeal is the sufficiency of the second paragraph of the answer to which the court sustained a demurrer. It is in these words:

"Defendant further answering, states that the car mentioned in the petition had been filled with soda ash, a chemical, the action of which causes boards to shrink and metals to rust; that defendant had delivered said car to another railway company, to-wit: the Muncie Belt Railway, and that the Muncie Belt Railway had delivered said car to the Muncie and Western Railway Company, which latter company had delivered said car to the factory of Ball Bros., near Muncie, Ind., upon a private switch of said Ball Bros.; that said Ball Bros. unloaded the soda ash from said car and without the knowledge or consent of defendant placed the cans of which complaint is made in the petition in said car; that said car, having been loaded with soda ash was not in fit condition to carry any sort of metal; that said Ball Bros. knew, or by the exercise of reasonable care could have known, that said car was in no condition for said shipment; that said car was delivered by said Ball Bros., to the Muncie and Western Railway and by the latter delivered to the Muncie Belt Railway, and by the Muncie Belt Railway delivered to the defendant; that the defendant had no power or right to inspect the contents of said car, or to inspect said car for any other purpose than to determine whether its running gear was in a sufficiently safe condition to carry over its road."

The railroad as a common carrier, is an insurer of the goods entrusted to it for transportation, with certain exceptions not material here, and for its own protection must provide proper cars. The owner is not required to see that the cars are suitable or safe. He is not required to show negligence on the part of the railway company. All that he is required to show is the loss of his goods. No defect in the vehicles can excuse the common carrier from its common law liability. (Hutchison on Carriers, section 497, Elliott on Railroads, section 1478.) The answer does not deny the allegations of the petition as to the defectiveness of the car. It was the duty of the company to furnish a car which would protect the goods from the elements. The defense set up in answer is in effect that Ball Bros., by ordinary care, could have known that the car was defective; but it is not shown in the answer that Ball Bros. selected the car or assumed to be responsible for its condition. There are cases holding that where the shipper selects the car himself, trusting to his

own judgment, the railroad company is not responsible if he selects a car that is insufficient; but that is not this case. It is not alleged that Ball Bros. selected the car nor is it alleged that the car was not delivered to Ball Bros. for the purpose of the cans being loaded upon it. In *Harris v. Northern Railway Co.*, 20 N. Y., 232, the shipper selected the car himself. In *Densmore Commission Co. v. Duluth, &c., R. R. Co.*, 101 Wis., 563, the shipper fixed the car to suit himself. In *Frolich Glass Co. v. Pennsylvania Co.*, 101 N. W., 223, the shipper had supervision of the loading with power to reject any car unfit for loading glass and kept inspectors whose duty it was to select and inspect the cars before the glass was loaded. In these cases the railroad company was held not liable for any defect in the car. But, ordinarily, to release the carrier from his common law liability there must be a distinct agreement by the plaintiff to assume the risk of the sufficiency of the car or facts must be shown warranting the conclusion that he did not leave this matter for the carrier to determine, but assumed to determine it himself. (*Pratt v. R. R. Co.*, 102 Mass., 557.) It was not the duty of Ball Bros. to inspect the car or to exercise care to know whether it was in condition for the goods to be shipped in it; but they had a right to put the goods in the car assuming that the railroad company would not have directed this to be done, unless the car was suitable. It is not charged that Ball Bros. were not authorized to place the cans in the car. The fact that it was done without the defendant's knowledge or consent does not show that the initial carrier did not authorize it, and it was the duty of the defendant to keep the goods safely after it received them.

Judgment affirmed.

COOKE, &c. v. WHITE COMMON SCHOOL DIST. NO. 7, OF BARREN COUNTY, &c.

(Filed June 20, 1908—Not to be reported.)

Principal and Surety—Contracts—Novation—The sureties of M. a building contractor, seek to be relieved in this action against them on the ground that certain named changes were made in the plans provided for in the building contract. Held—That the departures from the plans were so slight as to be presumed to be within the contemplation of the parties to a building contract.

Sims & Grider and Duff & Hutcherson for appellants.

Baird & Richardson and W. L. Porter for appellees.

Appeal from Barren Circuit Court.

Opinion of the court by Judge Hobson, affirming.

In August, 1905, the trustees of White Common School No. 7, in Barren county, made a contract with C. B. Marr, by which he undertook to build, for the district, a school house for \$7,980.30, and he executed to the trustees a bond with W. C. Cooke and others as his sureties, for the faithful performance of the contract. Marr built the school house and the trustees took possession of it, but a number of persons, who had furnished Marr the materials for the house, filed in the county clerk's office, liens under the statute, and brought this suit against Marr and the school district to enforce their liens on the school house. The district made its answer a cross-petition against Marr, and his sureties, praying judgment against

them for the amount which Marr failed to pay the materialmen. The sureties filed an answer in which they pleaded that the school trustees, after they signed the bond, had made other contracts with Marr, by which they had modified the original contract for which the sureties were bound, and thus released them from all liability. The trustees, by their reply, put in issue the allegations of the answer. They admitted owing Marr something over \$400. He filed an answer asserting that they owed him a larger sum than they admitted. Proof was taken on all the issues, and on final hearing the circuit court entered a judgment against the sureties for the amount of the claims against the house, subject to a credit of \$550, which he fixed as a balance due by the trustees to Marr. From this judgment, the sureties appeal.

The contract was made between Marr and the trustees, as a corporation representing the school district. The trustees could only bind the district by a corporate meeting held as provided by law. We do not find any evidence in the record that the trustees made with Marr any contract subsequent to the written contract sued on in any way affecting the rights of the sureties. When Marr built the foundation, one of the trustees refused to accept it, claiming that it did not come up to the contract. There was a dispute between the trustees and Marr as to whether the foundation was what the contract called for. Finally, he tore it out and made a new foundation, which was accepted. The weight of the evidence shows that the trustees were right in this matter. A dispute arose then between Caldwell, one of the trustees, and Marr, as to whether the contract required Marr to wall up the cellar! Marr insisting that it did not, and the trustees insisting that it did. Finally, to settle the dispute, they agreed to pay him \$61 extra to build the wall. From the evidence we think the trustees were right, but the sureties have no cause to complain of the manner in which the dispute was settled. Marr was paid the \$61. Another dispute was that the trustees claimed Marr was to put bridging between the joists. He claimed that his contract did not call for bridging. Still, the contract required the work to be done in first-class manner, and a floor laid without bridging in a schoolhouse of the size of this, would not be a first-class job. Marr put in the bridging, as he should have done under his contract. Marr undertook to build one of the gables and in doing so did not follow the plans. The trustees required him to take out the work, and it was then discovered that the plan of this gable would not harmonize with the rest of the house, and a slight change was made in the plans. He then put in the gable according to the modified plan. In all building contracts such slight modifications as this must be presumed to be within the contemplation of the contracting parties. The difference in the plans was not so great as to be beyond such changes as the parties should reasonably have contemplated. Marr claimed that the flue, if built according to the plans, would be insufficient. The trustees claimed that the flue called for by the plans was larger than Marr said. Finally, he built the flue as he said it ought to be. This, too, was one of those slight variations which should be presumed to be within the contemplation of parties to a building contract. Marr used joists 2x8 when the contract as originally drawn, called for joists 2x6; but the proof shows that this change was made before the contract was signed; so, also, was a change as to the additional flue which was put in the house.

These are in substance, all the matters which are complained of by the sureties as amounting to a novation. We concur with the circuit court in the conclusion, that nothing was done by the trustees which released the sureties or affected their liability. The find-

ing of the circuit court, as to the amount that was due Marr on the contract is not against the weight of the evidence. Considering all the proof in the case, and, on the whole record, we do not see that the substantial rights of the appellants were prejudiced.

Judgment affirmed.

COX, &c. v. FOWLER.

(Filed June 20, 1908—Not to be reported.)

1. Judgments—Void Because of Failure to Serve Process—The judgment adjudging appellee to be the owner of the land herein and directing its conveyance to him was void because the heirs of the deceased owner were not made parties, though they were necessary parties and were not before the court, process not having been served upon them. The judgment does not recite that the parties were before the court.

2. Same—A judgment taken when there has been no service of process, and the defendant has not entered his appearance, is absolutely void. (Section 63, Ky., 540.)

J. R. Llewellyn for appellants.

W. H. Clark and A. W. Baker for appellee.

Appeal from Jackson Circuit Court.

Opinion of the court by Judge Lassing, reversing.

Many years ago Perry Cox died in Jackson county, Ky., the owner of several tracts of land. He left surviving him a wife and nine children. After his death, one O. D. Henderson, bought out the interests of the respective heirs at law in the estate of Perry Cox, deceased and, under some sort of an arrangement between himself and John Wilson and Preston Cox, a son of Perry Cox, it was agreed that if Preston Cox would pay to John Wilson the purchase money, which had been paid to the heirs, including Preston, for their respective interests in said lands, that he could take the land. The purchase money had been furnished by John Wilson. It appears that Preston Cox either did not desire to do so or was unable to pay this purchase price and, in the course of time, John Wilson, who was the real owner of the land, and had paid for same, sold it to this appellee, and appellee has been in the possession of same since his purchase thereof from said John Wilson.

He instituted a suit in 1894 in the Jackson Circuit Court against the widow and heirs at law of Perry Cox, for the purpose of having the land conveyed to him through the commissioner of the court, and such proceedings were had in said suit that an order was entered directing the master to convey said land to this appellee, and the said commissioner attempted to convey same as directed in said order, but for some reason he failed to date or sign the deed. All of the title bonds evidencing the sales, by the respective heirs, of their interests in the lands of their father, it is alleged, are on file with the pleadings in that case. No further steps were taken in that suit, which was instituted in 1894, but on February 5, 1896, appellee filed a suit in equity asking that he be adjudged the owner of the land which he had purchased from the heirs of Perry Cox, through his vendor, John Wilson, and that same be conveyed to him by the commissioner of the court by proper deed. To this suit all of the heirs of Perry Cox, deceased, were made parties defend-

ant. This suit was prosecuted to a final judgment wherein appellee was adjudged the owner of the land, and same was directed to be conveyed to him by the commissioner of the court, all of which was done. The judgment was entered on the 9th day of May, 1897. It appears that at that time several of the grandchildren of Perry Cox, whose fathers and mothers had died, were infants under twenty-one years of age.

In December, 1907, two of the grandchildren of Perry Cox, and children and heirs at law of Preston Cox, sued out an appeal from said judgment in this court alleging that at the time the judgment was entered they were infants under fourteen years of age, and that they were at that date each under twenty-two years of age. The appeal was granted, and they now seek to reverse the final judgment of the Jackson Circuit Court, rendered in May, 1897, adjudging appellee the owner of the lands in question, and directing the same to be conveyed to him.

The grounds chiefly relied upon for reversal, are that no summons was ever issued for or served upon them, or on their three brothers, all of whom were under fourteen years of age, or on their mother for them. That the guardian ad litem, who was appointed by the court to represent them, failed to show, in his report that he had made a careful examination of the record, or of the case, and that the judgment should be reversed for that reason. That their father was the owner of the lands described in the pleadings, and that they, as his heirs at law, were entitled to same. That the evidence which was offered in support of appellee's title was too vague indefinite and uncertain to support the judgment which was rendered by the court.

The petition shows that the heirs of Perry Cox were all made parties defendant to the suit. It alleges that William Cox, a son, and Preston Cox, another son and the father of these appellants, were dead. That each left surviving him a wife and five children, all of whom were under twenty-one years of age, and all residing in Estill county, Kentucky, with their mothers. On the back of the petition there appears the following endorsement, among others: "Summons and thirteen copies issued to Estill." Neither this summons nor the return thereof is copied in the record. There is nothing in the record to show that this summons was ever served. The judgment does not recite that the parties defendant, including appellants, were properly before the court, or that they were before the court at all.

In the case of *Robinson v. Mobley*, 64 Ky., 196, it was held that a judgment rendered by default, when there had been no service of process, although the judgment recited that the "defendant had been duly summoned, but failing to answer, &c.," was a clerical misprision, but in the later case of *Long, &c. v. Montgomery*, 69 Ky., 399, such a judgment was held not to be a clerical misprision, but absolutely void, the court saying that the opinion in *Robinson v. Mobley* was evidently an inconsiderate and inadvertent mistake, which can not be recognized as an authority intended to overrule the then recent decision in *Ruby v. Grace*, (63 Ky., 540), and other opinions which held that a judgment taken in a case where there has been no service of process, and the defendant has not entered his appearance, is absolutely void.

In the case of *Herman's Executors v. Martin*, 107 Ky., 642, in passing upon a similar question, this court said:

"There is nothing in the record to show that there was ever any service of process upon the defendant, Herman, and the decretal recital is not sufficient evidence of service without other proof,

and a judgment rendered by default, where there has been no service of process upon the defendant, or appearances, is void, and may be reversed upon appeal."

A further citation of authorities upon this point is deemed unnecessary; the foregoing establishing the rule which has been adhered to by this court for more than forty years.

There is nothing in the record before us to show that a summons was ever served upon either of appellants and the judgment is, therefore, void as to them. As the judgment must be reversed for the reasons indicated, it is unnecessary to consider the other questions raised upon this appeal. Appellants being now of full age, upon the return of the case, the services of a guardian ad litem will no longer be required, and they may file such pleadings as they desire and deem necessary to properly present their defense.

For the reasons indicated, the judgment is reversed and remanded, for further proceedings consistent with this opinion.

CITY OF OWENSBORO v. SWEENEY.

(Filed June 20, 1908—Not to be reported.)

Geo. W. Jolly for appellant.

W. T. Ellis, C. M. Finn, Miller & Todd and C. S. Walker for appellee.

Appeal from Daviess Circuit Court.

Judge Hobson delivered the following dissenting opinion.

The opinion of the court is based on the case of *Chicago v. Blair*, 149 Ill., 310, but the court fails to observe that there the Legislature had not authorized the city to provide that the cost of sprinkling the streets should be paid by special assessments. The Legislature there had only authorized the city to make local improvements by special assessments. That is not the case here. The Legislature has in express terms authorized the city to make the assessment for sprinkling the streets precisely as it was made. That case is, therefore, not in point. It was followed in *New York Life Insurance Co. v. Prest*, 71 Fed., 815, a nisi prius opinion by the district judge, who also failed to notice that the case rested on a want of legislative authority to the city to do what it had done. Wherever the Legislature has authorized a special assessment to pay for the sprinkling of the streets the courts have, as a rule, sustained the Legislature. (*Starks v. Boston*, 108 Mass., 293; *Reinken v. Fuehring*, 130 Ind., 382; *Minnesota v. Stateler*, 38 Minn., 371.) Special assessments to pay for the sprinkling of the streets are not unlike special assessments to keep the streets free from snow and ice or to keep them free from dirt by sweeping, and these have been, we believe, universally sustained. (*Carthage v. Frederick*, 122 N. Y., 268; 1 Abbott on Municipal Corporations, sec. 340, and cases cited.) If a tax is levied upon the whole city and applied to the sprinkling of the streets a large number of persons who pay the taxes must of necessity get little benefit from it as the sprinkling is necessarily confined in the main to the business and more populous parts of the city. It is one of those things of which the persons who peculiarly receive the benefit should bear the burden. The limitation placed by the Constitution as to the amount of taxes which municipalities may levy applies to those things which should be met by a general tax on all the peo-

ple. It does not apply to those things which are local in character and ought to be paid for by those receiving the benefit. It is conceded that there is no other limitation in the Constitution affecting the matter and thus being so the discretion of the Legislature in prescribing how a matter of local benefit like sprinkling the streets shall be paid for, is unrestricted. So it is that the great weight of authority sustains the legislation in question. Any plan for paying for street sprinkling will produce great hardships. Under the plan which was held constitutional in *Maydwell v. Louisville*, 116 Ky., 885, precisely the same hardship might result, as is illustrated in the opinion. A man might have property worth \$100,000 and be so situated that no sprinkling would ever be done in front of his property, or where he might get no benefit from it. And if his \$100,000 worth of property consisted of vacant lots we would have just the hardship supposed in the opinion. What is the most just way of placing the burden may vary from time to time, and therefore, the whole matter should be left to the discretion of the Legislature and the municipal councils who represent the people that must in the end pay the taxes, and are best qualified to properly consider the interests of their constituents.

I therefore dissent from the opinion of the court. Judge Barker and Judge Lassing concur in this dissent.

OVERTON, &c. v. PERRY, JR., &c.

(Filed June 20, 1908—Not to be reported.)

1. Lands—Adverse Possession—Contiguous to Home Place—The question involved here is one of adverse possession—The land in controversy was embraced in a tract conveyed to M. in 1883, and adjoined his home tract of which he was in possession. He had the tracts surveyed and boundary marked so as to include the land in controversy. Held—That the land being contiguous to his home place, and being surrounded by a well defined, marked boundary, it was not necessary for him to make a new entry. Upon acquiring it, it immediately extended to the whole boundary.

2. Same—M., in 1888, conveyed to appellants, who from that time have occupied it by an agent and exercised undisputed ownership over it. They are, therefore, entitled to have their title to the land quieted.

Wm. H. Holt for appellants.

McGuire & McGuire and Hazelrigg, Chenault & Hazelrigg for appellees.

Appeal from Morgan Circuit Court.

Opinion of the court by Wm. Rogers Clay, Commissioner, affirming in part and reversing in part.

This action involves the title to 44 acres of land situated on Mordecai creek, in Morgan county, Ky., and also a small tract of two or three acres situated some distance from the first tract. Appellants, A. W. Overton, John A. Brislan and William H. Holt, on March 3d, 1903, brought an equitable action averring that they were the owners and in actual possession of said tracts of land; that appellees were trespassing thereon, and committing waste and interfering with appellants' tenants. Appellants asked that appellees be enjoined from so doing, and that their title be quieted. The

appellees, John M. Perry, Jr., and Lilla M. Perry, asserted title under and by virtue of a written contract of sale, made by Thomas D. Perry to E. B. Perry, whereby the former conveyed to the latter one-half of one-third of a tract of land, consisting of 500 acres, situated in Morgan county on a branch known as the Condon branch of Elk Fork of Licking river. The contract provides that the grantor is not to be responsible for the title to said land, but that E. B. Perry agrees to look to other sources for title. The consideration mentioned in the contract is \$50. The other one-half of one-third of the tract of land they claim was conveyed to E. B. Perry by John E. Cooper. The consideration for the latter contract is 8,000 feet of inch sawed lumber, and the contract contains the same provision in regard to title, i. e., it requires the vendee to look to other sources for title. Afterwards, E. B. Perry conveyed to appellees, J. M. Perry, Jr., and Lilla M. Perry. The latter claiming under this conveyance and the written assignments from Thomas D. Perry and John E. Cooper, defended on the ground that they had been in adverse possession of the 44 acres of land in controversy for the required period of time. Appellee, E. B. Perry defended as to the two or three acres, by claiming that it was included in a patent to one Cassity, which was prior to the Thomas D. Perry patent under which appellants claimed. Appellants claim under the patent of Thomas D. Perry, entered in the year 1847. It appears, however, that in their chain of title, there are certain tax deeds which contain no description of the property conveyed, and we are of opinion that appellants' proof of record title is defective. On the other hand the appellees show no record title. At the time Thomas D. Perry conveyed to E. B. Perry, he had previously conveyed his interest in the land to one J. W. Sewell, and in the contract of sale he expressly provided that the vendee therein, should look to other sources for title. Furthermore, no title of any kind is shown in John E. Cooper. Under this State of case the title to the 44 acres must depend altogether upon the question of adverse possession.

It appears that the land in controversy was embraced in a tract conveyed to William Mynhier in the year 1883. The tract so conveyed adjoined Mynhier's home farm, of which he was in possession. Mynhier had the tracts of land surveyed, and the boundary marked so that it included the land in question; and from that time on he claimed to a well defined boundary, including the land in controversy. It was not necessary for him to make a new entry upon the land thus purchased in 1883, for the reason that the land being contiguous to his home place and being surrounded by a well defined boundary, Mynhier's possession, upon acquiring the land, immediately extended to the whole boundary thereof. It is true, the deed to Mynhier did not furnish him a good record title, but it was admissible for the purpose of showing the extent of his claim. Mynhier afterwards sold the tract of land in controversy to appellants herein, in the year 1888, and from that time down to the institution of this suit they had an agent in control and charge of the property purchased from Mynhier, rented it to various parties, and exercised undisputed ownership over same.

The contract of sale between Thomas D. Perry and E. B. Perry appears to have been made in the year 1885. Thereafter E. B. Perry claims to have had the land surveyed. The time fixed by him was in the year 1886 or 1887. He claims then to have made an entry on the land embraced in the contract of sale and to have occupied the same by running a saw-mill on Cox branch, some distance from the tract in controversy.

It is manifest, that, as the 44 acres were then in possession of William Mynhier, E. B. Perry's possession did not include the 44 acres,

for the simple reason that he never took possession of any portion of said land. There could not be two possessions at the same time. Mynhier's possession was exclusive of E. B. Perry's, and the fact that the latter afterwards had the land embraced in a survey, made two or three years later, without entering upon the land in controversy, could not give him any possession of it, or interfere with the possession already obtained by William Mynhier. Nor did John M. Perry, Jr., ever afterwards take possession of the 44 acres. He may have moved upon the land adjoining it, but, in the absence of any actual taking, his possession did not extend so as to embrace the land in controversy. We, therefore, conclude that the appellants are entitled to the forty-four acres of land in controversy, and to the relief sought, and that the trial court erred in entering judgment in favor of the appellees.

As to the two or three acres involved in the controversy between appellants and E. B. Perry, the evidence is such as to leave the mind in doubt, and the judgment of the chancellor will not be disturbed.

That portion of the judgment affecting the land in controversy between appellants and E. B. Perry, is affirmed. The judgment as to the forty-four acres of land claimed by John M. Perry, Jr., and Lilla M. Perry, is reversed and cause remanded, with directions to enter a judgment in conformity with this opinion.

Chief Justice O'Rear not sitting.

ILLINOIS CENT. R. R. CO. v. EDMONDS.

(Filed June 20, 1908—Not to be reported.)

1 Master and Servant—Liability of Master—Where the master directs an employe to enter a dangerous place to work and the employe complies with the order and is injured, he can recover from the master unless the danger was so obvious and imminent that an ordinarily prudent person would not have undertaken the work even though ordered to do so by the master.

2. Settlement for Injury—Tender—Rule as to Tender and Settlement—Had the settlement relied on by appellant been for appellee's injuries, he would not have been permitted to recover in this action for damages as the result of his injuries except as he tendered and offered to return the amount paid him before bringing the action. But this rule does not apply to a settlement which only includes loss of time.

Grassham, Berry & Threlkeld, Trabue, Doolan & Cox and J. M. Dickinson for appellant.

G. W. Landram, J. Morgan Chinn and H. V. McChesney for appellee.

Appeal from Livingston Circuit Court.

Opinion of the court by Judge Hobson, affirming.

Appellee was employed by appellant to work in a gravel pit, or bank. He was working under a foreman. A blast had been made on the afternoon before appellee was injured, which blew out a large amount of gravel and rolled it down the bank, leaving a large lump of gravel and dirt above the place where the blast was made. There was a ledge or bench under this lump which supported and kept it from moving down the embankment. The foreman directed

appellee and another hand to go and pick under this lump so that it might fall. Appellee was somewhat fearful of it, and went to picking on one side of the bump when the foreman commanded him to go and pick at this ledge or bench, which supported the bump, and told him that if he saw that there was danger he would give him notice so that he could get out of the way. Appellee obeyed him and struck two or three licks with his pick and a large mass of gravel and dirt fell upon him, carried him down the embankment and severely injuring him.

The proof showed, without contradiction, that he has entirely lost the use of one arm; that it hangs limp by his side, and that there is no hope of his ever recovering the use of it. He was carried to the Illinois Central Hospital in Paducah, where he remained, under the treatment of the physicians, for two and a half or three months, when he desired to return to his home. One of appellant's agents appeared at the hospital, as appellant claims, to make a settlement with appellee, and did pay him \$250 for, as it claims, all damages for loss of time, mental and physical suffering and his bodily injuries. Appellee claims that this settlement was made and the \$250 paid was for the time already lost, and for the time he would necessarily lose by reason of his injured arm; that he was lead to believe, at the time, by the agent and the company's physicians that it would not be very long before he would recover the use of his arm.

Appellee instituted this action to recover \$2,000 damages for his injuries. Appellant denied that he received his injuries on account of its negligence, and pleaded contributory negligence on the part of appellee. It also pleaded the settlement, and filed the receipt of appellee, in bar of his right to recover. Appellee, by reply, denied the contributory negligence charged, and alleged that the receipt, or writing filed, was obtained by the fraud of appellant's agents; that he was unable to read, and was lead to believe that the writing, to which he made his mark, only covered the loss of time, as before stated. The parties introduced evidence tending to support the theories presented by each. The jury found for appellee \$1,000 in damages.

It is the duty of the master to furnish the employe a reasonably safe place in which to work; but, from the proof in this case, appellant violated this duty. Appellant contends that appellee should not be permitted to recover in this case, because he could see and realize that it was a dangerous place, and he ought not to have obeyed his foreman and have gone under this mass of gravel and dirt and attempted to remove the ledge or bench, which was supporting it. This question was properly submitted to the jury. The foreman was standing by, saw and knew more about the danger than appellee who had been laboring there for only a short time. The rule is, that where the master directs an employe to enter a dangerous place to work and the employe complies with the order and is injured, he can recover from the master, unless the danger was so obvious and imminent that an ordinarily prudent person would not have undertaken to work therein, even though ordered to do so by his master. Appellant also contends that appellee should not have been permitted to recover in this case because he did not tender it the \$250 received by him in the settlement before bringing the action; that he should not be allowed to retain the \$250 and then litigate and recover other money from it. This is true, under the opinion in the case of L. & N. R. R. Co. v. McElroy, 100 Ky., 153, and would defeat appellee in this case, if he had understood that he was settling and receiving remuneration for his injuries. But this rule does not apply when a settlement only in-

cluded loss of time. (McGill v. L. & N. R. R. Co., 24 Ky. Law Rep., 1244; I. C. R. R. Co. v. Belt, 29 Ky. Law Rep., 421, and Ingram v. Covington, Flemingsburg & Ashland Ry. Co., 28 Ky. Law Rep., 508.)

The instructions of the court, while not as explicit, upon the last point mentioned, as they should have been, we are of the opinion fairly presented the issues, and no injustice was done appellant under the evidence therein.

For these reasons the judgment of the lower court is affirmed.

COMMONWEALTH, ON RELATION, &c. v. BACON, &c.

(Filed June 20, 1908—Not to be reported.)

1. Commonwealth—Action by Attorney General to Recover Money Improperly Paid Out of Treasury—The Attorney General is authorized to maintain an action to recover money improperly paid out of the treasury. One obtaining money from the treasury to which he is not entitled, is required by law to pay it back, and this obligation may be enforced in an action by the State. (20 Ky. Law Rep., 1893.)

2. Principal and Surety—Extent to Which Surety is Bound—A surety is not bound beyond the letter of his covenant. The sureties in the bond herein did not undertake that they would be responsible for any money collected by the principal from the State above what he was entitled to receive, and there is nothing in the bond to apprise the sureties that any such liability was sought to be imposed upon them.

3. Attorney and Client—An attorney who asks that his client's claim be allowed, is not responsible for the amount allowed if it shall afterwards turn out that more was paid than due, and in this case the fact that the attorney was on the bond of his client does not change the rule.

4. Sureties—The liability of a surety must be measured by the terms of his contract. The terms of the contract herein for public printing were not violated, and the sureties are, therefore, not liable for the excessive amount the principal succeeded in collecting from the State. He collected the money as the result of his own fraud, and is alone responsible for it.

N. B. Hays, Chas. H. Morris and Chas. Carroll for appellants.

Eli H. Brown, Jr., and Lewis McQuown for appellee.

Appeal from Franklin Circuit Court.

Opinion of the court by Judge Lassing, affirming in part and reversing in part.

By section 3953, Kentucky Statutes, the Governor, Auditor, Secretary of State, Treasurer and Attorney General are ex officio commissioners to let contracts for the printing, binding and stationery used by the various State departments. By section 3954, the furnishing of all printing, papers, stationery and supplies for the use of the State, and the printing and binding of the State journals and reports, and the manufacturing and furnishing of all blank books, which are to be paid for out of the State treasury, and all other printing and binding made necessary by law, shall be let by contract to the lowest and best bidder. By section 3957, the commis-

sioners shall, between August 1st and Nov. 1st, biennially, advertise for sealed proposals for the executing of the several classes of printing and binding in separate contracts for the term of two years from the first Monday in January next ensuing. Sections 3956, 3972 and 3984, Kentucky Statutes, provide:

"The printing and binding for the State shall be divided into four classes, to be let in separate contracts, as follows: The printing of all bills for the two Houses of the General Assembly, together with such resolutions and other matters as may be ordered by the two Houses, or either of them, to be printed in bill form, and the printing and binding of the journals of the two Houses, together with such reports, communications and other documents as enter into and make a part of the journals, the printing and binding of the volumes of public documents, and of the general and local laws and joint resolutions; the printing and binding of the State reports containings the decisions of the Court of Appeals; the printing and binding of all reports, documents and other matters, bound in either book or pamphlet form, except as shall enter into or be bound within the journals of the two Houses, and all printing for the department of public instruction, and all miscellaneous printing and binding necessary for the several departments, and not otherwise provided for in this law, shall constitute the first class, and be let in one contract. The manufacture and furnishing of all blank books used by counties, which are to be paid for out of the State treasury, shall constitute the second class, and be let in one contract. The lithographic printing and engraving shall constitute the third class, and be let in one contract; and the furnishing of all printing paper, stationery, and such other supplied for the use of the State as provided for in this law, shall constitute the fourth class, and be let in one contract." (Section 3956.)

"The commissioners may contract for any printing, binding and furnish paper and such other supplies as provided herein, and name the number of copies to be printed and bound of all matter not otherwise provided for in this law: Provided, however, The same shall be let to the lowest responsible bidder therefor." (Section 3972.)

"Any printing, binding or the manufacture of blank books, to be done for the State, and the furnishing of paper and stationery, not embraced in the foregoing provisions, shall be subject to the provisions of this law, and the Commissioners of Public Printing may advertise for proposals therefor, and let the same as aforesaid, whether provided for by law or resolution." (Section 3984.)

The statute specifies various kinds of work but as the State may need other work, section 3972, was added to provide for work not specified. The statute also specifies the rate to be paid for many classes of work; but as the rate for all classes of work is not fixed, section 3984 was added to provide how the price to be paid was to be determined where the rate was not specified in the statute.

In January, 1902, Henry Bacon, was a bidder for the second class printing and binding. His bid was in these words:

"To the Commissioners of Public Printing, Binding, &c.:

"The undersigned, Henry Bacon, of Elizabethtown, Ky., proposes to furnish the record books for the various counties and for the departments of the State government for two years from the first Monday in January, 1902, according to an act, entitled 'An act to provide how the printing, binding and stationery used by the State shall be furnished,' approved June 20, 1893, at the common rate per centum of forty-nine per cent. of the schedule of prices fixed in said act for the work of this class.

"Also for the following work not specifically provided for by said act, we bid as follows:

"For separate indexes, 'Plain' or 'Cross' as ordered, and with proper printed headings, full leather bound on the same paper required for books, with leather tabs, gold and lettered, as follows: Cap size, 50 cents, Demy, 75 cents, Medium, \$1, Royal \$1.25. For indexes in front or back, leather tabs, gold lettered, each fifty cents. For printed 'headings' in stock forms, whether caption or full page, any size, per book ninety cents.

"We agree to use first quality of Crane's, Byron Weston's or L. L. Brown Paper Co.'s linen ledger paper of the following weights: Cap size 18 pounds per ream, Demy 28, Medium 40, Royal 44. We agree to properly wrap and ship record books to the various counties, charging no more therefor, than we pay for the express thereon.

"A bond for ten thousand dollars accompanies this bid.

"In witness whereof, we hereunto subscribe our name, this 13th day of November, 1901.

"HENRY BACON."

Accompanying the bid was the following bond:

"Whereas, Henry Bacon, of Elizabethtown, Ky., is a bidder for the contract to furnish the Commonwealth of Kentucky with public printing and binding, known under the law as second class, for the term of two years from and after the first Monday in January, 1902.

"Now, therefore, we, Henry Bacon, of Elizabethtown, Ky., and Sam Fulton, of Lakeland, Ky., and John A. Fulton, of Bardstown, Ky., sureties, bind ourselves to the Commonwealth of Kentucky in the penal sum of ten thousand (\$10,000) dollars, that in the event the said bid of Henry Bacon, for public printing and binding of the second class is accepted, said Henry Bacon shall enter into contract, and promptly, faithfully and skillfully perform the work bid for in accordance with the law; and we further bind ourselves that in case said Henry Bacon shall refuse or neglect to accept said contract after it has been allotted to them at their bid, then the said Henry Bacon, principal, and Sam Fulton and John A. Fulton, sureties, shall pay the difference between the amount of the bid of the person to whom the same shall be awarded after such refusal or neglect as provided by law.

"Given under our hands, this 13th day of November, 1901.

"HENRY BACON,

"SAM FULTON,

"JOHN A. FULTON."

The bid was accepted by the board and a written contract was entered into in these words:

"This contract made and entered into by and between the Commonwealth of Kentucky, by its Commissioners of Public Printing, party of the first part, and Henry Bacon, of Elizabethtown, Ky., party of the second part, Witnesseth:

"That the party of the first part, in consideration of the bid and bond of the party of the second part, filed on November 14, 1901, offering to execute for the Commonwealth of Kentucky the printing and binding of the second class according to the terms and conditions of the advertisement under which said bid was made and received, and of an act approved June 20, 1893, entitled 'An act to provide how the printing and binding and stationery of the State shall be furnished,' has let the said work of the second class to the party of the second part, and in consideration of the said award, and the bid and the bond of the party of the second part

1. **fixing the price**
 2. **based upon any**
 3. **clause of Bacon's**
 4. **either caption or**
 5. **in controversy**
 6. **es. They have**
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 8. **proper head-**
 9. **first quality**
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 11. **me terms**
 12. **a**
 13. **expen-**
 14. **book,**
 15. **was**
 16. **me**

Whether the above is conclusive, the power is having allowed. The power is correctness. The power is by the statute: and if any presented to the Commission will be examined and compared with the statute, and if any will be found to be correct, and if any will be found to be incorrect, the Commission or the Auditor will correct, and thereupon the Auditor will pay the claim.

that the Auditor shall not pay the claim unless the contractor has first presented a prima facie evidence of the correctness of the claim. If the Auditor finds the claim to be correct, he shall carefully examine the same, and if he finds it to be correct, he shall certify thereon the amount thereof, and thereupon the Auditor shall pay the claim. If the Auditor finds the claim to be incorrect, he shall certify thereon the amount thereof, and thereupon the Auditor shall not pay the claim.

This merely rent of Public In-
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ferred upon such work, the rights o
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rant; E. E. Owsley, \$3,240; George
for and H. H. Hughes, \$5,850. It
prior the first contract made by the
t 1893, the Courier-Journal Job
r the work of the first and second
and teachers' registers and ten t
The work being assigned to it unde
printing; it received therefor \$11.1
paper. It also appears that under th
Printing Co. was the contractor for
such it made fifteen thousand teach
for which it received \$16,516.84, it
amount which these contractors rece
weight in determining what would
work; for the reason that the contr

hereto attached, the party of the second part thereby agrees and undertakes that he will promptly, tastefully and skillfully perform the work bid for, according to the law and to the terms, conditions, and limitations of the advertisement under which said bid was made and accepted at the prices named and upon the terms contained in his written bid and the advertisement under which said bid was made and accepted. The aforesaid bond and bid and a copy of said advertisement are attached hereto and made part hereof as fully as if set out at length herein. This contract shall remain in force from the first Monday in January, 1902, until the first Monday in January, 1904.

"In witness whereof, the party of the first part, by the chairman of its Board of Public Printing, and the party of the second part have hereunto subscribed their names, this 6th day of January, 1902.

"HENRY BACON,

"J. C. W. BECKHAM,

"Chairman Board Printing Commissioners,"

The bond and contract are in accord with sections 3958 and 3959, Kentucky Statutes. George G. Fetter was the accepted bidder for the printing and binding of the first class. The Superintendent of Public Instruction decided to have printed 9,500 trustees' record books and 9,500 teachers' registers.

A dispute arise between Fetter and Bacon as to whether this work belonged to the first class or the second class. The question was submitted to the Board of Commissioners who held that the work belonged to the second class. Thereupon the Superintendent of Public Instruction delivered to Bacon the following order:

"January, 21, 1902.

"Henry Bacon, Louisville, Ky.

"Gentlemen: Please furnish this office with 9,500 each of Trustees' record books and teachers' registers. These books are to be made of Melrose paper.

(Signed) "H. V. McCHESNEY,

"Superintendent of Public Instruction."

The superintendent also delivered to Bacon sample copies of these books, which he ordered duplicated except as indicated, one of the changes being, that the back was to be reinforced by a cloth strip. The sample copies were the books which had been printed for the department under the previous administration. Bacon executed the order, printing the books on Melrose paper and binding them like the samples, with the addition of the cloth strip at the back. The superintendent examined them, found them satisfactory or as he says, better than the sample, and the books were delivered. After the books were delivered, Bacon presented to the Board of Printing Commissioners, the following account and asked its allowance:

(1.) 9,500 Teachers' Registers and Grade Books, 21-10 quires	
each at 65 cents per quire, \$12,967.50, less 51 per cent. off	\$6,354.07
(2.) Printing same at 90 cents a book.....	8,550.00
(3.) Reinforcing same with cloth strips.....	950.00
(4.) 9,500 Trustee Record Books, 1½ quires each at 65 cents	
\$9,262.50, less 51 per cent. off,	4,538.62
(5.) Printing same at 90 cents each a book.....	8,550.00
(6.) Reinforcing same with cloth strips.....	950.00
(7.) Packing and shipping same	148.20
(8.) Freight advanced	119.95

Total \$30,160.84

The commissioners were not all present at that meeting, the Attorney General being absent. They allowed \$20,000 upon the account and laid it over to their next meeting, the matter being referred, in the meantime, to the Attorney General. At the next meeting, the Attorney General reported that there was no authority of law for the two items in the account, "reinforcing same with cloth strips \$950" but that the remainder of the account was correct. Thereupon, the remainder of the accounts, less the two items, was allowed by the board and was paid by the Auditor. Subsequently this suit was brought in the name of the Commonwealth on the relation of the Attorney General then in office, against Bacon and the sureties in his bond, it being charged in the petition that the books printed by Bacon were not such as the contract required and that by fraud of Bacon, and through a mistake of the commissioners he had obtained from the treasury the sum of \$28,260.84, when he was only entitled to \$4,000; and judgment was prayed against him and his sureties for \$24,260.84 with interest from August 29, 1902, the time when the money was paid. The defendant filed an answer controverting the allegations of the petition and upon final hearing, the circuit court dismissed the petition. From this judgment the Commonwealth appeals.

The first question arising in the case is whether the allowance of the claim by the board of commissioners is conclusive. It is earnestly insisted that the commissioners having allowed the claim, the court can not now inquire into its correctness. The powers of the commissioners are thus defined by the statute:

(Ky. Stats., 3974.) "Every bill shall be presented to the Commissioners of Public Printing, who shall carefully examine and compare the same with the vouchers and orders relating thereto, and if any error is found in any account, they shall correct the same, and return the account to the contractor. If the account is found to be correct, or when it has been corrected, the commissioners or a majority of them shall indorse the same, and thereupon the Auditor shall draw a warrant in favor of the contractor upon the treasurer for the amount thereof."

This merely means that the Auditor shall not pay the claim until it is approved by the commissioners, but no judicial power is conferred upon the commissioners; they act in simply a ministerial capacity. Their approval of the claim is prima facie evidence of its correctness; but there is nothing in the statute, giving to the approval of the commissioners any greater effect than is given the approval of other officers on claims against the Commonwealth when required by statute. The purpose of the statute is simply to provide how a proper voucher may be made out, before the Auditor is to issue a warrant. If the commissioners reject any part of a claim, the contractor may maintain his action against them to require them to approve it, if it is improperly rejected; and if they approve a claim that contains errors by mistake or from their being misled by the claimant, the claimant, who thus obtains the money of the State improperly, can not thus profit by his own wrong, but is liable to an action by the Commonwealth for the money so improperly received (Ky. Stats., section 304A, sub-sec. 1; *Commonwealth v. Carter*, 21 Ky. Law Rep., 1509.)

The Attorney General is authorized to maintain an action in the name of the Commonwealth to recover money improperly paid out of the treasury. (Kentucky Statutes, section 114, 340A, sub-sec. 3, section 4171.) Money can be obtained from the public treasury only as provided by law. He who obtains from the treasury money to which he is not entitled, is required by law to pay the money back, and this obligation may be enforced in an action by the State.

(Commonwealth v. Norman, 20 Kentucky Law Rep., 1893.)

The next question to be determined is whether Bacon received any money from the State to which he is not entitled. The last two items of the account are not controverted, and the third and sixth items having been rejected by the commissioners, the whole controversy turns on the first, second, fourth and fifth items. The first and fourth items are based on section 3982, Kentucky Statutes, which so far as material, is as follows:

"For ruling and binding blank book work (paper and all material used to be furnished by the contractor or contractors), as follows:

"Per quire, letter size or smaller, for half binding, with corners, thirty (30) cents.

"Half binding, with spring backs, fifty (50) cents.

"Full binding, with spring backs, sixty-five (65) cents.

"For binding with Russia corners, seventy-five (75) cents.

"For binding, Russia ends and bands, ninety (90) cents."

The charge of sixty-five cents a quire less 51 per cent off is based upon the ground that the books in controversy are of full binding with spring backs. The terms used in the statute are fully understood in the printer's trade and must be given the meaning they have in the trade. According to the undisputed evidence, a half bound book with corners, is one which has a leather back and corners; with paper or muslin sides. A loose back book is one which is sewed with twine, the twine being interlaced into the sides, and is put together in such a manner that when the book is spread open, it will come away from the back. A spring back book is one that is heavily reinforced with board or some such material, in such a way as will make the back close quickly. The books in controversy are saddle stitched pamphlets bound in card board glued to the back. They differ from an ordinary pamphlet only in that card board is used for the cover instead of paper. The cover is not loose from the back but is fastened tight to it. They are made of letter size paper but manifestly they can not be charged under the clause of the statute fixing the price for half binding with corners for these books have no leather about them and no corners upon the cover, nor are they loose bound books; that is the back of the cover is not loose from the book, so that when the book is opened it will spring out. The loose back adds to the strength and durability of the book and is much more costly than a back which is fastened to the back of the book. As these books can not be charged under the clause of the statute for half binding with corners, it is still more manifest that they can not be charged under the clause of the statute fixing the price for half binding with spring backs or full binding with spring backs. In a full bound book the card board of the cover is wholly covered by the leather or other material used and the cover extends out beyond the edges of the book so as to protect it. In these books the flexible card board covers are cut even with the edges of the book. Appellee, Bacon, undertakes to justify his charge for these books as of full binding with spring backs, on the ground that when opened, they open to the cover and relies upon a definition found in Webster's Dictionary. But the rights of the parties are not to be determined by a dictionary definition; for such definitions are necessarily more or less inadequate. The statute uses the technical words of the trade. When Bacon did bid, he bid as a printer and with knowledge of these technical terms, which must be construed and understood according to their well understood meaning in the trade. (Kentucky Statutes, section 460.) We, therefore, conclude that these books can not be charged for as of full binding with springbacks, and

that they do not come under any clause of the statute fixing the price for such work.

The second and fifth items of the account are not based upon any provision of the statute, but upon the following clause of Bacon's contract, "for printed headings in stock forms, whether caption or full page, any size, per book, 90 cents." The books in controversy were gotten up under section 4438, Kentucky Statutes. They have printed forms for the guidance of the teachers and trustees in keeping the records required by statute. They also contain the proper headings and directions. But they are not printed upon first quality of Crane's Byron Weston's or L. L. Brown's linen ledger paper. They are letter size and not cap, demy, medium or royal. These terms are well understood in the printer's trade and designate an expensive paper of larger size than a letter sheet, on which blank books, used for permanent records are printed. It is said that Bacon was directed to print these books on Melrose paper, and that therefore he was justified in not using the paper called for by his contract. The proof shows that the paper called for by his contract is an expensive paper about four times as costly as the paper Bacon used, which is a cheap paper. He can not be permitted to contract with the State for a price agreed to be paid for a larger, expensive book and then furnish the State at this price a smaller, cheap book. The books in controversy are not of the size nor of the material called for by his contract, and, therefore, he is not entitled to the contract price for them. A very common way in which contractors with the public get the better of it, is by contracting for first class material at a given price and then putting in cheaper material. The order of the superintendent, to make the books like the sample, carried with it no right for Bacon to charge for the books, when they were made, the price fixed by his contract for larger and better books.

As neither of these four items were warranted by any provision of the statute or by the contract which Bacon made with the State, none of them can be allowed. What then, are the rights of the parties? Bacon has done work for the State which was not called for by his contract. It was done under the written order of the State Superintendent of Public Instruction and has been accepted by the Board of Printing Commissioners. The statute not fixing the price for such work, the rights of the parties must be determined by the reasonable value of the work. The State is not entitled to Bacon's work without paying a reasonable price for it; and the work not being included in Bacon's contract, he can not demand the contract price for it, but must take only the reasonable value of his work. As to the reasonable value of this work, the estimate of the witnesses is as follows: L. T. Davidson, \$3,000; F. P. Allen, \$3,100; E. E. Owsley, \$3,240; George A. Lewis, \$4,780; E. D. Veatch, \$5,700 and H. H. Hughes, \$5,850. It also appears from the proof that under the first contract made by the State after this act was passed in 1893, the Courier-Journal Job Printing Co. was the contractor for the work of the first and second class; that it printed ten thousand teachers' registers and ten thousand teachers' record books. The work being assigned to it under its contract for the first class printing; it received therefor \$11,162.86, the State furnishing the paper. It also appears that under the next administration, the Soule Printing Co. was the contractor for the second class printing; as such it made fifteen thousand teachers' registers and grade books for which it received \$16,515.64, it furnishing the paper. But the amount which these contractors received is not entitled to great weight in determining what would be a reasonable price of the work; for the reason that the contractor's bids are at a level rate

per cent. on the prices fixed by the statute, and might be less than reasonable for some work and more than reasonable for other. We have also reached the conclusion that little weight can be given to these figures for another reason, and that is, that the statute does not fix the price for such work as this, and it may have been fixed by the contracts made by these contractors with the State. Our construction of the statute is that these books are not blank books used by counties and are not therefore included in the printing of the second class. The blank books used by counties and referred to in section 3956, are the record books used in the different county seats of the State and the statute contemplates that they are to be bound in some of the ways specified in section 3982. We are also of opinion that these books are included in the words "all printing for the department of Public Instruction" and therefore, fall under the contract of the contractor for the printing of the first class. But the statute not specifying at what price such work is to be done, it must be a matter of special contract as provided in section 3984. The Legislature realized that it had not specified all the work which the State might require to be done, and therefore section 3984 was added to cover all unspecified work. The rates given in the statute are only to be paid for the work specified in the statute. The rate for work which is unspecified must be a matter of contract. As there was no contract in this case covering the work, the rights of the parties must be determined by its reasonable value which under all the evidence we fix at \$4,000 to which must be added the amount of the last two items on the account, \$268.15, making in all, \$4,268.15. Deducting this amount from the sum paid Bacon, \$28,260.84, we have a balance of \$23,992.69, which is the amount he owes the State with interest from August 29, 1902.

By way of explanation, it may be stated that the printing known as "first class" is the cheapest grade of printing, and that designated as "second class" is a much more expensive grade.

It remains to determine whether the sureties are also liable. A surety is not bound beyond the letter of his covenant. The only covenant in the bond relied on to charge the sureties is in these words:

"That in the event the said bid of Henry Bacon for public printing and binding of the second class, is accepted, said Henry Bacon shall enter into contract, and promptly, faithfully and skillfully perform the work bid for in accordance with the law."

It is conceded that Bacon entered into the contract and the only ground upon which the sureties are sought to be charged is the claim that he failed promptly, faithfully and skillfully to perform the work bid for in accordance with the law. It is insisted that it was the duty of Bacon to do the work put in his hands according to his contract and that McChesney, as Superintendent of Public Instruction, could not waive the terms of the contract which had been made with Bacon by the commissioners. The rights of the sureties do not depend upon anything that McChesney as Superintendent, did. McChesney indicated the character of work he wanted done; the Board of Printing Commissioners then decided that Bacon should do the work. Bacon took the work and did it under the decision of the Board of Printing Commissioners. When he had done the work literally as he was ordered to do it he presented his work to the Board of Commissioners and the board accepted it as done according to the order. The undisputed proof shows that the order was executed just as all the parties at the time contemplated it should be executed. The trouble here does not arise from the fact that Bacon did not execute the order according to its terms; it arises from the fact that after the work had been done according

to the order, Bacon improperly obtained from the State money to which he was not entitled. The sureties did not undertake that they would be responsible for any money collected by Bacon from the State above what he was entitled to receive. There is nothing in the bond to apprise the sureties that any such liability was sought to be imposed upon them.

It is insisted that one of the sureties, John A. Fulton, is estopped to say that he is not liable as he was present as Bacon's attorney and argued that the work should be assigned to him, and was also present when the claim was allowed asking its allowance, and in fact received from Bacon on a debt due him, a large part of the money which Bacon drew from the treasury. When Fulton asked the work for his client, all the parties had in mind, books to be made like the sample. Bacon did the work just as Fulton asked he should be allowed to do it. It is not a case where the surety consented for certain work to be assigned to his principal and the principal failed to do what the surety agreed for him to do. If Bacon had failed to do the work according to the order, there would be much force in holding John A. Fulton liable for any damages that the Commonwealth had thereby sustained. But that is not the case. as Bacon did the work just as Fulton asked that he should be allowed to do it. He did all that Fulton, by implication agreed that he should do. The trouble here arises, not from the way the work was done, but from the price that was received for it. An attorney who asks that his client's claim be allowed, is not responsible for the amount allowed, if it shall afterwards turn out that more was paid than was due.

The commissioners were imposed upon and deceived by Bacon, and the Legislative Committee, who subsequently investigated the transaction and reported that Bacon had received no more than he was entitled to, was evidently unacquainted with the technical terms of the printers' trade and were likewise deceived or else, their investigation was not thorough enough to enable them to learn the truth. The expert testimony which has been furnished us, explaining the terms of the printers' trade, as applied to the statute, has made our task comparatively easy, and we have had no difficulty in determining that the printing, which is the subject of this litigation, clearly belongs to what is known as "first class" and should have been done by Fetter, who had the contract with the State for such work.

It appears that the commissioners had implicit confidence in Bacon, and accepted any statement that he made to them relative to the printing as true. This enabled him to secure from them an order to do the work, which clearly did not belong to the class which his contract called for. With his skill and experience as a printer he was bound to know that this work was properly assignable to the "first class" and we can not escape the conclusion that in deceiving the commissioners and inducing them to permit him to do this work, he was then laying the foundation for the perpetration of the fraud which he later practiced, in presenting and procuring the commissioners to pay a bill which all the evidence shows to have been more than five times as large as it should have been; but for this, he alone is liable. The liability of his sureties must be measured by the terms of their contract, and this, as above stated, was not violated.

For the reasons indicated the judgment of the lower court is affirmed as to the sureties on the bond, but reversed as to Bacon, and the case is remanded, for a judgment against him, as above indicated.

HOCKER v. COMMONWEALTH.

(Filed June 20, 1908—Not to be reported.)

1. Indictments—Failing to Charge Intent—Acts Necessary at Common Law—The law looks not to form so much as substance, and when an indictment states concisely all of the acts necessary at common law to constitute the crime of murder, it is a good indictment for such. The failure of the indictment to charge that appellant shot deceased "with the intention of killing him" does not render it defective for the reason that it states all the facts constituting the offense with which he is charged, and the statements are sufficiently certain to enable the court to pronounce judgment of conviction.

2. Evidence—Competency of—While it appears to this court that the testimony with reference to appellant's intention to flee the country was immaterial, yet it was competent and it was the province of the jury to weigh and determine it.

3. Same—Although he killed deceased with a gun, it was competent that he bought pistol cartridges an hour before the killing, on the theory that he was making preparations to kill deceased.

4. Instructions—Each to Be Read in Connection with All the Others—Often the whole law can not be put into one instruction, and in such a case each instruction must be read in connection with all the others. When so read, in this case, the instructions aptly present the whole law of this case and particularly that of self-defense.

5. Same—A number of authorities hold that the word "passion" includes anger and terror, therefore the court did not err in refusing to embody in the manslaughter instruction, that the killing was done in a sudden impulse of terror.

John M. Stucky, Stoll & Bush and J. William Mitchell for appellant.

James Breathitt and Maury Kemper for appellee.

Appeal from Fayette Circuit Court.

Opinion of the court by Judge Lassing, affirming.

Appellant was indicted, charged with the murder of Newton Drummond Veal, tried, convicted and his punishment fixed at death. To reverse the judgment predicated upon that verdict he prosecutes this appeal, and assigns three reasons why it should be done. First, because the indictment was fatally defective and his demurrer thereto should have been sustained. Second, because the court admitted improper evidence over his objection. And, third, because of errors in the instructions.

Deceased lived with his mother and brothers on the Todd Road, which runs from Lexington to Winchester. The house stood back some 180 or 190 feet from the road. Appellant lived two miles or more east of deceased's home. About 250 yards west of Veal's front gate, the Walnut Hill turnpike intersects the Todd Road, and a blacksmith shop stands on the northwest corner of the intersection of these roads. This shop is run by a man named Pemberton. On the south east corner is the dwelling of D. E. Eldridge. It is about 200 yards from the front gate, leading from the Todd road into the Veal residence, to the blacksmith shop, and the ground in between the shop and the gate is slightly elevated.

Appellant, Hocker, had been in the employ of the Veal family as a day laborer from sometime in the fall of 1906. About two weeks

before deceased was killed they were engaged in making a pond, the day was warm and the work was hard; along in the afternoon, Hocker, on his own initiative, quit work, for the alleged reason that he was hot and tired, and, after some words between him and deceased and Thomas Veal, a brother of the deceased, he left the place where they were working and went in company with Thomas Veal to the residence where Mr. Thomas Veal made a settlement with him in which he stated that appellant owed them (the Veal Bros.), \$3 on account of provisions and a hog, which they had let him have. He had no money at that time and, although he alleges that he did not in fact owe them anything but that they owed him money, he did not make this known to them. After he left their employ he commenced work for one Charles Dodd, who lived on the Walnut Hill pike, something like a mile south of its intersection with the Todd road. He went from home to his work each day, and in so doing passed the Veal residence. On the morning of the day upon which Veal was killed, appellant went to Lexington, in a spring wagon, taking with him a negro, named Lige Brooks. Upon their return, as they were passing the Veal residence, Newton Drummond Veal was at a point near the gate. He called to appellant and asked him when he was going to pay that money, meaning the \$3. Appellant answered "next Saturday," and asked if that would do and Veal responded that it would. Nothing further was said and appellant went on his way home. Brooks got out of the wagon and went to his home before appellant reached his house. This was about noon.

Appellant testifies that after Brooks left him, he went home, ate his dinner, and went to a neighboring store for the purpose of buying some groceries. The grocer and his brother testify that he came there at the time he says he did; that he bought no groceries but did buy some 38 center fire pistol cartridges. He returned home and started out in the spring wagon, for the alleged purpose of going to see Mr. Dodd about working the next day. He took with him a single barrel shotgun and several loaded cartridges, for the ostensible purpose of shooting some birds for a child who was sick. He arrived in front of the Veal farm about four o'clock in the afternoon; when he reached a point nearly opposite the gate, according to his own statement, he was halted by Newton Drummond Veal, who came down to the gate, opened it, came through and approached him in a threatening manner: this so frightened him that scarcely before he realized what he was doing he drew his gun and fired the fatal shot.

Thomas Veal testifies, that when Hocker reached the gate he stopped and called his brother Newton, who was whitewashing at the barn, down to the road, telling him that he had his money for him and asked him to come and get it. That when his brother passed through the gate, and turned to chain or latch it, appellant fired the shot into his back, and that immediately the shot was fired, his brother sank to the ground, and, although he reached him very shortly thereafter, his brother was dead when he got there. After the shooting, appellant drove rapidly away from that neighborhood and escaped. He was captured about a month afterward in Cincinnati.

There is practically no difference between the testimony for the Commonwealth and appellant to the point where appellant reached the gate on the afternoon upon which deceased was shot; the Commonwealth's witness testifies that appellant called deceased down to him, whereas, appellant testifies that deceased accosted him, stopped him and cursed and abused him and threatened to kill him

and was approaching in a threatening manner when he fired the fatal shot. The principal witness for the Commonwealth, Thomas Veal, testifies that at the time appellant called his brother to come down to the road, he was with him, whitewashing at the barn, which was some 190 feet away. That he saw his brother go down to the road, go through the gate and turn to fasten it when he was shot. That he immediately ran to the house to arm himself, that appellant jumped out of his wagon and ran parallel with him down the road a piece, exclaiming, "you need not run, I will get you too." Appellant denies that he left his wagon at all, or that he threatened to do any violence whatever to Thomas Veal. It is urged for appellant that as the blacksmith, Pemberton, upon walking the length of his shop, after he heard the shot fired, saw appellant driving rapidly down the road, this testimony of Thomas Veal is necessarily untrue; for had appellant, after shooting deceased, left his wagon and run down the road, as it is alleged by Thomas Veal, he did, he could not have returned to his wagon in the time that elapsed between the firing of the shot and when the witness, Pemberton, walked out of his shop and looked in that direction. There is an irreconcilable conflict between the testimony of the witness, Thomas Veal, and appellant upon this point. Pemberton does not pretend to say that appellant did not leave his wagon after firing the shot, and his testimony does not corroborate appellant, for he only testifies that after he got out of the shop, where he could see and looked in that direction, appellant was driving rapidly away from the gate. Thomas Veal testifies to the same fact; so that the question as to whether or not appellant left his wagon after shooting deceased and ran down the road, as Thomas Veal says he did, was left an issue between these two. It is not contended by counsel for appellant that the admission of this testimony was error, their objection to it is that it was untrue, but the argument which they so forcibly present upon this point has no place here, it should have been, as it doubtless was, addressed to the trial jury, who were the sole judges of the facts.

The Commonwealth introduced a witness, G. H. Farney, who testified that on the afternoon of the day upon which Newton Drummond Veal was killed, he had a conversation with appellant, in which appellant told him that if it developed that he owed him money for the season to a boar he would pay him, and if he did not, his wife would. The Commonwealth introduced another witness, Sarah Taylor, to whom appellant said he wanted her to tell her daughter, who owed him some money, to leave the money with his (appellant's) wife. The testimony of these two witnesses is that of which appellant chiefly complains; the Commonwealth insists that it was competent, as it showed that appellant was contemplating killing Newton Drummond Veal, and was making preparation to leave, and wanted to get his business affairs straightened up before he did so. Appellant denied having the conversation either at the time indicated, or about that time; and his counsel insists that, even if he did, it was but such a conversation as would naturally occur in the conduct of one's every day business affairs, and was not in any sense evidence that appellant was contemplating the law and fleeing the country.

The indictment is in words and figures as follows:

"Fayette Circuit Court.

"Commonwealth of Kentucky,	}	Murder.
v.		
Robert Hocker.		

"The Grand Jury of Fayette county, in the name and by the authority of the Commonwealth of Kentucky, accuse Robert Hocker of

the crime of murder, committed as follows, to-wit: the said Robert Hocker on the 29th day of June, 1907, in the county aforesaid, did unlawfully, willfully and feloniously, and with malice aforethought, shoot and wound Newton Drummond Veal, with a gun, loaded with powder and leaden balls and other hard substances, from which shooting and wounding said Veal died in Fayette county, Kentucky, within a year and a day, against the peace and dignity of the Commonwealth of Kentucky."

To this indictment, appellant filed a general demurrer which was overruled, and of this ruling he complains. It is insisted for him that the indictment is defective for two reasons. First, it fails to charge that appellant shot deceased "with the intention of killing him." Second, that in the body of the indictment the word "murder" is not used and that it is fatally defective because of this omission. Was it necessary that the indictment should state that the shooting was done with the intention of killing deceased? This precise question has been before us in several cases. In the case of *Jane v. Commonwealth*, 3 Met., 18, the defendant was charged with the murder of the deceased by the use of poison. The indictment alleged that the defendant "willfully and maliciously, and with malice aforethought, killed one Jane Porter, by administering to her strychnine, from the effects of which she died." It did not allege that the strychnine was administered with the intention of killing deceased and, although the indictment in that case was attacked as defective, it was held to be sufficient. And in the case of *Wilson v. Commonwealth*, 22 Ky. Law Rep., 1251, the accused was charged with having murdered one Mary Cloyd, by administering to her drugs, and inserting into her womb, for the purpose of producing an abortion, instruments and other contrivances, which caused her to abort, and that by reason thereof, and the drugs administered she became sick and died soon thereafter. This indictment, although it failed to state that the drugs were administered or the instruments used for the purpose of producing death, was, nevertheless, held to be a good indictment for murder.

The law looks not to form so much as to substance, and where an indictment states concisely all of the acts necessary at common law to constitute the crime of murder it is a good indictment for such. There are certain essential elements which an indictment must contain. These are defined in section 122, of the Criminal Code, as follows:

1.

"The title of the prosecution, specifying the name of the court in which the indictment is presented and the names of the parties.

2.

"A statement of the acts constituting the offense, in ordinary and concise language, and in such a manner as to enable a person of common understanding to know what is intended; and with such degree of certainty as to enable the court to pronounce judgment, on conviction, according to the right of the case."

And section 124, states what must be set out with certainty in the indictment, to-wit:

"1. The party charged.

"2. The offense charged.

"3. The county in which the offense was committed.

"4. The particular circumstances of the offense charged, if they be necessary to constitute a complete offense."

The use of the word "murder" in the accusatory part of the indictment would not make it a good indictment for murder if it was lacking in the essential elements which go to make up that crime.

Although its use can not make an indictment good where some of the essential elements are lacking, would its absence, in a case where all of the constituent elements of the crime are present, render an indictment defective? We think not. In the case of *Kaelin v. Commonwealth*, 84 Ky., 354, this court defined the following to be the true test of a good indictment for a felony:

"If the defendant should admit on the trial all of the material facts alleged in the indictment as constituting the crime with which he was charged, he would not be permitted to plead or give in evidence any fact that would acquit him, such as self-defense."

Applying this rule to the indictment before us, we are of opinion that it is clearly sufficient; for, if appellant admits that he "unlawfully, willfully, feloniously and with malice aforethought shot and wounded the deceased, from the effect of which shooting and wounding, he died within a year and a day," he has admitted all of the constituent elements which go to make up the crime of murder, and in doing so has cut himself off from every defense. In this indictment the facts constituting the offense are clearly and concisely stated and the appellant, upon even a casual reading thereof, was fully apprised of the offense with which he was charged, and the statements therein are sufficiently certain to enable the court to pronounce judgment upon conviction. In the case of *Britton v. Commonwealth*, 29 Ky. Law Rep., 858, the indictment was for murder, and in the exact language of the indictment in the case at bar; although the same question was not raised in that case as in this case, the indictment was held to be good.

In the early history of our criminal practice, prosecutions were hedged about by so many forms and ceremonies that it was extremely difficult to draw a good indictment. In many instances there was a partial, if not a total, miscarriage of justice, because of the lack of skill or inadvertence on the part of the prosecutor in the drafting or preparation of the indictment. To remedy this evil and place the Commonwealth, as nearly as possible, upon an equal footing with the accused, the rigidity of the old rule of procedure has, by statutory provision, in most States, been so relaxed that now, if the constituent elements, constituting the crime are set out in apt and appropriate language, in the body of the indictment, it is held to be good. The pleader is not now confined or limited to the use of any particular words, phraseology or form in the preparation of the indictment, so long as he sets out with particularity, in apt and appropriate language the constituent elements of the offense, except in that class of cases where a constituent element of the crime can only be defined by the use of a particular word, then that particular word must be used.

It is urged that the use of the word "murder" in the indictment is as essential to its validity as is the use of the word "feloniously," or, "with felonious intent," but to this we can not agree. This court has repeatedly held that the word "feloniously" has fixed and well-defined legal meaning, understood by bench and bar. As said by Mr. Wharton, in his work on Criminal Law, section 399:

"The word 'feloniously' is essential to all indictments for felony, whether at common law or statutory; and in several cases technical and appropriate words are frequently requisite in adding to the description of the offense. Thus, in an indictment for murder, it is essential to state, as a conclusion from the facts previously averred, that the said defendant * * * feloniously did kill and murder—a term of art which in no case can be dispensed with—on the same principle, it must also be alleged, that the offense was committed of defendant's malice aforethought—words which can be sup-

plied by the aid of no other; and if any of these terms be omitted the indictment is defective."

The use of the word "feloniously" is necessary because it defines one of the constituent elements which go to make up the crime of murder, and there is no other word in the English language which is a perfect synonym for it that can be used to supply its place, hence, as said by Wharton, it is, in criminal procedure, a "term of art" peculiarly adapted to define one of the constituent elements of a felony, and its presence in every indictment for felony is absolutely essential; but not so with the word "murder." It defines the crime itself, and is not a constituent element thereof. In the accusatory part of the indictment it should appear, and in the indictment in the case at bar it does so appear. Measured by the standard which this court has adopted for a good indictment, and tested by the provisions of the Code and the adjudicated cases of this court, we are of opinion that the objections raised by counsel for appellant to the indictment in the case at bar are not well taken, and the trial court did not err in so holding.

We come now to the second ground urged for reversal. Did the court err in permitting the Commonwealth's witnesses, Farney and Taylor, to testify to certain conversations had with them by appellant, on the day of the killing, relative to matters of business? This evidence was offered by the Commonwealth as tending to show that on the day of the killing, appellant was making preparations for flight. The Commonwealth had a right to show all of the acts and conversations of appellant which would tend to throw any light, even though small, upon the killing, and to establish appellant's guilt.

It was the duty of the Commonwealth to bring before the jury every fact and circumstance which would tend to show that appellant maliciously killed deceased. If, on the day, or even a week or month, or at any time before the killing, he had stated he intended to kill him, clearly this evidence would have been competent. It is not usual for one who contemplates committing a minor offense, much less the most serious crime known to the law, to advertise the fact in advance, and where such an intent exists, it must usually be shown by acts and circumstances, rather than by direct or positive declaration. While, to our minds, the testimony offered by the Commonwealth for the purpose of showing that appellant contemplated fleeing the country, was so unimportant that it might almost be deemed immaterial, yet, it was competent, and being so it was peculiarly the province of the jury to weigh this testimony, and determine whether or not it tended to show that at the time the conversations were had, appellant was preparing for the commission of the crime, and subsequent flight from the country.

It is likewise complained that the court erred in permitting the witness, Lynch, to testify to the purchase of the pistol cartridges, inasmuch as deceased was not killed with a pistol, and it was not shown that appellant had, at the time of the shooting, upon or about his person a pistol, or cartridges. He admitted he had a pistol at home, while it is true he stated he had it with him when he killed deceased, and he introduced a witness whose testimony might be regarded as, in a degree, substantiating him upon this point; still the fact that he had bought the cartridges only an hour or so before killing deceased, was properly submitted to the jury for their consideration, along with the other evidence, on the theory of the Commonwealth, that at the time he did so he was making preparation to kill him. If, as a matter of fact, such was his purpose, and he afterward changed his plan and adopted other means of carrying out that purpose, the testimony would be none the less compe-

tent for the purpose of showing that, in killing deceased, he acted with malice aforethought.

Appellant likewise complains of the instructions, which are as follows:

"If the jury believe from the evidence, beyond a reasonable doubt, that the defendant, Robert Hocker, in Fayette county, Kentucky, and prior to the 29th day of June, 1907, willfully and intentionally shot and killed Newton Drummond Veal, by shooting said Veal with a gun loaded with powder and leaden ball or other hard substances, and that said shooting was not necessary, and did not, at the time, reasonably appear to the defendant to be necessary, to save the defendant from death, or from suffering some serious bodily harm at the hands of said Veal, the jury should find the defendant guilty—guilty of murder—if said shooting was done by the defendant with malice aforethought—guilty of voluntary manslaughter, if said shooting was done in sudden affray, or in sudden heat and passion, and without previous malice.

2.

"The jury should find the defendant not guilty, unless the jury believe from the evidence, beyond a reasonable doubt, that the defendant did, in Fayette county, Kentucky, and prior to the 29th day of June, 1907, willfully and intentionally shoot and kill Newton Drummond Veal, by shooting said Veal with a gun loaded with powder and leaden ball, or other hard substances.

3.

"If the defendant did shoot and kill Newton Drummond Veal, but at the time defendant shot said Veal, the defendant was in danger of death, or of suffering some serious bodily harm at the hands of said Veal, or if the defendant at the time, believed and had reasonable grounds to believe, that he was in danger of death, or of suffering some serious bodily harm at the hands of said Veal, and if it was necessary, or to defendant, reasonably appeared to be necessary, to shoot said Veal, to avert the danger, or what, to the defendant, appeared to be such danger, this was a shooting and killing in self-defense.

"And if defendant did shoot and kill Newton Drummond Veal, yet the jury should find the defendant not guilty, unless the jury believe from the evidence, beyond a reasonable doubt, that said shooting was not done in self-defense.

4.

"If the jury find the defendant guilty of murder, they should fix his punishment at death, or confinement in the penitentiary for life, in the discretion of the jury.

"If the jury find the defendant guilty of voluntary manslaughter, they should fix his punishment at confinement in the penitentiary for not less than two, nor more than twenty-one years.

5.

"The law presumes the defendant innocent until he is proven guilty beyond a reasonable doubt. Proof, beyond a reasonable doubt of guilt, is such evidence as establishes beyond a reasonable doubt, every fact necessary to constitute guilt, and unless the defendant has been proved guilty, the jury should find him not guilty.

"If the defendant has been proved guilty beyond a reasonable doubt, but the jury entertains a reasonable doubt, whether he has been so proved guilty of murder, or of voluntary manslaughter, they should find him guilty of voluntary manslaughter, the lower degree of the crime charged."

It is insisted that the whole law of self-defense was not given to the jury, and that the instruction on manslaughter was defective. That instead of the words:

"That said shooting was not necessary, and did not, at the time, reasonably appear to the defendant to be necessary to save defendant from death or from suffering some serious bodily harm, &c.," the court should have said that if the shooting was not done:

"In his necessary or apparently necessary self-defense."

That his failure to use the word "self-defense" in the first instruction was misleading to the jury, and prejudicial to appellant, and that as the word "self-defense" was not used, the court should have incorporated in instruction number one, all of the essential elements of self-defense, in order to make instruction number one a good instruction. In other words, appellant insists that if any qualifying clause whatever was inserted in instruction number one, it should have been such a qualification as embodied all of the elements of self-defense, or else the complete self-defense instruction should have been incorporated in instruction number one. That under the instruction as given, although appellant believed, and had reasonable grounds to believe that he was in danger, and although the danger was apparent and not real, still he would be guilty of murder or manslaughter, unless the jury believed that at the time he shot he was in actual danger. That under this instruction, the jury was required to believe that it was actually necessary or apparently necessary to shoot to avoid death or serious bodily harm, otherwise the defendant was guilty. That the necessity or apparent necessity applied to the use of the means employed to avoid injury, and not to the danger itself.

Instruction number one is not subject to the criticism which counsel for appellant is disposed to make of it. Nor are we able to draw the narrow distinction between instruction number one and the instruction which appellant concedes would have been proper. The distinction is very artificial, but even if it be conceded that the failure to use the exact words, "necessary or apparently necessary self-defense," was error, it was in no wise prejudicial or misleading to the jury. The law of self-defense was fully and completely given in instruction number three. When this instruction is read in connection with instruction number one, even the technical objection made thereto can not be sustained. The whole law can not often be put in one instruction, several are usually required, and, where this is the case, each must be read in connection with all of the others, and when so read in the case at bar, they aptly and correctly present the whole law of the case, and particularly the law of self-defense, upon which appellant relies. Instructions very similar to these were approved in the case of *Stout v. Commonwealth*, 29 Ky. Law Rep., 630.)

It is further contended for appellant that as he testified that the shooting was done under a sudden impulse of terror or fright, that in addition to the use of the words "in sudden heat and passion," in the manslaughter instruction, the court should have told the jury, in substance, that if the shooting was done in sudden fright or terror, and without previous malice, then they should find the accused guilty of manslaughter. This objection to the manslaughter instruction is novel. We know of no case where such an instruction was given. Webster defines "passion" to be:

"The state of the mind when it is powerfully acted upon and influenced by something external to itself; the state of any particular faculty, which, under such conditions, becomes extremely sensitive or uncontrollably excited."

So that, while the word "passion" usually refers to a state of mind brought about by anger, it, properly speaking, expresses that condition of the mind when it has lost its self-control and become

GOLDBERG, &c. v. CLEVELAND, &c.

(Filed June 20, 1908—Not to be reported.)

1. Passways—Presumption of Grant—The unexplained and uninterrupted use of a passway for a long number of years carries with it the presumption of a grant, and the burden of overcoming this presumption rests upon the land owner to show that the use has been merely permissive.

2. Grant—Adverse Use of Passway—General Use Of—The general use of this passway by the traveling public for more than thirty years, carries with it the presumption of a grant and the continuous uninterrupted and adverse use by appellees ripened into a right of which they can not be deprived.

Greene & VanWinkle, A. M. Cox, M. C. Swinford and Hazelrigg, Chenault & Hazelrigg for appellants.

W. T. Lafferty and Daniel Durbin for appellees.

Appeal from Harrison Circuit Court.

Opinion of the court by Judge Lassing, affirming.

This appeal involves the right of appellees to the use of a passway over a small tract of land containing about ten acres, owned by appellants. More than fifty years ago, there was a public road or passway from the Cynthiana & Falmouth road, at the point "I," on the annexed map, eastward, up Indian Creek, passing the point "L" to "A," where it intersected the old Cynthiana and Claysville dirt road, which ran from Cynthiana to Claysville along the dotted line through "F," "E," "A," "B," and "D." Later a turnpike was built from Cynthiana toward Claysville and this turnpike, beginning at the point "F," bore off to the east from the line of the old dirt road, and is designated on the map by the points "F," "G," "H" and "C." The land over which the passway in dispute runs, is known as the "Dills and Zilar Distillery property," and lies between the said turnpike and the old dirt road. The old dirt road leading from Cynthiana to Claysville has long since, presumably upon the completion of the turnpike, been abandoned and closed. After it was closed, perhaps as early as 1858, but certainly not later than 1868, the passway in controversy was opened up and from that time until it was closed by appellants, it was used uninterruptedly by appellees and their vendors, who resided at "L," as the only convenient way they had of reaching the Cynthiana and Claysville pike. It was likewise used by the traveling public who desired to pass through that way, either to the Cynthiana and Falmouth pike at "I," or to the Haviland county road at "K," there being a passway from the point "L" to "K" on the Haviland road. About 1868 Willis T. Zilar owned the 150 acre tract of land, upon which appellees now live, and whose dwelling is at the point "L." He also owned the ten-acre tract now owned by appellants. He conveyed to John H. Dills, a one-half interest in the ten-acre tract and they erected a distillery thereon. Later Dills and Zilar failed, and the property which they owned was sold by their assignee, Charles Bramble because the purchaser of the ten-acre tract. The deed by which this ten-acre tract was conveyed to him was never recorded, and the exact date of this conveyance is not known, though it was somewhere in the early seventies. During all the time that the ten-acre tract was owned by Dills and Zilar the traveling public continued to use this passway in question, and after the sale by

fering with their free use and enjoyment thereof, alleging that they were entitled to its use as a matter of right, by reason of its having been used by them and those whom they succeeded in the ownership of the farm upon which they lived, and the traveling public for a great number of years, and particularly for more than fifteen years. The answer, while admitting the use of said passway, alleged that it was merely a permissive use, and denied that appellees had acquired any right thereto by reason of their having been permitted to use said passway for a great number of years. Issue was joined upon the question as to whether or not the use of this passway was permissive.

Much proof was taken and upon final hearing, the court adjudged that it was not a permissive use, but that plaintiffs, as a matter of right, were entitled to the free use and enjoyment of this passway, as an outlet to and from their residence and the Cynthiana and Claysville turnpike. Being dissatisfied with the judgment the defendants appeal.

All of the proof taken by both sides shows, beyond question, that this passway, in practically the same place where it is now located, has been used uninterruptedly since the building of the distillery in 1868 or 1869; and, while some of the witnesses for appellants testify that it was merely a permissive use, they all agree that it was an uninterrupted use by the residents of appellees land at "L," and any one else who desired to pass that way, from 1869 to the spring of 1906. Much time and attention is devoted by appellants' counsel, in brief, to show that any right to the use of the passway over the ten-acre tract, which Willis T. Zilar had for the benefit of the 150-acre tract, now owned by appellees, was lost or merged in the fee when he became the owner of the ten-acre tract, and that inasmuch as he made no reservation whatever, of the passway for the benefit of the 150-acre tract, when he conveyed to Dills a one-half interest in the ten-acre tract, he necessarily lost the right to continue to pass over the ten-acre tract, as a matter of right, if such right had existed in his favor prior to his purchase and ownership of the ten acre tract in question.

This discussion presents many nice questions and points of interest, but from the conclusion which we have reached, a consideration of them will not be necessary, for we are of opinion that, without regard to what the rights of the vendors of appellees and the traveling public may have been in the use of this passway, prior to the sale and conveyance by Dills and Zilar, they have, by the uninterrupted, open and adverse use of the passway in question, since the sale by the assignee of Dills and Zilar, acquired a right thereto of which they can not now be deprived. Practically all of the witnesses agree that since Dills and Zilar became the owners of this ten-acre tract, the passway in question has been used by the occupants of the 150-acre farm, now owned by appellees, and the traveling public.

The record shows that, after the failure of Dills and Zilar in the distilling business, this ten-acre tract was sold and one Charles Bramble, became the purchaser thereof. This sale must have occurred sometime in the early seventies, though the exact date is not shown. The deed by which Bramble acquired title to this property was never recorded and is not before us, but he held it under his purchase for at least twelve years, as is evidenced by the testimony of Omer Taylor, who says that he lived there with his father, who was a tenant of Bramble's for twelve years. Bramble sold and conveyed it to N. W. Frazier. Frazier sold it to George Peddicord and wife in 1884, so that, without taking into consideration the time it was owned by Frazier, Bramble must have become the owner

thereof as early as 1872. The Peddicords, who purchased from Frazier, held it three years; following them, Bridget Murphy owned and held it for six years; and David Florence purchased and held it for seven years. R. S. Cordry purchased and held it for one year, and David Florence bought it a second time and held it for four years, making an aggregate of, at least, thirty-three years since the sale by the assignee of Dills and Zilar, during all of which time this passway has remained open to the free and uninterrupted use and enjoyment of the occupants of the 150-acre farm and the traveling public.

It is true some testimony is offered by appellants which, considered by itself, would tend to show that the use thereof had been merely a permissive use and not claimed as a matter of right by the owners of the 150-acre farm or by the traveling public. Among the witnesses who have so testified, are Thomas J. Murphy, the husband of Bridget Murphy, and David Florence, who twice owned the farm, and, while each testifies that the use was a permissive use, they admit that it was at no time interrupted and that no one was ever denied the right to use it. It is urged that the witness, Florence testifies positively to an agreement, which he made and entered into with Willis T. Zilar, the then owner of the 150-acre tract of land, by which the said Zilar was permitted to pass over the land along the passway in question, but when his testimony is considered and read as a whole, his idea of a permissive use is shown to be rather confused, as evidenced by the following cross-examination:

"Q. Did you ever hear any one dispute any one's right to pass over this passway?"

"A. No, sir."

"Q. So it has been by permission, as you say?"

"A. Yes, sir."

"Q. You mean by that, when you say by permission, that no one ever objected?"

"A. No, sir, only I asked Mr. Zilar if I could go through. He said yes, if I would let him go through my land, and I told him all right."

"Q. You mean by permission that you never heard any objections?"

"A. Yes, sir."

"Q. You never heard any one oppose it?"

"A. Of course, there was only myself. I would fuss because I could not close it up; I had no financial affairs to try to close it and I didn't want to have any trouble over it."

"Q. You don't know how that road got there in the first place?"

"A. No, sir."

"Q. You don't know how it was put there?"

"A. No, sir."

"Q. It was there when you bought the place?"

"A. Yes, sir."

"Q. And you sold it with the road on it?"

"A. Yes, sir."

"Q. And there was nothing said about closing it?"

"A. No, sir."

The witness, Thomas J. Murphy thus testified as to the permissive use of this passway:

"Q. Was this passway, if you know, a public passway, a private passway, or merely a gateway of your own?"

"A. The only ones that passed through there were just the neighbors."

"Q. Where were these neighbors going when they passed through there?"

"A. I don't know, there were only a very few went through, but I don't know where they were going."

"Q. Did the people, neighbors, who passed over your land on this passway, go over it by your permission, or did they pass as a matter of right, or was it by your indulgence?"

"A. I never refused them, I permitted them to go through, but if they had claimed to go through by right I would have stopped them, or I would have tried to anyhow."

"Q. Do you mean to say that you permitted those neighbors to pass through and over your land to the Zilar farm, merely as a neighborly courtesy, and not because they had a right to pass over it?"

"A. I simply allowed them to go, but if they had claimed a right to go, I would have stopped them, sure."

This witness admits that the passway was over the place at the time that his wife bought it, and that the neighbors passed through there when they pleased, without asking permission. The fact that permission to pass through was not sought of him or his wife is evidence rather against appellants than for them, for if the neighbors had not regarded this passway as a public passway, they would, no doubt, have sought permission before attempting to pass through, and their failure to do so rather lends color to appellees' contention that they were using it as a matter of right. The unexplained and uninterrupted use of a passway for a long number of years carries with it the presumption of a grant. (*Browning v. Griffith*, 23 Ky. Law Rep., 334; *Kriegler v. Newman*, 29 Ky. Law Rep., 27; *Schwer v. Martin*, 29 Ky. Law Rep., 1221; and *Boyd v. Morris*, 32 Ky. Law Rep., 642.) And the burden of overcoming this presumption rests upon the land owner to show that the use has been merely permissive. (*Burch v. Blair*, 19 Ky. Law Rep., 641.) And, while appellants have introduced some evidence which would tend to show that the use was a permissive use, still it is out-weighted by the facts and circumstances, which are shown by the record, and the main witness, by whom appellants seek to show that the use was a permissive use, contradicted himself on the vital question.

It is most significant that during the time covering at least thirty-three years, following the date of the sale of this ten-acre tract by the assignee of Dills and Zilar no one was ever denied the right to pass over this passway in question, until it was closed up by appellants in 1906, although during this time the land in question had been owned by, at least, six different people. Another significant fact is, that during all of this time no one is shown to have ever asked permission of any owner to pass over this passway. On this old passway, as it originally ran, connecting the Falmouth road with the Cynthiana and Claysville road, there at one time stood a grist mill, near the residence at "L," a stone factory, and later a distillery. Each of these business enterprises invited custom and trade, and necessarily encouraged the general public to pass over this connecting road, which having been used by the general public for a great number of years, prior to the building of the distillery, no doubt, as alleged by appellees, had come to be regarded by the traveling public as a public road, and not as a private lane or passway; after this distillery had ceased to be used as such, the public continued to use this road, from the ford, at "P" to the point "H," as they had theretofore used it. The great weight of the testimony and circumstances brought out in the evidence of the witnesses, not only for the appellees, but for appellants, as well, justify the conclusion that appellants used this passway as a matter of right. The fact that appellees attempted to buy the land, or a portion thereof, over which this passway runs, does not militate in the least against their claim, for it appears that it was done with a view of avoiding litigation with ap-

pellants on account thereof, and not in recognition of appellants' claim that their use of the passway was merely permissive.

Appellants also urge that appellees should not be permitted to claim the use of the passway, as a matter of right, because appellee, David Cleveland, was present when appellant bought the land over which the passway runs, and failed to assert his claim to any passway over said land, and that by reason of such failure on his part to speak when it was his duty to do so, he is now estopped from asserting claim to said passway. There might be some merit in this contention if it was a conceded fact that David Cleveland, who now claims the passway over said land, stood by and saw it sell to appellant and failed to make known that he was asserting a right to a passway over the land; but David Cleveland denies that he was present at the sale, and several witnesses were introduced who testified that he was not there, and, while several persons have testified that he was there, we are of opinion that the weight of the testimony is to the effect that while some of his brothers were present he himself was not at the sale. Much testimony was introduced to show that appellees have a convenient and accessible way of going to and from their farm to a public road known as the "Haviland Road" at "K." Admitting this testimony as true, it can not be considered for the purpose of depriving them of the right to their use of the passway in question, for their right to the use of his passway, under the pleadings in this case, is not made to depend upon their having no other convenient or suitable outlet, but it is claimed as a matter of right, by the uninterrupted, open and adverse use of it for more than fifteen years; they claim they have acquired a right to its free and undisturbed use, hence its necessity or convenience can not enter into the consideration of the question before us. In the case of *Estep v. Hammons*, 104 Ky., 144, and in the quite recently decided case of *George Johnson, v. Edna Allen, &c.*, it was expressly held that one could not be deprived of the use of a passway to which he was entitled because he had acquired another outlet.

The evidence shows that this passway is well-defined, and each of the several owners of the land who testified, bore evidence to the effect that it was there when he bought the land, was used uninterruptedly during his ownership, and was being so used at the time that he sold and parted with his title thereto. The general use by the occupants of appellees' 150-acre farm and the traveling public for more than thirty years, carried with it the presumption of a grant, and by their continuous, uninterrupted and adverse use thereof, appellees' claim to said passway had ripened into a right of which they could not be deprived.

We are of opinion that the chancellor arrived at the correct conclusion, and the judgment is, therefore, affirmed.

WEIKEL v. WEIL, &c.

(Filed June 20, 1908—Not to be reported.)

1. Contracts—Repairing Building—Question of Fact—The issue in this case, arising out of a contract for the repair of a building is a very simple one of fact, the instructions clearly presented the only issue in the case, and the verdict of the jury will not be disturbed.

2. Verdict of Jury—Rule as to Upholding—It has been repeatedly held by this court that it will not interfere with the verdict of a prop-

erly instructed jury upon a question of fact unless it is so flagrantly against the evidence, as to appear to be the result of passion or prejudice.

Campbell & Campbell for appellant.

J. D. Mocquot for appellees.

Appeal from McCracken Circuit Court.

Opinion of the court by Judge Carroll, affirming.

The appellant brought this action to recover from the appellees \$540.55, alleged to be due upon a contract for repairing a building. Two hundred and fifty dollars of this amount was charged for "shoring up joists," which was necessary in re-building a wall. The appellees admitted an indebtedness of \$290.55, but denied any liability on account of the shoring up of the joists. Upon a trial before a jury, a verdict was returned rejecting the claim for shoring up the joists, and from the judgment upon this verdict this appeal is prosecuted.

It appears from the evidence that J. P. Smith and the appellees owned a party wall. Smith made a contract with appellant to repair his building, of which this party wall was a part. The contract provided that appellant was to tear down and re-build the front, three stories in height; and further stipulated that appellant would do "all necessary shoring on all the floors." He further agreed "to furnish all labor and material necessary to tear down and re-build the partnership wall between Smith's building and the building owned by appellees, in a true and workman-like manner, of the same thickness and size as at present, from the front back to a separate wall which forms a part of the partnership wall; the length of the proposed new wall to be about 56 feet." It was also agreed that one-half of the cost of repairing the party wall should be paid by appellees, and because of this fact they signed the contract made between Smith and Weikel. Appellees were not concerned in the contract except as it related to the erection of the party wall. There is no controversy between Smith and appellant, as Smith paid the full contract price agreed upon. Nor is there any dispute between appellant and appellees as to the cost of one-half the party wall, that was to be paid by them, as the amount due for this was paid. So that the only question is whether appellant's obligation in the contract made with Smith "to do all necessary shoring on all the floors." embraced the shoring made necessary in the building of appellees by the tearing down of the old and the construction of a new party wall.

Appellant's contention is that the reference to shoring in the contract with Smith only embraced and contemplated the shoring made necessary in Smith's building, and on his side of the party wall, and did not include the cost of shoring up appellee's building on their side of the party wall. Whilst appellees insist that the contract with Smith, to which they were parties, in so far as the party wall was concerned, included all the shoring necessary to be done on either side of the party wall; and that this was the only contract between them in respect to the shoring.

It will thus be seen that the issue between the parties is a very simple one of fact.

Appellant testified that the tearing down of the party wall made it necessary to shore up with timbers the first and second stories of appellees' building, and this work was done at the instance and request of appellees, although all that was said between them was that appellee told Weikel "to protect his building and he would treat him right

about it." Appellant says that was all the contract there was between them. This alleged contract was in parol, and was made subsequent to the written contract between Smith and appellant.

It was also shown that the wall could not have been torn down without shoring up the buildings on each side, and that the reasonable expense of shoring up appellees' building was \$250.00.

Appellees' testimony was in substance that he had a contract with appellant to do other work on his building at the same time that the party wall was being re-built, and when Smith's work was going on. But that nothing was said about charging him for shoring up his building, nor did appellant inform him at any time that he would expect pay for it.

The court instructed the jury as follows:

"1. It is admitted by the defendants in their answer that the plaintiff furnished the material and performed labor, on tin work, for painting and pointing the front of the house, for \$279.95, and for shoring the front of the house \$110, and the court now instructs you to find for the plaintiff the said sum of \$290.00. And the court further instructs you that if you shall believe, from the evidence in this case, that, under the direction of the defendants, or at the special instance and request of the defendants, the plaintiff furnished the material and performed the labor in shoring up the joists of the house, then you will find for the plaintiff such additional sum, not exceeding \$250.00, as you may believe, from the evidence in this case, would be a fair and reasonable compensation for furnishing said material and performing said labor.

"2. But unless you shall believe, from the evidence, that plaintiff furnished the material and performed the labor in shoring up said joists, under the direction of the defendants, or at their special instance and request, then the law is for the defendants as to the said \$250.00, and you will so find."

These instructions presented clearly to the jury the only issue in the case.

It is complained that the court erred in permitting the contract between Smith and Weikel to be introduced as evidence. But this complaint is not well founded. The contract between Smith and Weikel was signed by appellees, and contained stipulations referring, not only to the party wall, but to the shoring of the building. Whether the provisions in this contract, in respect to shoring, embraced the building owned by appellees as well as the building owned by Smith was a material issue in the case, and upon this issue the jury found against appellant.

It is also urged that the verdict is flagrantly against the evidence. It may be conceded that the weight of the evidence supports appellant's view, but there was evidence from which the jury might have reasonably inferred that, as the contract between Smith and appellant expressly provided for re-building the party wall, it was contemplated that the price charged in that contract included the expense of shoring on both sides of it. We can not say that the verdict is not supported by evidence, or that it is so palpably against it as to warrant us in setting it aside. It has been repeatedly declared by this court that we will not interfere with the verdict of a properly instructed jury upon a question of fact, unless it is so flagrantly against the evidence as to appear at first blush to be the result of passion or prejudice.

The judgment of the lower court is affirmed.

GABOURY, FOR USE, &c. v. COOMBS, &c.

(Filed June 20, 1908—Not to be reported.)

Thos. W. Bullitt and A. Scott Bullitt for appellants.

B. F. Proctor and Greene & VanWinkle for appellee Kister.

John B. Grider and W. B. Gaines for appellee Meyler.

B. W. Bradburn for Aberdeen Coal Co.

Appeal from Warren Circuit Court.

Affirmed by equally divided court.

Judge Settle not sitting.

CITY OF MIDDLESBORO v. COAL AND IRON BANK.

(Filed June 20, 1908—Not to be reported.)

T. G. Anderson for appellant.

N. B. Hays and J. R. Sampson for appellee.

Appeal from Bell Circuit Court.

Judge Hobson delivered the following response to petition for rehearing, overruling:

Mrs. Saulsberry should be credited in the judgment by anything she paid on the attempted compromise.

The order appointing the receiver was made at a regular term of court, and we must presume the court had before it facts sufficient to warrant its action. The parties must take notice of what is done by the court, when in regular session, and as Mrs. Saulsberry was a pendente lite purchaser she is bound by the order of the court made.

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10. Pro Tem Commonwealth's Attorney—Appointment—Statutory Provisions—Discretion of Court—Under sections 120 and 127, Kentucky Statutes, relating to the appointment of a pro tem. attorney in the absence of the Commonwealth's Attorney. Held—Their meaning is that in the absence of both the Commonwealth's attorney and county attorney, or when both are of kin or of counsel for the accused, the circuit judge shall appoint a Commonwealth's attorney pro tem., whether in cases of felony or misdemeanor, but in the absence of the Commonwealth's attorney, when the county attorney is present, the circuit judge shall not appoint such pro tem. attorney, except in felony cases he may or may not appoint such pro tem. attorney in his discretion. <i>Adams v. Commonwealth</i>	779
11. Same—Presence of County Attorney—Refusal to Appoint Pro Tem. Commonwealth's Attorney—On the trial of one indicted for murder, in the absence of the Commonwealth's attorney, it was not error in the circuit judge to refuse to appoint a pro tem. Commonwealth's attorney, where the county attorney was present and took an active part in the prosecution, though employed counsel was permitted to close the argument for the Commonwealth before the jury. The case of <i>Keeton v. Commonwealth</i> , 32 Ky. Law Rep., 1164, is modified so far as it conflicts with this opinion. <i>Idem</i>	779
12. Same—Employed Counsel—Opening and Closing Argument --This court will refuse to reverse a judgment of conviction in a criminal case upon the ground that employed counsel was permitted to make the opening statement and the closing argument where it appears that the trial was otherwise properly conducted and the defendant's guilt is reasonably certain. <i>Idem</i>	779
13. Misconduct of Counsel—Admonition of Court to Jury—Effect--An improper statement made by the county attorney to the jury, which the court admonished the jury not to consider, can not be considered on appeal as prejudicial to the defendant. <i>Idem</i>	779
14. Embezzlement—Indictment—Averments—Proofs of Assumed Names—Competency—Identification—On the trial of	

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- one indicted by the name of Homer Marion, alias Homer Morris, alias P. Homer Morse, for embezzlement by collecting money from S. for a Distilling Co., for which he was acting as agent, and converting it to his own use, under Ky. Statutes, sec. 1202, evidence was competent that he had sold warehouse receipts for whisky in bond to persons other than S. and collected the money, representing himself as Homer Marion, for the purpose of identifying him as the person indicted. *Morse v. Commonwealth*. 831
15. Same—Identification—Range of Evidence Allowed—Upon the trial of an indictment, when the defense is that it was not himself but another who committed the crime the evidence on behalf of the Commonwealth may be permitted to take a wide range for the purpose of developing the past history of the accused, and the names he has assumed, to the end that he may be identified as the person who committed the offense charged. But if, in the investigation, it should appear that the accused had been guilty of some other offenses the court should admonish the jury that they should consider such evidence only for the purpose of identification. *Idem* 831
16. Same—Evidence of Commonwealth—On the trial of one indicted as agent, for embezzling the money of a corporation, the Commonwealth must prove (1) that the accused was the agent of the corporation; (2) that as such agent, in the course of his employment, he received money for the corporation; (3) that he fraudulently converted the money so received to his own use. *Idem* . . . 832
17. Same—Guilty Intent—Evidence Showing—Acts Implying—It is not indispensable that the Commonwealth should introduce evidence to show guilty intent before a conviction can be secured for embezzlement. While such intent is a necessary ingredient and must be alleged in the indictment, the law will imply an intent from the acts of the accused when they are sufficient to establish his guilt. But the Commonwealth will not be permitted to prove that the accused has committed other and distinct crimes than the one for which he is being tried unless such evidence is necessary to establish the identity or guilty knowledge of the accused. *Idem* 832
18. Corporation—How Proven—On the trial of one for embezzling the money of a corporation the existence of the alleged corporation may be proven by parol evidence. *Idem* 832
19. Money Embezzled by Agent—Commission of Agent—Where one is shown to have embezzled money which he as agent collected for his employer, he can not be excused because he was entitled to a part of the money as his commission as such agent. *Idem* 832
20. Amount Charged—Proof of Less Sum—Sufficiency—One may be convicted for embezzlement although the evidence may show that the amount embezzled was less than the sum named in the indictment. *Idem* 832
21. Housebreaking—Evidence—Motion For New Trial—On the trial of appellant for housebreaking, there was but one question before the jury, and that was one of fact, and the evidence was sufficient to warrant their finding that appellant was guilty. Under section 281, Criminal Code, this court can not reverse for any matter arising on the

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motion for a new trial, and therefore, affidavits as to newly discovered evidence, filed after the trial, can not be considered on appeal. <i>Thomas v. Commonwealth.</i>	849
22. Indictments—Failing to Charge Intent—Acts Necessary at Common Law—The law looks not to form so much as substance, and when an indictment states concisely all of the acts necessary at common law to constitute the crime of murder, it is a good indictment for such. The failure of the indictment to charge that appellant shot deceased “with the intention of killing him” does not render it defective for the reason that it states all the facts constituting the offense with which he is charged, and the statements are sufficiently certain to enable the court to pronounce judgment of conviction. <i>Hocker v. Commonwealth.</i>	944
23. Evidence—Competency of—While it appears to this court that the testimony with reference to appellant’s intention to flee the country was immaterial, yet it was competent and it was the province of the jury to weigh and determine it. <i>Idem</i>	944
24. Same—Although he killed deceased with a gun, it was competent that he bought pistol cartridges an hour before the killing, on the theory that he was making preparations to kill deceased. <i>Idem</i>	944
25. Instructions—Each to Be Read in Connection with All The Others—Often the whole law can not be put into one instruction, and in such a case each instruction must be read in connection with all the others. When so read, in this case, the instructions aptly present the whole law of this case and particularly that of self-defense. <i>Idem</i>	944
26. Same—A number of authorities hold that the word “passion” includes anger and terror, therefore the court did not err in refusing to embody in the manslaughter instruction, that the killing was done in a sudden impulse of terror. <i>Idem</i>	944
DECEDENT’S ESTATES—	
1. Estates—Settlement Of—Costs of Settlement—Payment Of—S. complains that the money realized from the sale of the real property, in this action to settle decedent’s estate, can not be taken to pay the costs of the settlement suit, and while this view as a principle is correct, it can not be applied here for the reason that the personalty realized more than enough to pay the costs, a part of which went to discharge a part of the prior mortgage debt. Appellant’s mortgage being inferior, can not complain of the judgment requiring him to pay the costs. (19 Ky. Law Rep., 1773.) <i>Sumrall v. Vanarsdall’s Adm’r.</i>	768
2. May be Brought as Soon as Representative Qualifies—The law is well settled in this State, that an action to settle the estate may be brought as soon as the personal representative qualifies. (22 Ky. Law Rep., 1366.) Appellant seeks to have her husband’s estate constituted a trust for her benefit because of his parol declaration just after he was shot and shortly before his death, and while the court properly held that she was not entitled to the whole of it, it was error to dismiss her action on the ground that she asked a settlement of the estate. <i>McCandless, &c. v. McCandless, &c.</i>	790

DEEDS—

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1. Cancellation of—Evidence—In this case, the evidence is examined and held that the deed was properly set aside. It was made under a misapprehension, and in view of the facts appearing, the lower court did not err in canceling it. *Lockhart, &c. v. Buckner, &c.* 678
2. Undue Influence—Evidence—Presumption of Law—There is an utter failure to show any undue influence or fraud in the execution of the deed. The law does not presume incapacity, fraud or undue influence, and when the deed has stood as long as this one (14 years) and has been acquiesced in by the grantor, the presumption in favor of the deed can only be overcome by clear and satisfactory evidence. *Martin, &c. v. Stewart, &c.*..... 739

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EASEMENTS—

- In Adjacent Wall—Prescription—One may acquire an easement in an adjacent wall by deed, or by prescription, which presumes a deed. Conceding that the wall stood upon appellees' lot when appellants came to rebuild their house, their easement was established and it included the right to repair or rebuild. *Mann v. Reigler, &c.* 774

ELECTRIC LIGHT WIRES—

1. Injury to Children—Elevations Beyond Danger—As long as electric light wires are not required to be put under ground, they must be put on poles, and where they are placed as high as eighteen feet above the street, the company should not be required to anticipate that children will climb up to them and get hurt and the company should not be held liable in such a case. *Mayfield Water & Light Co. v. Webb's Adm'r.*..... 909
2. Same—Trespassers—Risk Assumed—Children, as well as adults, when they trespass upon the property of another, take the risk, unless, the circumstances bring the case within the principle of what is known as the Turn Table cases, where a dangerous instrumentality is used that is attractive to children. *Mayfield Water & Light Co. v. Webb's Adm'r.* 909

EMINENT DOMAIN—

1. Taking Private Property for Public Use—Jurisdiction of Courts—Whenever it is attempted, in the interest of a private corporation, to take private property and devote it to a public use, the question as to whether the use to which it is to be put is or not a public one, is for the court to decide, and an act of the Legislature which attempts to deprive the courts of jurisdiction in such a case would be inoperative and void. *Henderson, &c. v. City of Lexington.* 703
2. Cities—Right to Close Public Ways—Public Function—Discretion of Officials—Assumption—Burden of Proof—The streets, alleys and highways of a city are public places and under the exclusive control of the city and when the properly constituted authorities of the city declare that the welfare and convenience of the public demand that public ways shall be closed, it is exercising a public function as an agent and sub-division of the State and

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it will be assumed that the officers of the city, as public agents, will exercise such power with wisdom and discretion for the benefit of the public and that the proceeding is not for private or individual use or advantage, and the burden of showing the contrary is upon the person who objects to such proceeding. Idem	703
3. Same—Legislative Act—Constitutionality—Assumption of Court—The court will not assume that an act of the Legislature authorizing the closing of a street or alley of a city, in whole or in part, by the city council, is unconstitutional because it fails to provide that the question of public use was a matter to be judicially determined, and such act does not take from the courts the control of the subject. Idem	703
4. Same—Public Purpose—Jurisdiction of Courts—The question of the necessity, expediency or propriety of exercising the right of eminent domain for a public purpose, and the extent and manner of its exercise are questions of general public policy and belong to the legislative department, but when the corporation that is given this power attempts to exercise it, it is for the courts to say whether or not it is exercised for a public purpose. Idem	703
5. Act of City—Incidental Benefit to Others—Effect—The mere fact that a corporation or an individual might be interested or benefited by the taking of property by the city for its use, will not of itself deny the right of the city to exercise such power. Idem	704
6. Closing Alley—Action—Necessary Parties—In a proceeding to close a street or alley in a city, the only persons who are necessary parties thereto are those whose property abuts upon or adjoins the street or alley proposed to be closed, but in case of a fraudulent combination between these property owners and the city to close such highway, not in the interest of the public, not in the interest of the public but for private ends, the court might permit other persons not entitled to compensation to come in and resist the closing. Idem.....	704
7. Same—Trial—Separate Trials—In the matter of allowing separate trials in a proceeding to close an alley-way in a city, the discretion is largely in the trial judge. The amount of damages to which each of the parties is entitled can as well be assessed by a single jury as in separate trials by different juries. Idem	704
8. Same—Measure of Damages—Loss of Business—Difference in Market Value of Property—The measure of damages to which an owner of property abutting on an alley is entitled which has been closed by the city, does not include loss occasioned to his business. He is only entitled to compensation for loss sustained to his property which is the difference in its market value by reason of closing the alley, and where such damages have been assessed by a properly instructed jury, the verdict will not be disturbed. Idem	704

ESTOPPEL—See Contracts, 2.

FISCAL COURTS—

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- Order Levying Taxes—Failure to Specify—Purpose of Levy—Validity of Order—The following order of the Fiscal Court of Ohio county was made January 9, 1897: "On Motion of Esq. Wilson it is ordered that the county levy be the same the ensuing year as the preceding years—50 cts. on one hundred dollars worth of property and \$1.50 poll tax on each poll." Held—That said order is void under sec. 180, of the Constitution, because it fails to specify for what purpose the said levy is made. C. O. & S. W. R. R. Co. v. Commonwealth..... 882

FORFEITURE OF TITLE—See Lands, 4.

FRAUDULENT CONVEYANCES—

1. Affirmed on the Evidence—The case is affirmed on the evidence, which shows that appellant W., to avoid paying a judgment, fraudulently conveyed to his father-in-law, S., his farm and all his personal property for the recited consideration of \$5,150, when in fact nothing was paid, which deed was set aside as fraudulent and without consideration and the property held subject to the judgment. Walker v. First Nat. Bank..... 753
2. Evidence—An examination of the facts of this record make it manifest that the conveyances complained of were fraudulent, and the lower court properly so held. Watson, &c. v. Watson's Trustee 760

GOVERNOR—See Special Counsel.

HOMESTEADS—

- Debtor and Creditor—Where a debtor is entitled to a homestead, his creditors can not have the land sold subject to the homestead right. Such a sale may be ordered after the death of the debtor, reserving the rights of his widow and children, but during his lifetime, the creditors can not demand that the land be sold subject to the homestead right. Under the evidence the lien was properly adjudged on the land in controversy. Louisville Fertilizer Co. v. Lorton, &c. 676

HOTELS—See License Taxes.

IDENTIFICATION—See Criminal Law, 15.

INDICTMENTS—See Criminal Law.

INJUNCTIONS—See Appeals, 5, 6; Natural Gas, 1—

1. Granting or Refusing—Discretion of Court—The granting or refusing of an injunction depends upon the facts of each particular case and rests in the sound discretion of the court. Somerset W., L. & T. Co. v. Hyde 866
2. Same—Public Interest—Public Inconvenience—Consideration—Where the interests of the public are to be taken into consideration by the court and when the issuance of an injunction will cause serious public inconvenience or loss without a correspondingly great advantage to the complainant, no injunction should be granted. Idem. 866
3. Same—Interests of Complainant—Where an injunction would have the effect of greatly injuring or inconveniencing the public it may be refused even though as against the defendant, the complainant would be entitled to its issuance. Idem 866
4. Application to Close Sewer—Long Continuance—Absence of Complaint—Damages Ascertainable—Refusal of Injunction—Where it is made to appear that a sewer in a city had been constructed for many years with the consent of the then owner of the property, that it was afterwards

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extended at the request of one of the joint owners of the property; that many years elapsed without any action looking to its abatement being taken, that its discontinuance would work a great hardship upon a large portion of the public in the city and would be a menace to the health of the inhabitants; that the injury to the plaintiffs is of a permanent character for which she may, in one action, recover for all damages past and present, the injunction sought was properly refused by the court.

Idem 866

INTOXICATING LIQUORS—

1. Liquor License—Discretion of County Court in Granting License—The county court has a discretion in granting tavern licenses, and unless it is shown, that that discretion has been abused, there is no cause of complaint. *Schneider v. Commonwealth* 770
2. Same—Appellant's license was regularly procured, the evidence is to the effect that he is a keeper of a tavern in good faith, and that there is a real necessity for a tavern at the place. The fact that he is charged in two cases of illegal sales of liquor does not show that appellant keeps a disorderly house. *Idem* 770
3. Shipping to Local Option Territory—Package—Quantity—Druggists—Under the act of March 21st, 1906, in reference to public or private carriers, or other persons bringing intoxicating liquors into local option territory in unbroken packages not to exceed five gallons at one time, a druggist, may have an unbroken package, not exceeding five gallons shipped to him, and at the same time a five gallon package of alcohol or wine to be used in his business as druggist. *L. & N. R. R. Co. v. Commonwealth* . . . 855
4. Same—Object of Act—Construction—Evasion—The purpose of the act was not to prevent the druggist from keeping up his stock but to prevent him from buying at any time, more than five gallons of any one intoxicant. If he should have more than one package of the same liquor shipped to him at one time, it would be an evasion of the act, but he may have as many packages as he needs of the different kinds shipped to him at the same time. *Idem* 855

JUDGMENTS—

1. Unsigned by Judge—Validity—Under section 390, of Civil Code, requiring the judgments of the court to be entered in the order book and section 378, Kentucky Statutes, requiring that the proceedings of each day shall be drawn up and read by the clerk, and signed by the presiding judge, it is indispensable to the validity of a judgment that it shall be entered on the order book of the court and signed by the judge who rendered the judgment, or by his successor or by the regular judge unless he is disqualified. *Ewell, & Co. v. Jackson, & Co* 673
2. Same—Delivery to Clerk—Entry of Record—Effect—A paper signed by a judge, although it contained the entire judgment and be delivered to the clerk of the court to enter upon the order book, is not a judgment in fact until it has been entered upon the order book of the court and signed by a judge. *Idem* 673
3. Same—Special Judge—Failure to Sign Record—Signature by Disqualified Judge—Validity—Section 977, Kentucky

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Statutes, providing that "upon the death of a circuit judge, or when for any cause the office is vacant or when the judge is absent, his successor, no matter how chosen, may sign any orders left unsigned by his predecessor the same as his predecessor might have done," applies to special as well as regular judges. If a special judge on account of death or absence from the court or retirement from the case, should fail to sign the orders in a case in which he presided they may be signed by the special judge who succeeds him in the case or by the regular judge unless he was disqualified. But if the regular judge be disqualified to preside in the case, then his signature would not validate such judgment. *Idem*... 673

4. Unsigned Judgment—Execution Thereon—Validity—The defendants to an unsigned judgment may enjoin the sheriff from seizure and selling their property under an execution issued thereon. *Idem* 673

5. Judgment for Specific Property—(*Renbaum v. Atkinson & Co.*, 21 Ky. Law Rep., 587, for a full discussion of this question.) The language of section 1665 is too plain to require construction. Wherever there is a variance between it and section 588, of the Code, the statute must prevail for it was enacted subsequently to the Code provision. *Martin v. Ferguson* 761

6. Void Because of Failure to Serve Process—The judgment adjudging appellee to be the owner of the land herein and directing its conveyance to him was void because the heirs of the deceased owner were not made parties, though they were necessary parties and were not before the court, process not having been served upon them. The judgment does not recite that the parties were before the court. *Cox, &c. v. Fowler* 928

7. Same—A judgment taken when there has been no service of process, and the defendant has not entered his appearance, is absolutely void. *Idem*..... 928

JURY TRIALS—

1. Actions—Equitable Issues—Right of Jury Trial—Discretion of Chancellor—The absolute right to have issues in an equity case tried by a jury is confined to issues which are purely legal in their character. Where issues are of equitable cognizance it is within the discretion of the chancellor whether he will order a jury to aid him in finding of the facts. *Barnes v. Johnson* 803
2. Same—Action to Cancel Deed—Consideration—Issues—In this action to cancel deed, Held—That the plaintiff failed to establish the allegation that there was no consideration for the deed or that the deed was intended for a mortgage and that the chancellor did not err in refusing to submit the case to a jury. *Idem* 803

LANDS—

1. Divisional Lines—Creek Changing Its Course—The proof shows that the line in controversy has existed and been acquiesced in for more than thirty years. It can not now be disturbed; if the creek has changed its course it has been gradual, and the line has followed the thread of it. It is not a sudden change of bed as by a freshet. *Pack v. Stepp, &c* 677

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2. Processioners—Report of—Prima Facie Evidence—Section 2374, Kentucky Statutes, provides that the report of processioners shall be prima facie evidence against and between the parties, and the report in this action would have been sufficient to defeat appellant's claim if there had been no other evidence introduced, but the proof shows that she owns the land in controversy, and that the length of the lines stated in the deed were made by oversight, resulting in the controversy. *Lee v. Wheat*..... 724
3. Same—Under the provisions of section 2128, Kentucky Statutes, the husband can not deprive the wife of her land or any interest therein by a conveyance made by him, and appellant did not sign the agreement upon which the report of the processioners was based. *Idem* 724
4. Failure to List for Taxation—Forfeiture of Title—Act of March 15, 1906, Kentucky Legislature—Constitutionality—The questions involved in this action have heretofore been fully considered in former appeals of Eastern Kentucky Coal Lands Corporation v. Commonwealth. (32 Ky. Law Rep., 129), and *Ky. Union Company v. Commonwealth*, decided March 25, 1908, to which reference is made. In conformity with those opinions we hold that article three of the act of the Kentucky Legislature of March 15, 1900, as construed by this court, does not violate the provisions of the Federal Constitution denying the passage by any State of ex post facto laws, or laws impairing the obligations of contracts, or laws denying in any person the equal protection of the law or depriving any person of his property without due process of law. *Eastern Ky. Coal Lands Corp. v. Commonwealth* 867
5. Adverse Possession—Contiguous to Home Place—The question involved here is one of adverse possession. The land in controversy was embraced in a tract conveyed to M. in 1883, and adjoined his home tract of which he was in possession. He had the tracts surveyed and boundary marked so as to include the land in controversy. Held—That the land being contiguous to his home place, and being surrounded by a well defined, marked boundary, it was not necessary for him to make a new entry. Upon acquiring it, it immediately extended to the whole boundary. *Overton, &c. v. Perry, Jr., &c.*..... 931
6. Same—M., in 1888, conveyed to appellants, who from that time have occupied it by an agent and exercised undisputed ownership over it. They are, therefore, entitled to have their title to the land quieted. *Idem*..... 931

LANDLORD AND TENANT—

1. One who takes possession from a tenant can make no defense against the landlord which the tenant could not make. *Hardwick, Sr., &c. v. Karn*..... 776
2. Same—Equity—(28 Ky. Law Rep., 615.) Hardwick was awarded a writ of possession against Smith, his tenant. K. can not take possession of the property from Hardwick's tenant and then enjoin Hardwick from enforcing the writ of possession which had obtained against the tenant. If the gift by K. to his daughter was void he may assert his right to the land in a proper action. *Idem*.... 776
3. Forcible Entry and Detainer—Statute of Frauds—Appellant does not show himself entitled to the possession of the

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premises in controversy. His contract was one not to be performed within a year, was not in writing and was void.

Moore v. Terrell 822

LIBEL—

1. Actions For—What Petition Should Charge—Publication in Newspaper—Where the effect of a publication in a newspaper is to hold a person up to contempt and ridicule, it is not necessary that the petition in an action seeking damages for a libelous publication should allege that the bringing of a suit without authority was unprofessional. When the article complained of charged appellee with bringing an unauthorized suit, the libel was complete. Register Newspaper Co. v. Worten..... 840
2. Same—Libelous Character of Publication—A publication referring to one as “the lawyer, a fellow with a license to practice,” and containing the charge that such person is the friend and companion of criminals is libelous, and a demurrer to the paragraph of the petition pleading it was properly overruled. Idem 840
3. Same—Charge in Publication That Attorney Solicited Business—The fact that it is unprofessional for a lawyer to solicit business is not only recognized by the bar, but by the public, and a newspaper publication containing such a charge is libelous. Idem 840
4. Pleading—Part of Publication Pleaded—In pleading a libelous publication, it is only necessary for the plaintiff to set out that part of publication which he considers libelous. He makes out his case when he proves the publication of the libelous matter. Idem..... 840
5. Same—Instructions—After setting out the alleged libelous articles, the instructions directed the jury to find against the defendants unless they believed from the evidence that all of said publication were true, or in substance true. Held—That the words “or in substance true,” were sufficient to exclude from the consideration of the jury all immaterial statements of fact having no real bearing upon the case. (Louisville Press Company v. Tenny, 20 Ky. Law Rep., 1231.) Idem..... 840

LICENSE TAXES—

Hotels—Restaurants—License—Tax Required—Changed From “American Plan” to “European Plan”—Liability to Double Tax—Under the statute requiring first-class hotels to pay a license of \$150 per year, and a like tax on all restaurants or eating houses where the yearly sales amount to \$50,000, the fact that a first-class hotel changed its plan of serving meals from the “American Plan” to the “European Plan” would not make it amenable to a license tax of \$150 for the hotel and separate tax of \$150 for keeping a restaurant, where all the meals are served from the same table. New Galt House Co. v. City of Louisville.... 869

LIFE INSURANCE—

Suicide—Evidence—This action was upon a policy of insurance which provided that if insured died by his own hand within three years, whether sane or insane, it should be void. Within three years the insured took his life. Under the rule announced in the cases referred to in the opinion herein, it is held, that, under a policy of this sort, there may be a recovery although the insured took his

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own life, if at the time he had not sufficient mind to know that he was taking his life, and the evidence brings the case within the rule above stated. *Modern Woodmen v. Neeley* 758

LOCAL OPTION—See Intoxicating Liquors.

MASTER AND SERVANT—

1. Injury to Servant—Negligence of Master—Safe Place to Work—Verdict—New Trial—Appeal—John E. Nolan, in a trial before a jury, was given a verdict for \$1,085 damages for personal injuries caused by the negligence of his employer in not furnishing him a safe place in which to work. The trial court set aside the verdict and granted defendant a new trial on the ground that the verdict was excessive, to which he excepted and prayed for an appeal. Before the second trial, he died. The action was revived in the name of his administrator and on the second trial, a verdict was rendered for the defendant. This appeal is prosecuted by the administrator to review the first verdict and judgment granting the defendant a new trial. *Nolan's Adm'r v. Stand. Sanitary Mfg. Co.* 745
2. Same—Excessive Verdict—Burning by Molten Metal—Cripple for Life—Pain and Suffering—Lost Time—Where, on the trial of an action, by a servant, against his master for an injury caused by not furnishing him a safe place to work, made so by the negligence of the foreman, in causing another laborer to dig a trench near where the plaintiff was at work, in doing which he struck a ladle containing molten metal, which the plaintiff was carrying, causing it to splash upon his leg and foot, burning both severely, causing him great suffering and pain and the loss of three months time from his work, and making him a partial cripple for life, a verdict of \$1,085 was not excessive. *Idem* 745
3. New Trials—Discretion in Granting—Review—While the circuit court has a broad discretion in granting new trials, its exercise is subject to review and where it is made manifest that it erred in the exercise of such discretion, it is the duty of this court to correct the error. It is with great reluctance that this court will interfere with a verdict on the ground that it is excessive and the circuit court should be equally reluctant to do so. *Idem* 745
4. Reversing First Judgment—Entry of First Verdict Ordered—Wherefore, the judgment is reversed and cause remanded, with directions to the lower court to set aside the last verdict and judgment and in lieu thereof to enter of record the first verdict returned by the jury and enter judgment in conformity therewith. *Idem* 745
5. Liability of Master—Where the master directs an employe to enter a dangerous place to work and the employe complies with the order and is injured, he can recover from the master unless the danger was so obvious and imminent that an ordinarily prudent person would not have undertaken the work even though ordered to, do so by the master. *I. C. Ry. Co. v. Edmonds* 933
6. Settlement for Injury—Tender—Rule as to Tender and Settlement—Had the settlement relied on by appellant been for appellee's injuries, he would not have been permitted

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to recover in this action for damages as the result of his injuries except as he tendered and offered to return the amount paid him before the action, but this rule does not apply to a settlement which only includes loss of time. *Idem* 933
- MEASURE OF DAMAGES—**See Eminent Domain, 8.
- MISCONDUCT OF COUNSEL—**See Criminal Law, 13.
- MINES AND MINING—**
1. Actions—Continuances—Correcting Error in Name of Party—Where the real defendant to an action is before the court, a verbal error in the name of the defendant and correction thereof, whether it be a corporation or an individual, will not of itself be grounds for a continuance. *Stern's Coal Co. v. Evans' Adm'r* 757
 2. Foul Air—Death of Miner—Action for Damages—Evidence—Competency—Statutory Provision—Under Kentucky Statutes, section 2731, providing for keeping fresh air in coal mines, on the trial of an action against a coal company for damages for negligently causing the death of a miner by reason of the explosion of foul air therein, evidence was competent, that a fan located on the outside, near the mouth, used to furnish pure and fresh air in the mine, was often, before the explosion, stopped and not in running order, and that the mine boss knew of this condition of the fan. *Idem* 757
 3. Same—This statute (section 2731), and every statute intended for the protection of laborers engaged in the hazardous business of coal mining, should be rigidly enforced and mine owners held to a strict accountability in the performance of these statutory duties. *Idem* 757
- MUNICIPAL CORPORATIONS—**
1. Cities Enacting Ordinances—Constitutional Requirements—Applicability—Kentucky Constitution, section 46, requiring three readings of a bill on three separate days in each house of the Legislature before its passage, and, on its final passage, to receive the votes of at least two-fifths of the members elected to each house, applies only to an act of the State Legislature, and is not applicable to an ordinance enacted by a city council. *Cumb. Tel'p & Tel. Co. v. City of Hickman* 730
 2. Telephone Franchise—Granted by City Council—Authority Conferred—A franchise to operate a telephone exchange in a city, which the city may grant, is not the same thing as a franchise granted by the State. As to the latter, the right to exist as a corporate being, to exercise eminent domain, to carry on a business of a quasi public nature which is conferrable by sovereignty only, may be said to constitute a franchise, but none of these rights can be given by a municipal corporation. *Idem* 731
 3. Franchise—Ordinance Granting—Installing Telephone—Validity—Under Kentucky Statutes, section 3636, part of charter of cities of the fifth class, providing that no ordinance granting any franchise for any purpose shall be passed by the city council on the day of its introduction, nor within five days thereafter, nor at any other than a regular meeting, "an ordinance of a city defining a franchise for the installing of a telephone therein, providing for competitive bids introduced at a regular meeting of

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the council held more than five days before the passage of the ordinance, conferred a valid franchise on the bidder."	
Idem	731
4. Action—Relief Demanded—Alternative Prayer—Under section 90, Civil Code, providing "if no defense be made the plaintiff can not have judgment for any relief not specifically demanded," where, in an action by a city against a telephone company for a violation of its franchise, the city asked that the company be required to remove its poles and wires from the streets, or if this could not be done, then that it be enjoined from charging its customers more than the amount fixed in the franchise, the defendant is not taken unawares if it confesses the petition when the court decides to grant either alternative of the prayer. Idem	731
5. Same—Action—Who May Sue—Remedy—In an action by a city against a telephone company for a failure to comply with its contract to build and operate a telephone therein, thereby connecting it with other cities, the city may sue for the enforcement of the contract made in its behalf, or one or more of its citizens may sue, but the remedy at law in behalf of the citizen is inadequate. The appropriate remedy was an action for its specific performance. Idem	731
6. Streets—Re-construction Of—Injury to Person in Crossing Street—Damages—Appellee, in crossing one of appellant's streets stumbled over a pile of brick that had been left following the re-construction of the street, injuring herself. It was a bright, sunshiny day, she knew the bricks were in the street and saw them as she attempted to cross it. Upon the trial for damages for the injury, there should have been a peremptory instruction directing the jury to find for the city. City Glasgow v. Crisp	768
7. Same—While it is true that persons have a right to walk across the street at all points where it can be done with safety, no one, knowing of the danger, has a right to wantonly cast himself upon it and then demand damages for the injury received as a result of his own negligence. Idem	768
8. Streets—Grades of—Damage to Property by Grading—A lot owner is not entitled to recover from a city for damage to his lot because of the original grading of the street, where the grade has not theretofore been fixed. The grade of the streets must be presumed to have been taken into consideration when the land was dedicated or acquired by condemnation. The case of City of Owensboro v. Hope, 33 Ky. Law Rep., ante, is conclusive of this question. City of Owensboro v. Singleton	775
9. Sprinkling Streets—Taxing Abutting Property Therefor—Validity of City Ordinance—The question for consideration in this case is, has the General Assembly of the State the power to enact a law "giving cities" the right to adopt ordinances imposing upon property abutting on the streets and public places of the city, a tax based upon the frontage of property, for the purpose of defraying the cost of sprinkling the streets and public places upon which the property abuts? City of Owensboro v. Sweeney	823

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10. Constitution — Limitations — Arbitrary Power — Taxation Without Corresponding Benefit—While there is no limitation in the Constitution, upon the power to levy improvement taxes nor any definition of what an "improvement tax" is, it does not follow from this that the Legislature is so absolutely supreme that its authority can not be questioned. Arbitrary power exists nowhere in this republic. There is a line at which the power to tax and take for special assessments must stop, and in this character of assessments we may safely say that it must stop when it goes beyond real and substantial benefits to the abutting property distinct from those enjoyed by the public. *Idem* 823
11. Special taxes can not be levied unless the property charged receives a corresponding physical, material and substantial benefit from the exaction, upon the ground that it is an attempt to take private property without just compensation in violation of the Constitution, and we hold that sprinkling streets does not confer a special benefit upon the adjacent property in the sense of contributing to its value and hence a special tax for this purpose can not be maintained. *Idem* 823
12. a city ordinance providing for the sprinkling of streets, at the expense of abutting lot owners, the cost being made a lien upon the abutting lots, according to their frontage on the street, is unconstitutional and void. (*City of Henderson v. Sweeney*, decided June 17, 1908.) *McCormick v. City of Henderson* 854
13. Second Class Cities—Superintendent of Streets—Appointment of Street Overseer—Under section 3118, Kentucky Statutes, part of charter of cities of the second class, authorizing the mayor to appoint a superintendent of public works, subject to the approval of the board of aldermen providing that "he can not undertake any improvement or perform any work or make any appointments until said work and improvements * * * and the number and compensation of the employes shall have been fixed by ordinance" it was intended to confer upon the superintendent the right to appoint the employes connected with the improvement of the street, subject to the approval of the council. But while this discretion is lodged in the council it can not take away from the superintendent the naming of the persons he is authorized to employ or appoint. *Board of Aldermen City of Covington v. City of Covington* 880
14. Towns and Cities—Street Improvements — Apportionment Warrant — Assignment — The lot owner having failed to make the improvement required by ordinance, the work was let to James Lillis. In this action by the city against the owner to enforce the lien, he defends on the ground that the work was done by Ed. Lillis and that he assigned the apportionment warrant to Collins and that the title did not pass. Held—That these parties worked together, sometimes taking contracts in the name of one and then in the name of the other, the city discharged a debt appellant owed and is entitled to be subrogated to the rights of the person to whom it paid the money. *Nickels v. City of Frankfort* 918

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15. Ratification—The fact that the city had become the owner of the claim for paving, did not affect the power of the council to ratify the contract. <i>Idem</i>	918
NATURAL GAS—	
1. Actions—Injunction and Damages—Separate Actions—Bar—While an action for injunctive relief and for damages may be joined, they are separate and distinct causes of action and the plaintiff may elect to prosecute each by a separate action, and the fact that he prosecuted an action for an injunction does not bar a subsequent action for damages resulting from the injury he sought to enjoin. <i>Louisville Gas Co. v. Ky. Heating Co.</i>	912
2. Rival Companies—Owning Adjacent Territory—Damages for Wasting Gas Supply—Appellee, Kentucky Heating Company, owned a natural gas well in Meade county and conveyed its product in pipes to Louisville for sale. Appellant, Louisville Gas Company, manufactured gas in Louisville for sale therein and also owned a gas well in Meade county, adjacent to the well of appellee. Appellee, in an action in equity, obtained an injunction against appellant from wasting the Meade county gas by burning it in a pretended effort to make lamp-black, and in subsequent action obtained a judgment for \$60,000 in damages for wasting the gas in the Meade county gas territory from which judgment this appeal is prosecuted. Held—That the burden was on the appellee to make out its case, and it must do this by evidence other than the finding of the jury in the equity case which was incompetent in this action. <i>Idem.</i>	912
3. Same—Gas Reservoir—Reservoir of Adjacent Owners—Wasting Gas Supply—Measure of Damages Recoverable—The right of surface owners to take gas from subjacent fields or reservoirs is a right in common. There is no property in the gas until it is taken. The right of owners of the surface to take it is only limited by its being taken for a lawful purpose and in a reasonable manner, but any unlawful exercise of this right which results in injury to the natural right of any other tenant in common is an actional wrong, and in such case the measure of damages is the difference in money at the point where taken between the value of the natural flow of the gas and that of the diminished flow directly and independently of all other causes attributable to the wrong. <i>Idem.</i>	912
4. Same—Punitive Damages—When Recoverable—In an action by a surface owner against a like owner for damages for wasting the gas under their common territory there can be no recovery for punitive damages unless it is shown that the defendant willfully wasted the gas or acted maliciously with a design to injure the plaintiff's business, in which case punitive damages may be recovered. <i>Idem.</i>	912
5. Same—Argument to Jury—Discretion of Counsel—In an ordinary action no argument should be permitted in making the opening statement to the jury by counsel, but counsel may, with propriety, in the closing argument, discuss such facts as are in evidence without limit or restriction so long as he confines himself to the evidence and its application to the law as given by the court. <i>Idem</i>	912

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OFFICE AND OFFICER—

1. Action on Bond of Town Marshal—Unlawful Arrest—Necessary Parties—In an action on the official bond of a town marshal for damages for an unlawful arrest, the town is not a necessary party and is not liable for the wrongful acts of such officer, and can not protect such officer by refusing to join in an action with and for the benefit of a person injured by the wrongful acts of its officials. Commonwealth, For, &c. v. Teel, &c..... 741
2. Same—Necessary Allegations—Penalty Recoverable—In an action on the official bond of a town marshal for damages for an unlawful arrest it is not necessary to allege in the petition that the city council had, by an ordinance, fixed a penal sum to be named in the bond, for, if the plaintiff recovers, he is not limited by the amount of the penalty named in the bond. Idem 741
3. Same—Approval of Bond by City Council—In an action on the official bond of a town marshal for damages for an unlawful arrest, the petition is not demurrable because it fails to allege that the bond was approved by the city council, nor is it demurrable because there is no averment that the plaintiff had not committed any offense authorizing his arrest. Idem 741
4. Damages — Recoverable Against Sureties — In an action against a town marshal and his sureties on his official bond for damages for an unlawful arrest, the plaintiff should not be permitted to recover against the sureties anything more than compensatory damages. Idem 741
5. Jailers—Fees Allowed—Ordinances of Second Class Cities —Diverting Fees—Public Policy—By Kentucky Statutes, section 3145, part of charter of second class cities, the compensation of jailers of such cities is fixed at not less than \$1,500 nor more than \$2,500 per annum. Section 1730, Kentucky Statutes, allows certain compensation for dieting prisoners and other fees. By an ordinance of the city of N. (a second class city), the salary of the jailer was fixed at \$1,800, payable in monthly installments, and provided that the jailer shall account to the city at 20 cents per day for each prisoner other than those from said city. Held—That where a city fixes the fees of a jailer for more than \$1,500 the jailer must look to his fees for the sum so fixed in excess of \$1,500, as it would be contrary to public policy to permit the city to divert to its own use the fees allowed for taking care of persons other than its own. City Newport v. Ebert..... 820

PARTNERSHIPS—See Attorneys at Law, 1—

Notice to Partner—(32 Ky. Law Rep., 1078)—There being no evidence that M. was a partner of O. in the purchase of the timber involved in this controversy, that part of the former opinion in this case embodying that idea, is withdrawn. While notice to one partner is notice to the other of any transaction occurring after the formation of the partnership, it appears that the parties were not partners at the time O. conveyed the timber. Miller v. Jones. 848

PASSWAYS—	Page.
1. Long Use—Presumption of Right—Where a passway has been used without interruption for a long number of years, the presumption will be indulged that its use is a matter of right. <i>McCauley v. Twyman, &c.</i>	692
2. Same—Adjoining Lands—Agreed Passway—Long Recognized—Effect—Where two brothers owning adjoining tracts of land, in order to straighten their lines, made a passway between them, each surrendering to the other a parcel of land on his side of the passway, and so recognized the passway as their dividing line for forty years, such passway controls, and their fences should be adjusted accordingly. <i>Idem.</i>	692
3. Long Use—Evidence to Establish—Burden of Proof—The law is now well settled in this State that, where the use of a passway extends over a long period of years, very slight evidence will be sufficient to show that it was enjoyed as a matter of right, and when the proprietor undertakes to close it the burden is on him to show that the use was merely permissive and not a claim of right. <i>Evans v. Cook, &c.</i>	788
4. Same—Obstruction—Erecting Gates—Points of Entry and Exit—Failure to Show—Statutory Fine—Where gates were erected across a passway that has been used and claimed as a matter of right for more than fifteen years by the public, the burden is on the owner of the land through which it runs to show that they were erected at the points where it enters and leaves his premises, and failing to do this the gates are an obstruction, for which he is liable to a fine under Kentucky Statutes, section 4354. <i>Idem.</i>	788
5. Permissive Use—Rights Conferred—Where the use of a passway is merely permissive on the part of the owner, a privilege extended to his neighbors without any intention to surrender his right to it, or purpose on their part to assert claim, and no act or conduct by either indicating that such use was other than a neighborly act, such use, even for fifty years, would not confer the right to claim it against the owner, or prohibit him from closing it. <i>Berea College v. Burnell, &c.</i>	796
6. Presumption of Grant—The unexplained and uninterrupted use of a passway for a long number of years carries with it the presumption of a grant, and the burden of overcoming this presumption rests upon the land owner to show that the use has been merely permissive. <i>Goldberg, &c. v. Cleveland, &c.</i>	953
7. Grant—Adverse Use Of—General Use of—The general use of this passway by the traveling public for more than thirty years carries with it the presumption of a grant and the continuous, uninterrupted and adverse use by appellees ripened into a right of which they can not be deprived. <i>Idem.</i>	953

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RAILROADS—

1. Duty of With Reference to Its Coaches, Windows and So On—Falling of Window—Injury to Passenger—It is the duty of railroad companies to keep their

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- coaches, including its windows and doors, in proper condition. The question as to the falling of the window on appellee's hand was a simple one of fact, submitted to the jury in such manner that they could not mistake the law applicable to the case. *C., N. O. & T. P. Ry. Co. v. Lorton.* 689
2. Continuance—Bill of Exceptions—The record does not disclose, except the affidavit made in connection with the motion for a new trial, that a continuance was asked because of the absence of a witness, therefore, it can not be said what error was made in this respect. But it appears that the necessary steps to procure the attendance of the witness were not taken. *Idem.*..... 689
3. Going With State Guards to Inauguration—Volunteer—Illness From Filthy Car—Action for Damages—Grounds for Recovery—One not a member of the State Guards who volunteered to go with a company of State Guards to the inauguration of the Governor is not entitled to damages against the railroad company for illness alleged to have been caused by being compelled to ride in a car that was not properly lighted or heated or not furnished with drinking water or by reason of the noisome and filthy condition of the car, as he was not a member of the guards he had the right at any time to leave the car and go into another without being subjected to military discipline therefor. *L. & N. R. R. Co. v. Scalf.*..... 721
4. Action Against—Improper Remark to Jury by Counsel—The objection to the improper remark of counsel complained of was sustained and the jury admonished to disregard it, and this was all that was necessary under the circumstances. *L., H. & St. L. Ry. Co., &c. v. McDonald.* 762
5. The answer of the Louisville Railway was properly permitted to be read as evidence against it. Its evidence was not rendered incompetent because appellee's counsel subsequently took the position that no blame could be attached to it. (For a full statement of the facts and circumstances in the matter of the collision in which appellee was injured, see 31 Ky. Law Rep., 617.) *Idem.*..... 762
6. Pleading—Private Crossings—(*L. & N. R. R. Co. v. Emerson*, 30 Ky. Law Rep., 1149, for the facts of this case.) The provisions of the Kentucky Statutes, relating to farm crossings, did not have the effect to repeal the provision in appellant's charter relating to such crossings. The petition seems sufficient to support the judgment; it does not appear that any demurrer was filed to it, and where objection is made that a private statute is not properly pleaded, it should be done by special demurrer. *L. & N. R. R. Co. v. Robbins.*..... 778
7. Railroads—Children Stealing Rides—Legal Duty of Company—Actional Negligence—There is no legal duty devolving on railroads to prevent children of tender years from stealing rides by jumping on passing trains in cities or towns. Where there is no legal duty there can be no actional negligence. *Swartwood's Gdn. v. L. & N. R. R. Co., &c.*..... 785
8. Same—Trespassers—Duty Owing to Company—All persons who venture upon a railroad train unbidden by the company and unknown to it, do so at their own peril, and as they have no right, the company owes them no duty in

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- such cases. This rule applies without respect to the age or condition of the trespasser. *Idem*..... 785
9. Invitation to Children to Play on Lot—Stealing Rides—Proximate Cause of Injury—The fact that a railroad company had a pile of sand on an open lot, near its track, on which children sometimes played, does not render the company liable to damages in an action by a child who ran from the sand pile and jumped on a passing train to steal a ride and was thereby injured. The sand pile had no connection with the injury, and was not the proximate cause of it. *Idem*..... 785
10. Volunteer—Riding On Freight Train—Where one voluntarily performs services upon a freight train on which he is riding, with the knowledge of the conductor, without having paid compensation, he can not be considered as a passenger, or as an employe, but may be classed as a volunteer. *Clarke v. L. & N. R. R. Co.*..... 797
11. Same—Injury to Volunteer—Performing Services—Knowledge of Engineer—Care Required—Recovery—Where a volunteer riding on a freight train, received an injury in attempting to couple the engine to the cars, with the knowledge of the engineer, the only duty the servants of the company owed him was to exercise ordinary care to prevent injuring him, and, to entitle him to recover damages for an injury so incurred, there must be evidence conducing to show that the engineer failed to exercise ordinary care in handling his engine at the time he was injured. *Idem*..... 797
12. Death Caused by Collision of Trains—Action Against Both Railroads—Verdict Against One—Wrong Name Given in Verdict—Judgment Thereon—Validity—H. D. was killed in a collision between the trains of the P., C., C. & St. Louis Ry. Co. and the L. & N. R. R. Co. In an action by his administratrix against both roads the jury returned the following verdict: "We, the jury, find a verdict for the plaintiff to the amount of ten thousand dollars, and fix the blame on the Pennsylvania Railroad Company." The Pennsylvania Railroad Company was not a party to the action, but the evidence showed that the defendant, P., C., C. & St. L. Ry. Co., though a separate corporation was a subsidiary corporation of the Pennsylvania Railroad Company, and was, on the trial, called by the latter name. Held—That the lower court properly rendered a judgment on the verdict against the Pittsburgh, Cincinnati, Chicago & St. Louis Railway Co., sometimes called the Pennsylvania Railroad Company. *P., C., C. & St. L. Ry. Co. v. Darlington, Adm'x.* 818
13. Same—Verdict of Jury—Intent—Duty of Court in Ascertaining—The intent of a jury is to be sought in the language they use in their verdict in the light of the record, and resort may be had to the pleadings and other parts of the record to see what the jury meant by their verdict. The court is at liberty, in the absence of a stenographic report, to consult his recollection of the evidence, as well as the file of the court, in order to understand what the jury meant by their verdict. *Idem*..... 818
14. Action Against Two Defendants—Verdict as to One—Effect as to the Other—Where two defendants are sued and the jury returns a verdict against one of them the effect of the verdict is to release the other. *Idem*..... 818

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15. Injury to Pedestrian on Track—Run Over by Hand Car—Evidence—Incompetency—On the trial of an action against a railroad for damages by one run over by a hand car, while walking on a railroad track, evidence that the foreman told the men in charge of the hand car to make a quick trip was incompetent as the mere direction to make a quick trip is not evidence of excessive speed. <i>L. & N. R. R. Co. v. Berry</i>	850
16. Lookout Duty—Incompetent Men—Defective Appliance—Wherever a lookout duty is imposed, the further duty is imposed to have the train properly manned and properly equipped. A lookout duty would avail nothing, if, because of incompetent men or defective machinery, and appliances, the train or car could not be stopped. <i>Idem.</i>	850
17. Same—Punitive Damages—Erroneous Instructions—In an action for damages by one injured by being run over by a hand-car while walking on a railroad track, the instructions were erroneous that did not impose on the plaintiff the duty of exercising ordinary care for his own safety, and an instruction authorizing punitive damages is erroneous where there was no evidence tending to show gross negligence in the railroad company's employes. <i>Idem.</i>	851
18. Obstructing Public Highways—Piling Freight Therein—Frightening Horse in Buggy—Injury to Occupant—Damages Recoverable—A pile of sixty sacks of ship stuff out on a pike is calculated to frighten a horse, and where a railroad company received and piled up sixty sacks of ship stuff at a flag station, where it had no depot, extending the pile out to the center of the pike, at which a horse, in a buggy, took fright, throwing out and injuring the occupant, the company was properly held to be liable in damages for the injury inflicted. <i>L. & N. R. R. Co. v. Blackaby</i> ...	855
19. Collision of Trains—Injury to Flagman—Negligence of Company—Contributory Negligence of Employee—A caboose on a work train is the proper place for the flagman of such train to ride. Where a work train which was loaded with railroad track rails, was run into by a freight train, it was not negligence of the flagman to jump off from the rear end of the caboose and the fact that he was injured by the loose rails on the flat car being driven against him in attempting to escape from the caboose did not make him guilty of contributory negligence preventing his recovery for damages against the railroad company whose negligence had placed him in peril. <i>I. C. R. R. Co. v. Vaughan</i> .	906
20. Same—Evidence—Resumption of Work—Discharge—Cause—In an action by a flagman for damages for an injury in a collision of trains where he testified that he resumed work for the company after he had partially recovered from his injury but was discharged because of his inability to work on account of his injury, it was competent for the company to prove that he was discharged for inebriety and not for inability to labor otherwise. <i>Idem</i>	906
21. Same—Evidence—Contract of Settlement—Meaning—Instructions to Jury—Where, in an action by an employe against a railroad company for damages for an injury, a written contract was introduced in evidence, purporting to be a complete settlement of plaintiff's entire claim, the	

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court should have told the jury that such a writing alone must be looked to for the meaning of the parties, if an intent may be gathered from its terms; and its intent is governed solely by the law and not at all by the mental consideration of one of the parties to it; there being no plea of mistake. <i>Idem</i>	906
22. Same—Accepting Compensation—Tender Before Suit—Where, in an action for damages by an employe, against the railroad company, a written compromise of settlement was pleaded by the company for the entire claim which the plaintiff claims was intended for and was accepted by him solely for his lost time caused thereby, he was not required to tender back the money he claims was paid for lost time, but if he recovers in his action he should be required to account for the money he received. <i>Idem</i>	906
23. Evidence—Pleadings of Adverse party—Competency—Where there is no admission of fact in the pleadings of the defendant against its interest, they were not competent to be read on the trial as evidence for the plaintiff. <i>Idem</i>	906
24. Carriers—Principal and Agent—Contracts—The principal who accepts the benefit of a contract made for himself by his agent not only ratifies the action of the agent, but the ratification relates back to the beginning, and it has been held by this court, in a number of cases, that the second carrier, when it accepts stock from the initial carrier, is bound by the contract made with it. <i>Richardson v. L. & N. R. R. Co.</i>	916
25. Limitation—The plea of limitation can not be sustained because the contract was in writing and within the meaning of section 2514, Kentucky Statutes. <i>Idem</i>	916
26. Injury to Person Crossing Track—Gross Negligence—There can be no recovery by appellant in this action for the death of his decedent for the reason that deceased was injured at a place where she had no right to be, and where the railroad company was not required to anticipate that any one might be between the cars. The act of deceased in attempting to pass between the cars was one of gross negligence. <i>Bracket's Adm'r v. L. & N. R. R. Co.</i>	921
27. Duty of Railroad Company—Presence of Persons About Stations—While it is the duty of the railroad companies to anticipate the presence of persons about their stations when a train is arriving, and to use ordinary care for their safety, this rule does not extend to persons who pass between cars where no invitation has been held out for them to do so. <i>Idem</i>	921
28. Action against For Damages—Shipment of Goods—Injury To—Defective Car—In this action against appellant for damages to appellee's goods which it is alleged appellant transported to it in such defective car as that they were damaged, appellant sought to avoid liability on the ground that it did not know of the condition of the car, but that the shipper of the goods did, and that appellant had no right or power to inspect the car. Held—That a demurrer was properly sustained to this plea. A railroad, as a common carrier, is an insurer of goods entrusted to it	

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- for transportation and must provide proper cars. The owner of the goods is not required to see that the cars are suitable or safe. He is required to show the loss of his goods. C., C., C. & St. L. Ry. Co. v. Louisville Tin & Stove Co. 924

RECEIVERS—See Attorneys-at-Law, 2.**SCHOOLS AND SCHOOL DISTRICTS—**

1. Levy of Taxes to Build Schoolhouse—Power of Trustees—Any indebtedness in excess of the income and revenue for any year is void under section 157, Constitution, but the county superintendent, having made the levy to build the schoolhouse, the trustees of the school district had the right to make the levy and allow the fund to accumulate until it amounted to a sufficient sum to warrant them in undertaking the building of the schoolhouse. They had a right to make a levy in 1903, another in 1904, and then wait until 1905 to make another levy to build the schoolhouse. Trustees, &c. v. Cummins, &c. 739
2. Graded Common Schools—District Established for Seventeen years—County Superintendent—Refusal of Pro Rata to District—Where a graded school district has been established and recognized for seventeen years as such without question, either by the State or county officials, or others, the county superintendent of schools can not refuse to pay over to the treasurer of such school district the pro rata to it from the common school fund, on the ground of an alleged defect in the election proceedings by which such district was established as a graded school. McDonald, &c. v. Parker, &c. 805
3. Same—Employing Teachers Without Certificates—Gratuitous Services—A college known as Union College, which belonged to the Methodist church, was burned, near Barbourville, in August, 1906. The professors of said college (including two young lady teachers, who had no certificates of qualification and who made no charge for their services), were employed by the trustees of a graded common school district to teach said district school for the year 1906. Held—That while the statute forbids the employment, as teachers in the common schools, of persons who do not hold certificates showing them competent to teach, it does not forbid the trustees from accepting the aid of teachers whose services are given gratuitously. Idem. 805
4. Same—Employing Teachers from Denominational College—Constitutional Inhibition—Where a denominational college was destroyed by fire, the fact that the trustees of a graded common school district employed the faculty of said college to teach its school for that year, is not a violation of section 189, of the Constitution, forbidding "the appropriation of any fund raised or levied for educational purposes to be used by or in aid of any church, sectarian or denominational school," the said teachers at the time having no connection with the burned college. Idem... 805

SPECIAL COUNSEL—

1. Employment by Governor—Assistant County Attorney—Refusal of Commonwealth Attorney to Act—Compensation Recoverable—Section 118, Kentucky Statutes, provides that the Governor may employ counsel to assist the Commonwealth's attorney in civil cases, the fees to be paid

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- out of the State Treasury, upon a voucher signed by the Governor. Section 127 provides that, in the absence of the Commonwealth's attorney, the county attorney shall attend to all of the Commonwealth's business in circuit court. Where, upon the application of many good citizens of the city, the Governor was urged to enforce the Sunday closing law in the city of Louisville, he called upon the Commonwealth's attorney to enforce the law, who declined to do so and the county attorney offered to do so with the assistance of employed counsel, the Governor had a right to employ a competent attorney to assist the county attorney in enforcing said law, and agree, with him for compensation therefor. *James, Auditor v. Helm*..... 871
2. Enforcement of Law—Duty of Governor—It is the policy of the Commonwealth to see that the laws are enforced and this is the proper duty of the executive who acts through officials subordinate to himself. *Idem*..... 872
3. Same—The primary object of the statute in authorizing special counsel is to see that the State's interests are properly looked after, and in the management of the State's civil suits, the county attorney, in the absence of the Commonwealth's attorney, is clothed with all his authority, and to say that the Governor can employ special counsel to assist the latter and not the former, would place it in the power of the Commonwealth's attorney, in declining to act, to prevent the employment of special counsel, no matter how urgent the need therefor might be. *Idem*. 872
4. Public Offenses—Statutory Provisions—Construction—Section 11, of the Criminal Code, provides that "public offenses of which the only punishment is a fine, may be prosecuted by a penal action in the name of the Commonwealth. * * * which trials are regulated by the Code of Practice in civil actions." Section 118, Kentucky Statutes, expressly authorizes the employment of counsel in civil actions. Where a statute is capable of two constructions, one of which is calculated to defeat the ends of justice and the other would be in furtherance thereof, the latter will be adopted. *Idem*..... 872
5. Question Involved—The importance of litigation to the State can not be measured by the amount involved in the controversy; especially is this true where the State is fighting to enforce a principle rather than making an effort to recover money. *Idem*..... 872
6. Action for Penalty—Civil Code Controls—In a proceeding where a penalty only is sought to be recovered, the action is civil and is tried according to the Civil Code, although no answer, other than the plea of "not guilty," is required of the defendant. *Idem*..... 872
7. Commonwealth—Anomalous Position—Enforcing Law—Civil Actions—The Commonwealth in this case occupies an anomalous position. She elected to proceed against the violators of the Sunday closing law, by civil suits, and the Governor, believing that the best interests of the State demanded that special counsel be employed to assist in their prosecution, arranged with appellee to render the Commonwealth certain service. Under his employment he rendered valuable service. Now, when he asks for his compensation, he is met with the answer that, although he was employed to bring civil suits and

- SPECIAL COUNSEL—Continued—** Page.
- did so, that the suits were not in fact civil. In our opinion, the suits instituted by appellee were civil suits and the Governor acted within the scope of his authority under section 118, of the Kentucky Statutes, and the judgment of the lower court enforcing the contract is affirmed. Idem. 872
- SPECIAL JUDGES—See Judgments.**
- STATE TREASURY—**
1. Commonwealth—Action by Attorney General to Recover Money Improperly Paid Out of Treasury—The Attorney General is authorized to maintain an action to recover money improperly paid out of the treasury. One obtaining money from the treasury to which he is not entitled, is required by law to pay it back, and this obligation may be enforced in an action by the State. (20 Ky. Law Rep., 1893.) Commonwealth, on Relation, &c. v. Bacon, &c..... 935
 2. Principal and Surety—Extent to Which Surety is Bound—A surety is not bound beyond the letter of his covenant. The sureties in the bond herein did not undertake that they would be responsible for any money collected by the principal from the State above what he was entitled to receive, and there is nothing in the bond to apprise the sureties that any such liability was sought to be imposed upon them. Idem 935
 3. Attorney and Client—An attorney who asks that his client's claim be allowed, is not responsible for the amount allowed if it shall afterwards turn out that more was paid than due, and in this case the fact that the attorney was on the bond of his client does not change the rule. Idem. 935
 4. Sureties—The liability of a surety must be measured by the terms of his contract. The terms of the contract herein for public printing were not violated, and the sureties are, therefore, not liable for the excessive amount the principal succeeded in collecting from the State. He collected the money as the result of his own fraud, and is alone responsible for it. Idem..... 935
- STREET RAILROADS—**
1. Personal Injury—Collision of Wagon With Street Car—Injury to Boy Assisting Driver—Question of Fellow-servants—Where a boy, assisting the driver of an ice wagon in delivering ice, was injured by a collision with a street car, the boy and driver of the wagon, though fellow-servants of the ice company, sustained no such relation to each other as that the negligence of the driver should be imputed to the boy in an action by the boy against the street car company for damages in causing his injury. Paducah Traction Co. v. Sine, &c..... 732
 2. Same—Care Required to Avoid Collision—It is the duty of one driving or riding in an ice wagon, on a street to exercise ordinary care in approaching a crossing on which a street car line is running to avoid a collision, and while the street railway company is entitled to the free passage of its cars it is also its duty to use ordinary care to discover the approach of a wagon to its track and avoid injuring it or the persons in it. Idem 732
 3. Negligence of Driver—Concurring Negligence of Street Car Company—If the boy's injuries were caused wholly by the negligence of the driver of the wagon, no right of

STREET RAILROADS—Continued—	Page.
recovery exists against the street car company, but if they resulted from the joint or concurring negligence of the company and the driver, both are liable and a recovery may be had against either. <i>Idem</i>	793
4. Duty of Motorman—Failure to Use Ordinary Care—If the motorman of the street car, notwithstanding the negligence of the driver of the wagon, by the use of ordinary care, could have stopped the car in time to have prevented the collision and failed to do so, such failure constituted negligence for which the company was liable to the boy in an action for damages, and this would be true whether the motorman's failure to stop the car was caused by his running it too fast, or by not maintaining a lookout ahead of his moving car. <i>Idem</i>	793
5. Instructions After Closing Argument—The giving of an additional instruction to the jury, after the conclusion of the argument, while not proper practice, yet where a proper instruction was given, after the argument, which it would have been error to have omitted, the giving of the instruction was not a reversible error, especially where neither counsel asked to make an additional argument. <i>Idem</i>	793

SURETIES—See Bills and Notes; Office and Officer, 4.

TAXATION—

1. Taxation—Tax on Dogs—Act Regulating Sheep Industry by Taxing Dogs—The act of the Kentucky Legislature, approved March 1, 1906, entitled "An act to promote the sheep industry and to provide a tax on dogs," means that it is an act to promote the sheep industry by providing a tax on dogs, and is, therefore, not inimical to section 51, of the Constitution, providing that no "law enacted by the General Assembly shall relate to more than one subject, and that shall be expressed in its title." *McGlone, Sheriff v. Womack, &c.* 811
2. Same—Statute—Police Regulation—Remuneration for Sheep Killed by Dogs—The act is not a revenue statute, but is a police regulation, in that its object is to remunerate the owner of the sheep for any losses they may suffer by the killing of their sheep by dogs, and the license imposed was intended to be a regulation of dogs and in this way to promote the sheep industry. *Idem*..... 811
3. Ownership of Dogs—Legislature—Regulation—Dogs are an appropriate subject of regulation under the police power of the State. It is within the power of the Legislature to prohibit their ownership entirely and to provide, where their ownership is allowed, any regulation which the legislative discretion may impose. *Idem* 811
4. Special Privileges—Public Services—The statute does not confer any special privileges on the owners of sheep, but merely protects these owners from the destruction of their property by dogs, and, therefore, it is not inimical to section 3, of the Bill of Rights, forbidding the grant of exclusive privileges to any man, or set of men, except in consideration of public services. *Idem* 811

TELEGRAMS—

1. Failure to Deliver—Breach of Contract—Where a telegram is delivered to a telegraph company and the price for transmission paid, a contract is entered into between the

- TELEGRAMS—Continued—** **Page.**
- sender and the company for a delivery of the message within a reasonable time, and for a failure to do so the company is liable for a breach of the contract. *Western Union Telegraph Co. v. Witt*..... 685
2. Same—Action for Breach of Contract—Limitation—Damages for the failure to deliver a telegram are not an injury to the person in the meaning of Kentucky Statutes, section 2516, requiring an action for an injury to the person to be brought within a year next after the cause of action accrued, but are recoverable under section 2515, providing that an action upon a contract * * * shall be commenced within five years next after the cause of action accrued. *Idem* 685
3. Measure of Damages—The measure of damages recoverable for a breach of contract in failing to deliver a telegram such as flow directly from the breach and they may be to the feelings as well as to the property. *Idem* 685
4. Same—Duty of Plaintiff—Effort to Minimize Damages—Where one receives a delayed telegram announcing the death of a sister whose funeral he desires to attend, he should use all reasonable means to minimize the damages for the delay. He can not stand idly by and permit the damages to increase and then hold the wrongdoer liable for the loss which he might reasonably have prevented. *Idem* 686
- VERDICTS—**See Appeals, 1, 2, 7; Railroads, 13.
- WILLS—**
1. Devise by Husband to Wife—Estate Devised—Construction—A husband by his will provided that “after my death, when all my debts are paid, I give and bequeath to my beloved wife, Catherine Zeller, all my personal, mixed and real estate of which I may be possessed at the time of my death for her sole use and benefit, to use the same for her and her children as she may see proper.” Held—That the will gives the testator’s wife the entire estate absolutely. The words “to use the same for her and her children as she may see proper,” do not restrict the widow’s interest to a life estate in the property devised, or constitute a limitation over. *Schneiderhaus, Gd’n v. Zeller, &c.* 694
2. Recitals—Disposition of Entire Estate—Testator devised (1) his house and lot to his wife for life and at her death to descend to his three daughters jointly, or, in case of the death of any without issue, to the survivor. (2) Authorized his executor to convert into money any property, real or personal, which he owned, and divide one-fifth of a \$2,000 life policy to his granddaughter and to hold the same until she marries, or, in case of her death, to go to his other heirs. (3) The executors were empowered to sell all his real estate, and his wife to have all the household furniture. (4) That his wife and three daughters shall share equally in the distribution of his estate after the bequests made are complied with. Held—That, by the will, testator disposed of all his estate. *Thomas’ Ex’or v. Thomas’ Gd’n, &c.*..... 700
3. Same—Reasonable Presumption—The natural and reasonable presumption is that when a will is made the testator intends to dispose of his whole estate, which presumption is overcome only where the intention to do otherwise is plain and unambiguous, or is necessarily implied. *Idem*.. 700

WILLS—Continued—

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4. Benevolences—Funds Set Apart To—Object to Which It Should Be Applied Ceasing, to Exist—The association having long since ceased to exist, viz: in 1858, the fund sought to be set apart to its use can not be reached by the appellants who claim to be survivors of it. Testator intended to make some provision for a volunteer fire association and it ceasing to exist, his executors merged the fund intended for it in an object of charity, to which he had bequeathed the great bulk of his estate, and the refusal of the chancellor to disturb it after the great length of time the latter institution had had control over it, it will not be disturbed. *Johnson v. Cook Ben. Institute*. 772
5. Letter of Father to Daughter—Anticipation of Death—Probation as Will—A letter written in jail by a prisoner who was under sentence to be hanged, to his four daughters, three days before his execution, in which he said that he "wanted to make a deed to two of them (naming them) to a certain house and lot because they had attended to their mother so good," was properly admitted to probate as the will of the deceased father. *Milam, &c. v. Stanley, &c.* 783
6. Testamentary Paper—Situation and Intention of Maker—In determining whether a paper is testamentary or not the court will look not only at the language of the instrument, but at the situation of the maker and at his intention. *Idem*. 783
7. Dying Without Issue—The devise to Mrs. S. being to her for life, and at her death to her children, and having none, that the land should revert to testator's children, the chancellor correctly held that, upon the death of the devisee, the property so conveyed her by the will, passed to her surviving brother and sisters, no children having been born to her. *Golladay v. Thomas, &c.* 829
8. Same—Under section 4843, Kentucky Statutes, the devise having failed, by reason of the death in the lifetime of the testator, the estate must pass as in the case of intestacy, no contrary intent having been expressed in the will. *Idem*. 829

WRITS OF PROHIBITION—

1. Granted by Appellate Court—Restraining Circuit Court—Legality of Action—Under section 110, of the Constitution, providing that "the Court of Appeals * * * shall have power to issue such writs as may be necessary to give it general control of inferior jurisdictions," whenever any inferior jurisdiction, particularly a circuit court, is proceeding beyond its jurisdiction a writ of prohibition may issue out of the appellate court on a proper application to prevent the exercise of the usurped jurisdiction, or when the inferior court has jurisdiction, but there is not an adequate remedy by appeal, the appellate court may, in its discretion, exercise a supervisory control over the inferior court so as to prevent irreparable injury or injustice. *Renshaw v. Cook, Judge*. 895
2. Action of Circuit Courts—Invading Jurisdiction of Inferior Courts—Authority of Appellate Judge—In the exercise of discretion vested in them by law, inferior courts

WRIT OF PROHIBITION—Continued—**Page.**

will not be subjected to interference by the appellate court merely because its views on the subject may be at variance with those of the lower court. There must, in such case, be such an abuse of discretion as would indicate a failure to hear, or a bias in the consideration of the question by the trial judge. But where there is not a discretion, and the inferior court is proceeding out of its jurisdiction, or is invading the jurisdiction of another court or officer, the appellate court may grant the writ to prevent the unauthorized interference. *Idem*.....

895

3. **Sheriffs—Failure to Execute Bond—**Under act of 1906, chapter 22, article 8, section 2, Session Acts of 1906, and Kentucky Statutes, section 4557, requiring sheriffs to execute bond each year, the execution of a bond each year at the time fixed by the statute is a condition precedent to his right of incumbency, and his failure to give such bond for any one of the years work a forfeiture of his office, subject to the discretion of the county court to allow further time as to the bonds subsequent to the first one, and without such extension of time the office becomes vacant and he may be removed from his office by the county judge without notice. *Idem*

895

4. **County Courts—Record Authority—Individual Action of Judge—**A county court must speak through its records. A county judge, when off the bench, has no power to bind the county by anything he says or does in his individual capacity. *Idem*

895

5. **Interlocutory Injunctions—Granted by Inferior Court—Jurisdiction of Appellate Judge—Dissolution—Re-Instatement—**By statute a judge of the Court of Appeals is given jurisdiction to dissolve an interlocutory injunction granted by a circuit judge or any other inferior officer, and the judgment of the appellate judge in that matter, is the law of that case so long as the facts shown in the record are substantially unchanged, until it is reversed by the Court of Appeals. Interlocutory injunctions, if dissolved by the trial court or judge, when re-instated by a judge of the appellate court, may not thereafter be disregarded by the inferior tribunal where the matter may be pending, so long as they remain interlocutory. *Idem*

895

6. **Same—Jurisdiction of County Judge—Order Removing Sheriff From Office—Revisory Authority of Circuit Judge—**In the absence of the circuit judge from the county, the county judge may hear and grant or refuse motions for interlocutory injunctions of a prohibitory nature (section 273, Civil Code), and where a county judge granted an injunction restraining a sheriff from exercising the duties of an office who had refused to execute his annual official bond, the circuit judge had no jurisdiction to grant a temporary writ of prohibition and could not do so without invading the rightful jurisdiction of the county judge. *Idem*

895

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No. 7

COURT OF APPEALS OF KENTUCKY.

GABOURY, FOR USE, &c. v. COOMBS, &c.

(Filed June 20, 1908—Not to be reported.)

Thos. W. Bullitt and A. Scott Bullitt for appellants.

B. F. Proctor and Greene & VanWinkle for appellee Kister.

John B. Grider and W. B. Gaines for appellee Meyler.

B. W. Bradburn for Aberdeen Coal Co.

Appeal from Warren Circuit Court.

Affirmed by equally divided court.

Judge Settle not sitting.

CITY OF MIDDLESBORO v. COAL AND IRON BANK.

(Filed June 20, 1908—Not to be reported.)

T. G. Anderson for appellant.

N. B. Hays and J. R. Sampson for appellee.

Appeal from Bell Circuit Court.

Judge Hobson delivered the following response to petition for rehearing, overruling:

Mrs. Saulsberry should be credited in the judgment by anything she paid on the attempted compromise.

The order appointing the receiver was made at a regular term of court, and we must presume the court had before it facts sufficient to warrant its action. The parties must take notice of what is done by the court, when in regular session, and as Mrs. Saulsberry was a pendente lite purchaser she is bound by the order of the court made.

Petition overruled.

SULLIVAN v. HILL.

(Filed September 23, 1908—Not to be reported.)

1. Land—Ascertaining Boundary—Course and Distance—Marked Lines—Question for Jury—In ascertaining the boundary of a tract of land, course and distance must give way to marked lines and corners found on the ground, or to established monuments called for in the deed, and it is necessarily a question for the jury, where the proof is conflicting, to locate the lines of the tract of land actually sold.

2. Calls of Deed—Reversing Calls—Effect—One call of a deed is entitled to as much respect as another, and often uncertainty may be avoided by reversing the calls of the deed from the beginning corner, and in doing this, if the monuments called for in the deed are found this much of the survey will be located, and the location of these lines will throw great light on how other lines should be located so as to close the survey.

J. N. Sharp and H. H. Tye for appellant.

T. Z. Morrow, R. L. Pope and E. L. Stephens for appellee.

Appeal from Whitley Circuit Court.

Opinion of the court by Judge Hobson, reversing.

A. J. Sullivan on September 2, 1901, conveyed to N. B. Hill a tract of land in Whitley county in consideration of \$600. The deed describes the land by metes and bounds, but it does not show the number of acres conveyed. In August, 1904, Louis Stanfill brought a suit against Hill to recover a body of land which Hill claimed under the deed from Sullivan, and in that suit Stanfill recovered from Hill about thirty acres of land. Hill gave Sullivan notice of the pendency of the suit, and after it was decided, brought this action against Sullivan to recover of him damages for the breach of the warranty. The case was tried in the circuit court, and resulted in a judgment in favor of Hill for \$203.22. From this judgment Sullivan appeals.

The chief question in the case arises on the instructions of the court to the jury. The court told the jury that the quantity of land which the plaintiff lost in the suit with Stanfill, which was covered by the deed from the defendant, as shown by the evidence, was thirty acres, and that they should find for the plaintiff such part of the whole consideration paid for the entire tract as the value of the thirty acres bore to the entire tract, with six per cent. interest from September 2, 1901, and his cost in the former suit. There was an issue in the pleadings as to whether the land which Stanfill recovered was covered by the deed made by Sullivan, and this issue should have been submitted to the jury. There is no dispute about the calls of the deed running from the beginning corner, until we reach a hickory on a ridge. From this point the deed calls to run with the top of the ridge "N. 55 E. 145 poles to a stake in the line of a 100-acre survey; thence N. 54 W. 14 poles to a locust corner of 75 acres, patented to John Hill; thence with it N. 55 W. 43 poles to a small chestnut." If we run from the hickory on the ridge we strike the line of the 100-acre survey before the distance gives out; and if from this point we run the courses and distances of the deed, as they are written, none of the land which Stanfill recovered will be included in the deed. On the other hand, if we run from the hickory the distance called for in the deed, and then follow the other calls for course and distance, we do not reach the 75 acres

survey of John Hill or the locust corner. To reach the locust corner from the point where the distance gives out, or from the line of the 100-acre survey, we have to disregard entirely the course and distance of the deed, and when we do this and undertake to run the other calls of the deed back to the beginning, it will not close and includes a very large boundary of land, much larger, it would seem, than was contemplated by the parties in the sale of Sullivan to Hill. Where the lines and corners of the deed are located on the ground is a question for the jury, and should be submitted to them under appropriate instructions. Course and distance must give way to marked lines and corners found on the ground or to established monuments called for in the deed; but sometimes parties are mistaken as to where the lines and corners of the other surveys are, and they call for such lines and surveys deeming them at one place when they are at another, in which event the lines must be run as the parties intended them to be located (*Bowling v. Siler*, 19 Ky. Law Rep., 788; 42 S. W., 90); so it is necessarily a question for the jury, where the proof is conflicting, to locate the lines of the tract of land actually sold. One call of a deed is entitled to as much respect as another, and often uncertainty in a case of this sort may be avoided by reversing the calls of the deed from the beginning corner. If, when the calls are reversed from the beginning corner, the monuments called for in the deed are found, this much of the survey will be located and the location of these lines will throw great light on how other lines should be located so as to close the survey.

The court, instead of the instruction given, should have instructed the jury that they should determine from the evidence whether any of the land, which Stanfill recovered of Hill, was included in the deed which Sullivan made Hill; and, if any, how much was so included.

On another trial the court will confine all evidence as to the value of the land, or the timber on it, to the time of the making of the deed, and no evidence will be admitted of its value at a subsequent time. Hill's recovery on account of the value of the land lost must be such a part of \$600 as the value of the land lost at that time bore to the entire value of the place, \$600, with interest from that time.

No question of the champerty statute arises. There was no such actual occupancy of this timbered land by Stanfill as made Hill's purchase void under the champerty statute. A possession may be sufficient under the statute of limitations which is not sufficient under the champerty statute.

Judgment reversed and cause remanded, for a new trial.

LYNCH v. COMMONWEALTH.

(Filed September 23, 1908—Not to be reported.)

Campbell & Williams for appellant.

James Breathitt and Thos. B. McGregor for appellee.

Appeal from Pulaski Circuit Court.

Opinion of the court by Chief Justice O'Rear, affirming.

Appellant was convicted of the statutory offense of breaking into a railroad car with intent to steal therefrom. (Section 1163. Ken-

tucky Statutes.) He complains of the trial on the sole ground that there was no evidence of his guilt. The trial court thought there was; the jury thought so, and we think so.

Judgment affirmed.

COMMONWEALTH v. WELLS.

(Filed September 23, 1908—Not to be reported.)

Indictments — Construction of Statutes—Instructions—Evidence—
The evidence conducing to show that appellee did not carry away the switch light with felonious intention, the court properly instructed the jury with reference to the offense as defined by section 1256, Kentucky Statutes, as well as that defined by section 807, under which he was indicted. Section 264, Criminal Code, was enacted to meet cases like this, and authorized the instruction under section 1256, of the statutes.

James Breathitt and Tom B. McGregor for appellant.

Appeal from Laurel Circuit Court.

Opinion of the court by Judge Nunn, certifying the law.

Appellee was indicted for the offense named in section 807, of the Kentucky Statutes, which section is as follows: "Any person who shall willfully and maliciously tear up, displace, break or disturb any rail or other fixture attached to the track or switch of any railroad in operation, or break any bridge or viaduct of such road, or who shall place any obstruction on the track or switch of such road, or do any act whereby any engine or car might be upset, arrested, or thrown from the track of such road or switch, or any branch or turnout, shall be confined in the penitentiary not less than one nor more than five years."

Upon the trial the court gave the jury an instruction upon the offense defined in this section, and also gave an instruction upon the offense defined in section 1256, of the Kentucky Statutes. To this last instruction the Commonwealth objected and excepted. The jury convicted the defendant of the offense defined in the last instruction, and the Commonwealth appeals.

The substance of the evidence produced upon the trial is about as follows: Appellee, a boy, and a younger companion, were in the town of East Bernstadt, from where they started to their home, about three miles in the country; it was getting dark and they tried to borrow a lantern in town, but failed; but as they passed out of town they came to a switch light on the railroad; appellee took it down, opened the frame in which the light was enclosed, took the light out and carried it home with him. The evidence tended to show that he did not do it maliciously, that he had no thought of any malicious purpose, or of throwing an engine or any cars from the track.

In our opinion, in view of the facts proven, the court properly instructed the jury with reference to the offense defined by section 1256, of the statutes; that is, if he took and carried away the switch light without a felonious intention, that he should be punished as provided by that section.

Section 264, of the Criminal Code, authorized this instruction.

That section is as follows: "If an offense be charged in an indictment to have been committed, with particular circumstances as to

time, place, person, property, value, motive or intention, the offense, without the circumstances, or with part only, is included in the offense, although that charge may be a felony, and the offense, without the circumstances, a misdemeanor only."

Section 807, of the Kentucky Statutes, under which the indictment was prepared, required the jury to believe that appellee was actuated by malice in the removal of the switch light before they could convict him under that section; but no evil intention was required to be proven to authorize a conviction under section 1256, of the statutes. This section of the Code was enacted for the purpose of meeting just such cases. (*Barnard v. Commonwealth*, 94 Ky., 285, and *Houseman v. Commonwealth*, 33 Ky. Law Rep., 311; 110 S. W., 236.)

Wherefore, the clerk of this court is directed to certify this opinion to the lower court as the law of the case.

CHAPMAN v. COMMONWEALTH.

(Filed September 23, 1908—Not to be reported.)

1. Argument of Counsel—Objection to Must be Made in Lower Court—This court will not reverse for an argument of counsel which was not objected to in the lower court.

2. Instructions—An instruction under section 240, Criminal Code, should follow the language of the section, and should not, in addition, require proof tending to connect the defendant with the commission of the offense.

3. Evidence—There was sufficient evidence to take the case to the jury. That of what the defendant himself said was competent against him and while it should have been offered in chief the failure to do so was not a substantial error.

Breckinridge & Breckinridge, Fox & Jackson and John W. Rawlins for appellant.

James Breathitt and Tom B. McGregor for appellee.

Appeal from Boyle Circuit Court.

Opinion of the court by Judge Hobson, affirming.

Joe Rice ran a country store at Hedgeville, in Boyle county. Above the store were some rooms in which he lived with his family. In September, 1907, his family consisted of his wife, her two brothers, Frank and Fred Chapman, and her sister, Myrtle Chapman, Myrtle being thirteen years old, Fred fifteen and Frank twenty-one. Frank had been clerking in the store for Rice, and they were on good terms apparently. On the day in question they had been to the river fishing, and had returned in the afternoon about four o'clock. Rice then sent Fred Chapman for a keg of three gallons of whisky. When Fred returned with the whisky, Rice, the two Chapmans and two or three other men who were in the store, drank together. Rice and Fred Chapman got very drunk. One of the other men went home because he was getting drunk. The proof is not so clear as to how much whisky Frank Chapman drank. At about eight o'clock the attention of the neighbors was attracted by quarreling and loud talking at Rice's place. A woman whom they took to be Mrs. Rice, and a man whom they took to be Frank Chapman, appeared at

the front of the store. The man was heard to say to the woman, "All I want is to kill him before this night is gone, and that's what I am going to do." About ten o'clock Myrtle Chapman appeared at a neighbor's house, asking them to come over at once to Rice's. When they got there, Rice was lying on the floor of the room in which he and his wife slept with a knife wound between the fourth and fifth rib, which penetrated the heart. He was dead; one hand was lying upon the floor, and near this hand was a bloody barlow knife. There was another knife on the mantle which had blood on it. As the neighbors approached the house, they saw, through the window, Frank Chapman bending over the body of Rice, his back being toward them; and as they saw him he was straightening up. Frank Chapman was indicted for the murder of Rice, and was found guilty of manslaughter, and his punishment fixed at eighteen years in the penitentiary.

The proof for the Commonwealth showed, in addition to the facts above stated, that when the neighbors came in, Mrs. Rice asked Frank Chapman where he had put his knife, and he answered, "on the mantlepiece." This proof also showed that just after the cutting, Frank Chapman called up Dr. Kinnaird on the telephone, asking him to come and see Joe Rice. The doctor asked, "What is the matter?" Chapman answered, "He is cut." The doctor said, "Where?" Chapman answered: "He was cut here, out here." The doctor said, "I mean what part of the body?" Chapman answered, "Near the heart." The doctor asked, "Who cut him?" and he answered, "I did."

On the other hand, the defendant testified that he did not tell the doctor that he cut Rice, and he and his sister both denied she asked him where he put his knife, or his saying that he put it on the mantlepiece. He, his two sisters, and brothers, Fred, all testified that there was a difficulty at eight o'clock, but that this difficulty was between Frank Chapman and Fred Chapman; and that Fred then tried to cut Frank with a knife, and this being taken from him by Rice, he got a hatchet which was taken from him by Mrs. Rice, and he then said of his brother that he would kill him before morning. Another witness, who was in the store at the time, substantiates them as to this difficulty. They also testified that Fred, soon after this, went to bed, being very drunk; that later Mrs. Rice went to bed; then her husband, the last of all Frank Chapman, who closed up the store; that after Frank Chapman got in bed, he heard Mrs. Rice scream, when he ran into the room and his sister said to him, "Frank, come quick, Joe is cussing and threatening to kill me. Says he is going to take my money away from me." Rice asked him what he had in his hands. He answered, "Nothing, Joe," and Rice started at him with a knife. He grabbed Rice with both hands, and in the scuffle Rice fell to the floor, and when they turned him over, his own knife was found sticking in his heart. When Myrtle Chapman got to the neighbors, as shown by the Commonwealth, she told them that Joe and Frank were in a fuss and Frank had cut Joe with a knife, and he was down in the wardrobe, and Belle (Mrs. Rice) thought he was dying. When the neighbors got into the house they found Rice's body on the floor; his feet were just inside of the door-sill of a closet used as a wardrobe. The Commonwealth also introduced proof attacking the character of Mrs. Rice and Frank Chapman. The defendant, at the conclusion of the evidence for the Commonwealth, and at the conclusion of all the evidence, moved the court peremptorily to find him not guilty. The court overruled the motion; of this he complains. He also complains that there is no evidence in the case competent to be considered, showing that he is guilty. We cannot concur in this. Frank Chapman told one

of the persons who came in that he had phoned to Dr. Kinnaird. Dr. Kinnaird testified that the man who phoned to him said his name was Chapman, and this was the only message he got from the house. There was sufficient evidence, therefore, to admit the evidence as to what was said to Dr. Kinnaird over the telephone. The evidence that Frank Chapman said he had placed his knife on the mantle was competent against him. This was a declaration by him. What his sister said to him, asking where he had put his knife, was only introductory to this statement. The deceased was killed by a knife wound in the breast, and there was not only testimony that Frank Chapman said that he did it, but there was conduct on his part tending strongly to confirm the testimony of the Commonwealth.

It is earnestly insisted that a new trial should be granted because the employed attorney, in arguing the case to the jury for the Commonwealth, insisted that the proof showed that Frank Chapman had a knife and had killed Joe Rice with it, arguing that two witnesses had testified that Mrs. Rice asked Frank Chapman, in their presence, the question, and he said that he put it on the mantle, when the court had instructed the jury that they could only consider the evidence of these two witnesses as to what Mrs. Rice said in their presence, for the purpose of contradicting Mrs. Rice. But, as we have said, the evidence of what the defendant himself said was competent against him as substantive testimony. It is true it should have been introduced in chief, but the failure to do so was not a substantial error, in view of all the facts of the case. It is also insisted that the Commonwealth's attorney, in his concluding argument, said that Chapman had cut Rice while in the closet, basing the argument upon the statement which two witnesses made as to what Myrtle Chapman said when she came to them and asked them to come over to Rice's, when the court had instructed the jury that this testimony could only be considered for the purpose of contradicting Myrtle Chapman. But there is no objection to the argument. If an objection had been made to it, the court would have had an opportunity to correct the matter; and we can not reverse here for an argument of counsel which was not objected to in the circuit court. The counsel also argued that other facts shown in the case, showed that this was the way the cutting was done.

The instructions of the court to the jury were more favorable to the defendant than they should have been. Instruction 4 should not have been given. When there is an instruction under section 240, of the Criminal Code, as to the weight to be given the defendant's confession out of court, it should follow the language of the section and should not, in addition, require proof tending to connect the defendant with the commission of the offense. Such an instruction should not be given where the corpus delicti is sufficiently established. (*Dugan v. Commonwealth*, 103 Ky., 251; *Green v. Commonwealth*, 26 Ky. Law Rep., 1228, and cases cited.)

Judgment affirmed.

ADAMS EXPRESS CO. v. COMMONWEALTH.

(Filed September 23, 1908—To be reported.)

1. Common Carriers—Carrying Whisky Into Local Option Territory—Act of 1906—Indictment—Allegations—An indictment against a common carrier under the act of the Kentucky Legislature of 1906 (chapter 63), for carrying whisky into local option territory in quantities more than one gallon, need not negative all the provisions

of said act. While the general rule may be that in drafting an indictment under a statute, whose enacting clause contains exceptions, it must negative such exceptions, it is not necessary to do so in the terms of the statute, provided the whole indictment does so in language that leaves no doubt that the accused does not belong to the excepted class.

2. Same—Necessity to Obey the Law—Knowledge of Carrier—Question for Jury—Common carriers ought to obey the law both in letter and spirit as other persons are expected to do, and where a package of whisky is conveyed by a carrier into local option territory, it is a question for the jury to determine from the evidence whether the agents of the carrier knew, or had reason to believe that the contents of the package were whisky.

3. Agents of Carriers—Care Required—Agents of carriers, in shipping packages into local option territory, are not only required to believe that they do not contain whisky, but they must use ordinary care, or due caution, to avoid a violation of the statute.

4. Same—Inspection of Packages—Duty of Agents—While it is questionable whether or not the carrier has the right to open and inspect a package, in the absence of legislative authority to do so, where he has a reasonable suspicion that the shipper is attempting to use his vehicle to violate the law of the land, he may, as he ought, require enough evidence of the legality of the shipment to satisfy a reasonably prudent mind that the suspicion was not well founded.

John W. Lewis and Lawrence Maxwell for appellant.

James Breathitt and Tom B. McGregor for appellee.

Appeal from Washington Circuit Court.

Opinion of the court by Chief Justice O'Rear, affirming.

Appellant, a common carrier, was indicted and convicted, charged with the statutory offense of bringing and delivering spirituous liquors into local option territory to another than a licensed physician or druggist. The indictment was drawn under the act of 1906 (chapter 63), which makes it unlawful for "any person or persons, individual or corporation, public or private carrier to bring into, transfer to other person or persons, corporations, carrier or agent, deliver or distribute, in any county, district, precinct, town or city, where the sale of intoxicating liquors has been prohibited, or may be prohibited, whether by special act or of the General Assembly, or by vote of the people under the local option law, * * * Provided, Individuals may bring into such district, upon their person, or as their personal baggage, and for their private use, such liquors in quantity not to exceed one gallon: and, Provided, The provisions of this act shall not apply to licensed physicians or druggists, to whom any public carrier may deliver such goods, in unbroken packages, in quantity not to exceed five gallons at any one time."

Appellant argues that the indictment is bad on demurrer, because it does not negative all the provisos of the act. It did charge that the person to whom the liquor was delivered was not a licensed physician or druggist. But it did not say that the liquor was not brought into the local option territory by the defendant upon its person, or as its personal baggage, for its own use and in a quantity not more than one gallon. Now was it necessary to have so pleaded in terms. The indictment alleges that the accused was a common carrier, an incorporated or joint stock company. Such a person being purely artificial was not intended to be embraced in the exception just

alluded to, but that exception was designed for the benefit of natural persons only. An artificial person can not have personal baggage any more than it could drink the liquor. So that while the general rule may be that in drafting an indictment under a statute whose enacting clause contains exceptions, the indictment must negative such exceptions, it is not necessary to do so in the terms of the statute provided the whole indictment does so in language that leaves no doubt that the accused does not belong to the excepted class. This indictment is good under that rule of pleading.

The liquor in this case was a box containing bottles of whisky shipped from a point in Nelson county, Kentucky, to Springfield, Ky., and wholly within this State. Springfield is a local option town. The box did not have any marks upon it to indicate its contents. Nor did the way bill accompanying it, show what the box contained. The shipper and the consignee each declared that the box contained paint. The shipper was a distiller's clerk. The consignee a painter. Both were known respectively to the agents of appellant receiving and delivering the box. At the receiving point there was only a distillery—a flag station on the L. & N. R. R. The express company's agent on the train, who received the box, suspected its contents; he inquired of the distiller's agent, whom he knew, what the box contained. The receiving agent also suspected the contents of the box. He asked the consignee what it contained. Each of them testified that they believed the statements that it contained paint. The box was not marked, probably to conceal the nature of its contents. The way bill made out by the express train agent, may or may not have failed to show what the box was represented to contain for the same reason. The shipper's clerk falsely stated the box's contents for the same reason, and the consignee for like reason misrepresented the fact, though he says in his testimony, that he said to the agent jokingly, "It might be paint." Now if all these facts had actually deceived both of appellant's agents, and they had acted in good faith and with due caution, the carrier would not be liable. For although the statute contains no such qualification, it is rare when the law makes one ignorant of the fact and innocent of intent, a malefactor. (L. & N. R. R. Co. v. Commonwealth, 31 Ky. Law Rep., 687.) So the question for the jury was, did the agents, or either of them know, or have reason to know, of the real contents of the package, and were they, in spite of such notice as they may have had, actually deceived, although acting in good faith and with proper caution in the matter?

Common carriers ought to obey the law just like other people, not in merely keeping its letter while breaking its spirit, but keeping both letter and spirit under such circumstances as other people are expected to do. An agent of a common carrier is required to exercise the same kind of judgment, and to have as much sense in doing his employer's business as if he were doing the business for himself. And what would convince him, or ought to, that a certain fact exists, is notice to his master of its existence. He must act on knowledge, probabilities, information, experience, use judgment, infer facts from other established facts, as men generally do in similar matters when thinking or acting for themselves. In this way the corporation is humanized, is made to see, hear, know and exercise care, skill, judgment and prudence, and is made amenable to the laws where intent, motive and knowledge are elements of wrong.

The jury in this case evidently did not believe that appellant's agents were actually deceived as to the contents of the package. The following additional circumstances were in evidence, tending to show the agents to be culpable; other packages shipped from

the same distillery by the same express, unlabelled as to contents, had been declared upon falsely, in order to deceive the carrier, and to evade the law; these agents had learned of the fact; they had been in the service for years, and knew the parties and their business and shipping methods, yet they took no precaution to protect themselves, their employer or the public against a repetition of evasions of this statute. No other business was done at the point of shipment, except in connection with the distillery. The train stopped there for the accommodation mainly, if not solely, of that plant. It was in the habit of shipping whisky over that railroad and by express. It is quite likely that the agent was not deceived in fact; for, although it would probably have deceived him once or twice, he would become more wary, and would refuse to believe the trick which had been used successfully upon him before. The jury's verdict is not without a probable basis of truth. If every guilty man could demand a peremptory instruction merely because he said he was deceived, there would be a quick end to most jury trials. The jury was not deceived by the same facts. No one who is at all familiar with the history of the times, the cause of the enactment of the stringent laws of which the one now being discussed is a part, the tricks and wiles of those who violate these laws, is often deceived by such matters.

The trial judge gave the jury the following instruction, among others: "If the jury further believe from the evidence that defendant's agents receiving and bringing said box of liquor from Bourbon, in Nelson county, to Springfield, in Washington county, Ky., and defendant's agent in delivering same to said Rogers acted in good faith, believing said box contained something other than whisky, you should find the defendant not guilty."

This instruction was more favorable to the defendant perhaps than it was entitled to; for in addition to the good faith of defendant's agents, they must have acted with ordinary care or due caution to avoid violation of the statute.

As Bishop puts it (Bishop on Statutory Crimes, section 132): "One who, while careful and circumspect, is lead into a mistake of facts," may be excusable.

We are not prepared to say that the carrier has a right to open and inspect, or to require the shipper to submit to an inspection of all goods shipped, unless the Legislature should so authorize, as we have no doubt it has the right to do. And in the absence of such right of inspection, the carrier will not be bound to have more knowledge than he has, or has notice of. But where he has a reasonable suspicion that a shipper is attempting to use his vehicle to violate a law of the land, he may, as he ought, require enough evidence of the legality of the shipment to satisfy a reasonably prudent mind that the suspicion was not well founded. Authorities are cited by appellant, in some of which the ground is stated as that relied on for denying the right of inspection that it would be a burden to commerce. The State and Federal governments have done much to foster commerce, and the public policy has been upheld. But the statute in question here is not for the benefit of commerce; it rests upon a different conception; the Legislature is aiming to protect men, women and children from the vices of an article of commerce, which is deemed by the Legislature an evil, and in doing so they have attempted to put a check upon a vehicle of commerce. The legislation is anti-commercial. It puts the peace and good order of society above its commerce in this particular. In construing and applying the statute, if the courts devitalize it by subordinating it to the supposed interests of commerce, the manifest legis-

lative intent would be frustrated, which is contrary to every allowable rule of statutory construction. Yet we do not go so far as to say that the carrier may require all shipments to be subjected to its inspection before undertaking to deliver them. But we do say, that when the carrier knows that the article is contraband it must be rejected, no matter what the shipper says to the contrary, and, if the carrier believes upon reasonable grounds that it is contraband, he may require reasonable assurances that it is not; and, if an inspection is reasonable and practicable, under the circumstances, may require an inspection. Let them be as careful to obey the law as they are to further their own interests, and there will be little doubt but that the law will be obeyed.

Other questions presented are not deemed material.

Judgment affirmed.

COMMONWEALTH v. ALEXANDER.

(Filed September 23, 1908—To be reported.)

Embezzlement—Indictment—Money Unlawfully Collected and Misappropriated by Sheriff—Property Not Listed for Taxation—An indictment against a sheriff which alleges that “during the year 1898, he knowingly, feloniously and fraudulently collected from various citizens of the county the sum of \$2,286, and retained and applied it to his own use, when the property of the county had not been listed for taxation,” is not a good indictment for embezzlement. The indictment shows on its face that the sheriff was not rightfully and legally in possession of the money charged to have been collected and misappropriated by him.

Jas. Breathitt and Tom B. McGregor for appellant.

H. W. Alexander, W. B. Moody, W. A. Lee and H. G. Botts for appellee.

Appeal from Owen Circuit Court.

Opinion of the court by Judge Nunn, affirming.

Appellee was indicted in the Owen Circuit Court for the offense of embezzlement. The court sustained a demurrer to the indictment, and the Commonwealth appeals. The indictment was evidently drawn to cover the offense defined by section 1205, of the Kentucky Statutes. In substance, appellee was charged in the indictment with having collected from divers taxpayers of the county the sum of \$2,286, during the year 1898; that he feloniously, knowingly and fraudulently collected this money, retained and applied it to his own use and benefit, thereby depriving the county of its use; that the property upon which he collected this money as taxes had not been assessed for taxation. The substance of the charge against appellee is that while he was sheriff, during the year 1898, he collected from various citizens of the county the sum named when the property had not been assessed, that is, had not been listed for taxation, and that he failed to turn over to the county the money thus collected. The question is: Does this constitute embezzlement as defined in section 1205, of the Kentucky Statutes? In our opinion it does not.

The section of the statute referred to provides: That when a person having custody or control of any money, or other thing named in the section, belonging to or for the use of the State or of any county, &c., or under any trust or duty, return or specifically apply same, or any part thereof, shall, in violation of such trust or duty, willfully misappropriate or otherwise dispose of such money, or other thing named in the statute, he shall be punished as provided in the section. This section assumes that the person or officer is rightfully and legally in the possession of the money, or other thing, for the use of the State or county, and then misappropriates it.

The indictment in this case shows on its face that appellee was not rightfully and legally in possession of the money charged to have been collected and misappropriated by him. Section 4067, of the Kentucky Statutes, provides: "No sheriff shall receive or receipt for any taxes until a copy of the assessor's books, as approved by the board of supervisors, has been delivered to him by the county clerk, or the list filed in the county clerk's office has been certified to him by the said clerk. For a violation of this section the sheriff shall be fined one hundred dollars for each offense."

This is a positive prohibition against the collection by the sheriff of any taxes on unassessed property. The sheriff has no power or authority to assess or list omitted property for taxation under the statutes. His powers and duties as to property omitted by the assessor and supervisors are defined by section 4241, of the statutes, which requires him to file in the clerk's office of the county in which the property is liable to assessment, a statement containing a description and the value of the property proposed to be assessed. The sheriff has no part in the assessment of property, except to report omitted property to the clerk, as directed by section 4241, of the statutes; and he is forbidden, under a penalty of one hundred dollars for each offense, to collect any taxes at all until the property is assessed by a person authorized to assess it, and its proper assessment certified to him.

The collection by appellee of the sum alleged from the various taxpayers of the county on property which had not been assessed for taxation, was a plain violation of the law; it did not relieve the taxpayers from their liability to the county, and they could have sued appellee immediately and recovered each of the various sums paid to him. It was their money; it did not belong to the county. If appellee held it in trust, it was for the persons who paid it to him, and not for the county. (*Commonwealth v. Boske*, 30 Ky. Law Rep., 400; 9 S. W., 316.)

For these reasons we are of the opinion that the lower court properly sustained a demurrer to the indictment.

Judgment affirmed.

RICHARDSON v. LOUISVILLE & NASHVILLE RAILROAD CO.

(Filed September 24, 1908—To be reported.)

Courts—Pleading—Jurisdiction—Special Demurrer—Presumptions—When the petition, to which it is desired to demur specially upon the ground that the court has no jurisdiction of the defendant or of the subject of the action, fails to disclose the want of jurisdiction, the defendant, if he desires to raise the question, should point out distinctly in an answer or other pleading, as provided in section 118, of the Civil Code, the reasons why the court has not jurisdiction,

so that the court may be informed of the grounds upon which the special demurrer is rested. Circuit courts are courts of general jurisdiction, and it will be presumed, in the absence of a showing to the contrary, that they have jurisdiction.

G. E. Lilly for appellant.

Fred P. Caldwell, Benjamin D. Warfield and John T. Shelby for appellee.

Appeal from Madison Circuit Court.

Judge Carroll delivered the extension of opinion, overruling.

In the petition for re-hearing it is suggested that the court in the opinion made no reference to the question raised by the appellee in the lower court, and urged by it in the brief filed in its behalf in this court, that the Madison Circuit Court had no jurisdiction to hear and determine this case.

The action was brought under section 73, of the Civil Code, providing that: "Excepting the actions mentioned in section 75, an action against a common carrier, whether a corporation or not, upon a contract to carry property, must be brought in the county in which the defendant, or either of several defendants, resides; or in which the contract is made; or in which the carrier agrees to deliver the property." * * *

It will thus be seen that the venue of the action is limited to either one of three counties. In the brief filed on the original hearing, as well as in the petition for re-hearing, it is stated that the contract was entered into in Estill county, that the appellee's residence is in Jefferson county, and the property was to be delivered in Kenton county. Neither of these facts appears in the record. The jurisdictional question was not properly raised or made in the lower court. For this reason it was not noticed in the opinion, and would not now be considered except for the insistence of counsel that the plea to the jurisdiction of the Madison Circuit Court should have been sustained.

Before entering its appearance in the Madison Circuit Court, the appellee filed the following special demurrer: "The defendant demurs specially to the plaintiff's petition herein on the ground that this court has not jurisdiction of this cause of action set forth in the plaintiff's petition and amended petition."

It did not file any other pleading of record stating the reasons why the Madison Circuit Court did not have jurisdiction, or setting out that it resided in Jefferson county, or that the contract was made in Estill county, or that the property was to be delivered in Kenton county. The petition did not disclose the fact that the Madison Circuit Court was not the county in which the contract was made or the county in which the defendant resided. In the absence of a pleading showing a want of jurisdiction, the lower court properly overruled the special demurrer. Section 92, of the Civil Code, provides that:

"A special demurrer is an objection to a pleading which shows:

"1. That the court has no jurisdiction of the defendant or the subject of the action; or,

"2. That the plaintiff has not legal capacity to sue; or,

"3. That another action is pending in this State, between the same parties, for the same cause; or,

"4. That there is a defect of parties, plaintiff or defendant.

"Either of said grounds of objection, shown to exist by a pleading, is waived, unless distinctly specified by a demurrer thereto, except

the objection to the jurisdiction of the court of the subject of the action, which objection is not waived by failing so to make it." * * *

When the petition to which it is desired to demur specially upon the ground that the court has no jurisdiction of the defendant or of the subject of the action, fails to disclose the want of jurisdiction, the defendant if he desires to raise the question should point out distinctly in an answer or other pleading as provided in section 118, of the Civil Code, the reasons why the court has not jurisdiction, so that the court may be informed of the grounds upon which the special demurrer is rested. Circuit courts are courts of general jurisdiction, and will be presumed, in the absence of a showing to the contrary, that they have jurisdiction of the defendant.

The Madison Circuit Court had jurisdiction of the subject-matter of the action; and as the pleading to which the special demurrer was filed did not disclose the jurisdiction over the person of the defendant, and the objection was not made by answer or other pleading, it was waived.

The petition for re-hearing is overruled.

CLARK v. COMMONWEALTH.

(Filed September 24, 1908—Not to be reported.)

Evidence—Competency Of—(32 Ky. Law Rep., 63, and response to petition for re-hearing in same case.) The only complaint here is that Blair's evidence was not excluded. But the facts examined and held that his evidence was competent.

Mercer & Mercer for appellants.

Jas. Breathitt and Tom B. McGregor for appellee.

Appeal from Breckinridge Circuit Court.

Opinion of the court by Judge Carroll, affirming.

We do not deem it necessary to write an extended opinion in this case. The only ground for reversal seriously urged is that the lower court erred in not excluding the evidence of Norville Blair. Upon a former appeal by appellant (32 Ky. Law Rep., 63), the judgment of conviction was reversed because of error committed by the trial court in admitting the evidence of this witness. In a response to the petition for a re-hearing in that case by Commonwealth, Judge Hobson, in delivering the opinion of the court, said:

"The testimony of Blair can only be competent upon the ground that it shows a confession made by the defendant. But to make the statement Blair heard competent against the defendant, the Commonwealth must show that he made the statement. The difficulty with the proof offered on this subject is that it does not establish that fact. Blair did not see the person who talked to him through the sewer pipe, and he did not know the voice. The proof does not show that only a person in the cell downstairs in the southwest corner of the jail could talk through this sewer pipe to a person upstairs where Blair was. It does not show that Clark was confined in this cell and that no one else had access to the sewer pipe. It is not common for prisoners to be allowed the use of the corridors of the jail during the day. The evidence of Blair shows this was the case upstairs where he was and there is no proof that things went differently downstairs. The Commonwealth may show by circum-

stantial evidence that it was Clark who talked to Blair through the sewer pipe; and if on another trial the evidence should show that Clark was confined in this cell and that no one else had access to the sewer pipe, and that no one else could talk through it to the cell where Blair was except a person in this cell, the testimony of Blair as to what was said may be admitted."

Upon the trial from which this appeal is prosecuted, the evidence is conclusive that at the time Blair had the conversation with Clark, no other person was confined in the cell occupied by Clark except himself, nor did any other person except the jailer enter or have access to the cell. The sewer pipe, through which the conversation was had extended from the cell occupied by Blair, which was immediately above that occupied by Clark, to the cell in which Clark was confined.

Blair testified that the conversation he had through the sewer pipe was with the person in the cell immediately under him. As there was no person in this cell at that time except Clark, and as the sewer pipe in Clark's cell was so located that a person who was not inside the cell could not talk into it, the evidence of Blair under the opinion delivered by Judge Hobson was competent, and the judgment must be affirmed.

FOSTER v. COMMONWEALTH.

(Filed September 24, 1908—Not to be reported.)

1. Murder—Instructions—Upon Matter Where No Evidence—Complaint is made here that there should have been an instruction upon voluntary and involuntary manslaughter, but under the evidence there is no place for an instruction except upon the subject of murder. In such a case it would be absurd to instruct upon questions about which there was no evidence whatever.

2. Evidence—There was sufficient evidence to sustain the verdict, and under the well established rule of this court, there being no prejudicial error, the verdict will not be disturbed.

K. D. Perkins and W. R. Henry for appellant.

Jas. Breathitt and Jno. F. Lockett for appellee.

Appeal from Whitley Circuit Court.

Opinion of the Court by Judge Carroll, affirming.

Under an indictment charging her with the murder of James Foster, her husband, the appellant was convicted and her punishment fixed at imprisonment in the State penitentiary for life. At the conclusion of the evidence for the Commonwealth, her counsel asked the court to direct the jury to return a verdict of not guilty. This request being refused, they declined to offer any evidence. One of the principal grounds relied on for reversal is that the evidence introduced for the Commonwealth was wholly insufficient to support a verdict of conviction. The additional error urged is that the court failed to instruct the jury as to the whole law of the case.

The evidence upon which the conviction was had was entirely circumstantial and consisted chiefly of statements made by appellant. There were no eye witnesses to the murder. The deceased was found lying in his bed dead. His death was produced by a ball from a pistol, that entered the back or top of his head, killing him instantly. The pistol was held so close to the bed upon which

his head was resting, that the fire from it when discharged burned or scorched the bed clothes. Deceased was asleep, and did not move his position in the bed after he was shot. The work of the assassin was quickly done, and the victim, without a struggle, passed from sleep into death.

Appellant and deceased, with their children, lived in a small house in a rather thickly settled neighborhood. Deceased was in the habit of getting drunk, and when under the influence of liquor was violent and abusive to his wife. They had several serious and noisy quarrels, during which each would threaten to kill the other. The murder was committed on Sunday night. On Sunday afternoon, the deceased left home for the purpose of going to a place where whisky could be obtained. Soon after his departure the appellant took her children to the house of her daughter, nearby, and said that her husband would come home drunk during the night, and that she would go away and stay until he got sober.

There was no evidence whatever, except a statement made by appellant, tending to connect any other person than appellant with the commission of the crime. The evidence conducing to establish her guilt consists of threats and the statement made to more than one person that "Foster had come home drunk, gone to sleep, and woke up in hell;" that "he never could come in drunk and put his pistol against the side of her head again;" and contradictory accounts of where she spent the night. To one person she said, that after leaving home Sunday afternoon, she became sick and spent the night at a school house about a half mile from where she lived. At another time, she said that she had gone to bed in her own house and was awakened by her husband on his way home hollering and shooting; that she went out of the house with a view of escaping from him, and within a short distance came upon two men to whom she told why she was leaving home; that they prevailed on her to return with them to her house, which she did, when one of them went in and fired the fatal shot, after which she went to the school house and remained the balance of the night.

Without relating the other circumstances of her guilt, based upon her conduct and conversations, we will content ourselves by saying that there was sufficient evidence to sustain the verdict. Under the well established rule of practice prevailing in this State, if there is any evidence tending to show the guilt of the accused, the case should go to a jury and their finding of guilt will not be disturbed unless some prejudicial error of law has been committed. (*Martin v. Commonwealth*, 32 Ky. Law Rep., 657.) The only error of law complained of is the failure of the trial court to instruct the jury upon the subjects of voluntary and involuntary manslaughter. The court refused to charge the jury upon these branches of the law of homicide—giving only an instruction upon the question of murder, and the usual one as to reasonable doubt of guilt entitling the defendant to an acquittal.

It has been ruled in several cases that where no eye witness to the homicide testifies, it is the duty of the court to give to the jury the law applicable to manslaughter as well as murder. The cases so holding were reviewed in *Bass v. Commonwealth*, 30 Ky. Law Rep., 967; and it was there held, after fully considering them, not to be necessary to give an instruction as to voluntary or involuntary manslaughter or self-defense, unless there was some fact or circumstance developed on the trial upon which such instructions or one of them might be predicated. In the case before us, there is no room or place for an instruction except upon the subject of murder. There is not a word of proof or a single circumstance upon which an instruction as to voluntary or involuntary manslaughter or self-

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defense could be rested. It would be absurd to hold like this the trial court should have given instructions concerning which there was no evidence whatever. The appellant, if guilty at all, was guilty of murder. The jury, per instructions, after a trial free from prejudicial error, found the appellant was guilty, and the judgment of the lower court was affirmed.

REINECKE v. BAILEY.

(Filed September 24, 1908—Not to be reported.)

Corporations — Actions to Recover Corporate Property Brought in Name of Corporation—An action to recover property must be brought in the name of the corporation. An action can not be maintained by one or more of the stockholders unless it be shown that the corporation or its directors brought the action, and that the interests of the stockholders require it necessary that one should be instituted.

Yost & Laffoon and Gordon, Gordon & Cox for appellant.
Waddill & Dempsey for appellee.

Appeal from Hopkins Circuit Court.

Opinion of the court by Judge Carroll, affirming.

Appellant, who was plaintiff below, in his petition stated his cause of action substantially as follows:

That some twenty years ago he founded a corporation, the Reinecke Coal Company, with a capital stock of one thousand dollars, which corporation continued until 1901, when a new corporation styled the Reinecke Coal Company took over the property of the Reinecke Coal Company. That he gave to Bailey, who was defendant below, one hundred shares of stock in the original corporation, and when reorganized in the original corporation, gave him the same number of shares in the new, and also made him secretary and general manager of each of the corporations. That after the organization of the new corporation, the appellee purchased 150 shares of its stock. That by this purchase all the stock in the corporation, except 100 shares, was owned by the appellant and appellee. That during the next five years appellant has owned one-half and appellee one-half of the capital stock of the corporation known as the Reinecke Coal Company, Light & Water Company, and also all the stock, except 100 shares, in the corporation known as Bailey & Company. That the management and control of each of the corporations was exercised by the appellee, and he disbursed the funds thereof. That while holding the stock in the corporations, the appellee wrongfully converted to his own use, for his private purposes, the funds of the corporations to the extent of at least \$135,000, no part of which was accounted for either to appellant or the corporations. That upon discovering the fraud committed by appellee, a compromise was made between them, by which appellee assigned to appellant the sum of \$50,000—\$20,000 of this amount was paid by the assignment and transfer of capital stock of the Reinecke Coal Mining Company, and the balance by the transfer of stock of the Bailey Light & Water Company, and the Bailey Light & Water Company, a corporation of promissory notes. He averred that, under and

this settlement, appellee assigned and transferred to him \$20,000 of the capital stock of the Reinecke Coal Mining Company, but refused to comply with the other terms of the settlement; and he sought to recover from appellee \$30,000 with interest. He also averred that each of the corporations was solvent, and that neither their creditors nor any other person would be affected injuriously by the settlement referred to—that the holders of the three shares of stock had really no interest in the corporations, but were stockholders merely for the purpose of qualifying them to act as directors.

Appellee filed an answer, denying the indebtedness as charged, although admitting that he did wrongfully convert certain funds of the corporations, and that no agreement to compromise or settle on the terms stated in the petition was made, and asked that the shares of stock in the Reinecke Coal Mining Company that were delivered to appellant be restored to him.

The case being submitted on the pleadings, the demurrer to the petition as amended was sustained; and an order entered directing appellant to return to appellee the shares of stock received by him.

Pending the action, the Reinecke Coal Mining Company filed an answer, consenting to the compromise settlement that was the basis of the action, and averred that it had no interest in the litigation. Neither of the other corporations were before the court.

The settlement sued on was made by the son of appellee, acting under a power of attorney. We do not, however, deem it necessary in the disposition of this case to consider the question raised as to the sufficiency of the power of attorney to authorize the settlement, or whether or not the settlement was procured by fraud. Our conclusion is that the special judge who heard the case correctly ruled that appellant as a stockholder in the corporation had no power or authority to make the compromise settlement that was the basis of the action, or to institute in his own name a suit for the embezzlement of the funds of the corporations.

The petition on its face shows that if appellee converted to his own use, or embezzled the funds, concerning which a settlement was made, the funds converted or embezzled belonged to the corporations and not to appellant. There being no averment that the corporation declined to institute the action, the right to institute it was in the corporations and not appellant, who was merely a stockholder. The argument is made for appellant that as there are only three stockholders in the corporations, that is, appellant and appellee, and the nominal owner of the three shares not held by them, and as the corporations are solvent, and the rights of creditors will not be injuriously affected by the settlement, that these facts take the case out of the general rule which it is conceded would vest the right of action as well as the right to make a compromise settlement of claims due the corporations in the corporations. But this argument is not sound, nor it is supported by any authority. There is no escape from the proposition that the wrong, if any, committed by appellee was against the corporations; that the money he embezzled, if any, was the property of the corporations. This seems conclusive of the question that any settlement concerning the wrongful acts of appellee upon which an action could be maintained must have been made by and with the corporations, and that a suit to enforce the settlement must be in the name of the corporations. No matter how many shares of stock Reinecke and Bailey owned, they were merely shareholders in the corporation. The amount or value of stock that one shareholder owns does not confer upon him any greater rights with respect to the corporate property than are vested in smaller stockholders, except in so far as his holdings may enable him to control the interests or dictate

the policy of the corporation through its directors or officers. The large stockholder, no more than the smaller one, can substitute himself for the corporation, or make in his own name a settlement affecting its affairs or institute, as an individual, an action concerning its property. This controversy is not an individual matter between Reinecke and Bailey. Nor does the fact that Reinecke owns the principal interest in the stock of the corporations confer upon him the right to make the corporate business a personal matter. That a compromise of doubtful claims is a good consideration to uphold a contract we have no doubt; and if the claim alleged to have been compromised between Reinecke and Bailey related to their individual affairs, it is clear that an action might be maintained upon the compromise agreement, if one was made. But, back of this is the question, whether or not the parties making the compromise have the right to do so, or the authority to maintain an action upon the agreement resulting from it. It is well settled that an action to recover corporate property must be brought in the name of the corporation, and that such an action can not be maintained by one or more stockholders unless it should be shown that the corporation or its directors declined to bring the action, and that the interests of the stockholders make it necessary that one should be instituted. When this state of case is presented, an action to recover corporate property or to protect the interests of the corporation, may be brought by the stockholders. (*Collier v. Deering Camp Ground Association*, 23 Ky. Law Rep., 1799; *P., C., C. & St. L. R. R. Co. v. Dodd*, 24 Ky. Law Rep., 2057; *Jones v. Johnson*, 10 Bush, 649; 10 Cyc., pages 963, 967.)

The judgment is affirmed.

EHRLICK & BERNERO v. COMMONWEALTH.

(Filed September 24, 1908—Not to be reported.)

1. Jurisdiction—The complaint that a special grand jury was empaneled to investigate appellants conduct can not be noticed here for, by the provisions of section 281, Civil Code, this court can not pass upon motions to quash indictments.

2. Admonition of Court to Witness—The witness appeared to be trifling with the court who stated in the presence of the jury that it might be a good thing if some people were prosecuted for perjury. The witness deserved disciplining and the remark did not bear on appellants' rights.

3. There was abundant evidence to take the case to the jury.

C. L. Raison, Jr., and Jno. B. O'Neal for appellants.

Jas. Breathitt and Theo. B. Blakey for appellee.

Appeal from Campbell Circuit Court.

Opinion of the court by Chief Justice O'Rear, affirming.

Appellants were convicted of maintaining a public nuisance, and fined \$500 and \$100 respectively. They set up and operated a pool-room, in Campbell county, just outside the corporate limits of Newport, where betting on horse races throughout the country was indulged in by large crowds attracted to the place by its facilities for betting. The crowds numbered from two hundred to two thousand

and assembled daily except Sundays, when races were being run anywhere in the United States.

The principal features of the case are very similar to, if not identical with those of the case of Ehrlick v. Commonwealth, 31 Ky. Law Rep., 401. It is not deemed necessary to restate here the propositions of law there laid down.

In the case at bar appellants complain at the action of the trial court in empanelling a special grand jury to investigate their conduct, which returned the indictment under which they were tried. It is not necessary, because not permissible, for us to notice the grounds of complaint on this score. For the Legislature has seen proper to withhold jurisdiction from this court to pass in review upon motions to quash indictments. (Section 281, Criminal Code; Commonwealth v. Simons, 100 Ky., 164.) We do not mean to be understood as intimating that the action of the trial judge in selecting and empanelling the special grand jury was in any wise irregular. We have not considered that phase of the question at all.

Judgment of abatement was entered after the verdict of the jury. The complaint is that the indictment does not sufficiently describe the premises. The indictment as to the premises says, "Said room is located on the East side of the Alexandria Pike, south of the city of Newport." The preceding language describes it as a place where a pool-room was being conducted by appellants at which large numbers of persons daily congregated. The requirement of the law is that the description should be sufficiently definite to enable the sheriff to find the place. Probably in the light of this record, he could find a place which a thousand or so other people were able to locate every day in the week. "That is certain which may be made certain," is a maxim applying to descriptions of this kind as well as to forcible entry cases. If the sheriff should find it impossible to locate the premises, the order of abatement may have to be amended, as it well could be from the record. If the sheriff should accidentally close the wrong pool-room under this order the public would not suffer from that fact, provided appellants would obey the order of the court and close the right one.

One of the attendants at the pool-room being investigated, was called as a witness by the prosecution. His answers showed that his memory was woefully bad, or that he was uncandid in his statements. He testified to nothing very hurtful to appellants, and to nothing in their favor. The judge, evidently believing that the witness was trifling with the court, thus admonished him:

"I might say this to you by way of admonition; it is your duty to answer these questions frankly. This is not a place for sport. I want this conducted properly; and, I might say, gentlemen, it would be good for this community if some people were prosecuted for perjury."

Appellants object to the judge's statement. If this witness had testified to anything in their favor, it might have been argued that the effect of the statement was to discredit the witness' credibility, and therefore, have damaged their case. Such was not the fact. The witness deserved disciplining. Whether the closing remark was too harsh is a matter that does not appear to us to bear on appellants' rights.

There was abundant evidence of appellants' guilt to take the case to the jury. The rule in this court is, if there is any evidence of guilt, the weight to be given it, and the punishment (within the limits as given in the court's instructions) are questions solely for the jury.

Judgment affirmed.

PARACAMPH CO. v. COMMONWEALTH OF KENTUCKY.

(Filed September 24, 1908—Not to be reported.)

Indictments—Omission to Use Word "Incorporated" in Newspaper Advertisement—Jurisdiction—Appellant was indicted in the Hopkins Circuit Court for its failure to use the word "incorporated" following its name in a newspaper advertisement. As its home office was in Jefferson county, the Hopkins Circuit Court was without jurisdiction, and while the question could not be raised in a special demurrer, it should have been raised in the answer in the nature of a plea to the jurisdiction. The lower court should have discharged the defendant when it was made to appear in the amended answer that its principal place of business was in Louisville. (32 Ky. Law Rep., 189.)

Johnson & Jennings for appellant.

Jas. Breathitt and Tom B. McGregor for appellee.

Appeal from Hopkins Circuit Court.

Opinion of the court by Wm. Rogers Clay, Commissioner, reversing.

Appellant, Paracamph Co., whose place of business is in Louisville, Ky., was indicted in Hopkins county for a violation of section 576, Kentucky Statutes. The particular offense charged against appellant was publishing an advertisement of its business in the "Hustler," of Hopkinsville, without having under its corporate name the word "incorporated." Appellant first filed a special demurrer to the jurisdiction of the court. It then filed an answer in two paragraphs. In the first paragraph it pleaded not guilty, and in the second alleged that it had upon its letter heads, checks and envelopes, and all other written or printed matter, the word "incorporated;" that it was impossible for anyone to deal with appellant without knowing it was a corporation. Subsequently it offered to file an amended answer in which it alleged that its principal place of business was in Louisville, Ky. It then set out more specifically the allegations contained in its first answer in regard to its having the word "incorporated" upon all of its literature. The court refused to permit this amended answer to be filed. The case was then submitted to the court and judgment rendered, imposing a fine of \$150 on appellant, of which it complains.

It is insisted by appellant that the Hopkins Circuit Court was without jurisdiction of the offense charged.

The question here involved was recently before this court in the well-considered case of Commonwealth v. Remington Typewriter Co.: 32 Ky. Law Rep., 189, wherein it was said:

"The offense against the statute is more certainly committed where its home office in this State is than in any other county where a stray magazine or a fugitive newspaper might find its way, or other kind of advertising be used. In prosecutions for violations like this it seems to us better for the interest of all parties concerned that the venue should be fixed in one county, if it can with propriety be done, so that persons desiring to proceed against the corporation in default may know where to institute proceedings, and the corporation may know in what court it will be proceeded against. We doubt if the Commonwealth would contend that, if an advertisement in violation of the statute was inserted in a newspaper that circulated in every county in the State, prosecutions might be instituted and convictions had in each

of the 119 counties. In other words, could not a conviction in one county be pleaded as a bar to the prosecutions in the others? It is not, however, necessary to further elaborate this view. If it should be entertained by the court in a case where it was presented, only one recovery could be had, and this, it seems to us, should be in the county where its principal office or place of business in the State is located, or where its designated officer for service of process resides. Nor will the efficiency of the statute which subserves a useful purpose be impaired by this ruling."

As appellant's principal place of business or home office was in Louisville, Jefferson county, Ky., it necessarily follows that the Hopkins Circuit Court was without jurisdiction to try appellant. True, the question of jurisdiction could not be raised by special demurrer, for there was nothing in the record to show where appellant's principal place of business was located. The question should have been raised by an answer in the nature of a plea to the jurisdiction. However, when it was made to appear to the trial court by appellant's second amended answer that its home office or principal place of business was in Louisville, Jefferson county, Ky., it was then the duty of the court to discharge the defendant for the reason that it was apparent that the court was without jurisdiction.

For the reasons given the judgment is reversed and cause remanded, with directions to dismiss appellant.

STANDARD SANITARY MANUFACTURING CO. v. MINOR.

(Filed September 24, 1908—Not to be reported.)

Master and Servant—Instructions—In this action by appellee to recover damages for injuries resulting from the alleged negligence of the appellant by which he was injured, held that the facts warranted the submission of the case to the jury, and they were correctly told by the trial court that if the master knew the force was inadequate to do the work assigned, and the plaintiff did not know it, and because of this he was injured, the master is liable except for the plaintiff's negligence.

O'Neal & O'Neal for appellant.

J. A. Skaggs for appellee.

Appeal from Jefferson Circuit Court, Common Pleas Branch, Second Division.

Opinion of the court by Chief Justice O'Rear, affirming.

Appellant, a laborer in appellee's employ, was set to work with three other men to unload from a car a number of iron pipes about twenty feet long and twelve inches in diameter. It was raining and sleeting, and it is charged that the force was inadequate for the task. Notwithstanding complaint was made by the boss in charge of the work to appellee's foreman, they were ordered to proceed with the work. The men handling one end of one of the pipes let it slip, and it rolled down on appellant, crushing his ankle and otherwise injuring his leg. He recovered a verdict and judgment for \$500 as damages in this action. On this appeal the appellant has not argued or briefed the case. But

we assume from the motion for a new trial in the Circuit Court that the grounds of complaint are that the court misinstructed the jury as to the law governing appellant's liability. The instructions, in substance, were that it was the duty of the master to furnish enough force to do the work with reasonable safety to all those engaged in it; that if it knew, or by ordinary care could have known, that the force was inadequate, and if the plaintiff did not know it, and in consequence of such lack of adequate force plaintiff was injured, the master was liable to the injured servant, except for the latter's own negligence in the matter, if any. And such we understand to be the law. The facts warranted the submission of the case to the jury, whose verdict can not be said to be flagrantly against the evidence.

Judgment affirmed.

COMMONWEALTH v. LANDIS.

(Filed September 24, 1908—To be reported.)

Indictment—Carnal Knowledge of Female Under Sixteen Years of Age—Allegations—Sufficiency—Under section 1511, Kentucky Statutes, as amended by the Acts of 1906, which reads: "Whoever shall, unlawfully, carnally know a female under the age of sixteen years, or an idiot, shall be confined in the penitentiary not less than ten nor more than twenty years," an indictment against a man charging him with carnally knowing a female under the age of sixteen years need not allege that such female was not the wife of the accused.

Jas Breathitt, Tom McGregor and B. J. Bethurum for appellant.

Appeal from Pulaski Circuit Court.

Opinion of the court by Judge Lassing, ordering law certified.

Appellee was indicted charged with the offense of carnally knowing a female under the age of sixteen years. The indictment is as follows:

"The grand jury of Pulaski county, in the name and by the authority of the Commonwealth of Kentucky, accuse J. C. Landis of the crime of carnally knowing a female under the age of sixteen years, committed in the manner and form as follows, viz: The said Landis, on the last day of May, 1908, before the finding of this indictment and in the county and State aforesaid, did unlawfully, carnally know Esther Miller, who was then and there a female under the age of sixteen years, against the peace and dignity of the Commonwealth of Kentucky."

To this indictment the appellee entered a plea of "not guilty," was tried and his punishment fixed at confinement in the penitentiary for ten years. He filed a motion and grounds for a new trial, and, upon hearing, this motion was sustained, the verdict of the jury was set aside and appellee granted a new trial. The proof offered by the Commonwealth warranted the finding of the jury, and it is alleged that the trial judge granted a new trial because the indictment failed to charge that appellee and the prosecuting witness were not husband and wife, and that the proof failed to establish this fact. The only question before us on this appeal is the sufficiency of the indictment.

This indictment is drawn under section 1511, of the Kentucky Statutes, as amended by the Acts of 1906, which reads as follows:

"Whoever shall unlawfully, carnally know a female under the age of sixteen years, or an idiot, shall be confined in the penitentiary not less than ten nor more than twenty years."

The indictment follows substantially the language of the statute. Sub-section 2, of section 122, of the Criminal Code, provides that: "An indictment must contain a statement of the acts constituting the offense in ordinary and concise language, and in such a manner as to enable a person of common understanding to know what is intended; and with such degree of certainty as to enable the court to pronounce judgment, on conviction, according to the right of the case."

Section 124, of the Criminal Code, defines the facts that must be stated with certainty in an indictment to be "the party" and "the offense" charged, the county in which the offense was committed, and the particular circumstances of the offense charged, if they be necessary to constitute a complete offense. The particular circumstances of the offense charged in the case at bar are those defined by the statute as amended by the act of 1926, creating the offense. Section 136, of the Criminal Code, provides that the words used in the statute to define an offense need not be strictly pursued in an indictment, but other words conveying the same meaning may be used.

Measured by these Code provisions the indictment in the case at bar meets the requirements of the law, unless it can be said that, under sub-section 4, of section 124, above referred to, it is necessary to allege that the accused and the female whom he is charged with carnally knowing were not husband and wife, in order to constitute a complete offense. We know of no authority so holding, nor are we referred to any such.

In Roberson's Criminal Law, section 271, it is stated that, in "an indictment under the statute concerning rape on infants under twelve years of age, * * * sex need not be alleged, the indictment is sufficient if it gives a woman's name and uses the pronouns 'she' and 'her,' in speaking of the person on whom the rape was committed. The word 'female' in an indictment is equivalent to the word 'woman.' It need not be averred that the woman was not the wife of the defendant."

And, in the case of the Commonwealth v. Fogarty, 69 Am. Dec., 264 (Mass.), the court, in passing upon the sufficiency of an indictment for rape, said:

"Nor was it necessary to allege that the prosecutrix was not the wife of the defendant. Such an averment has never been deemed essential in indictments for rape, either in this country or in England. The precedents contain no such allegations. A husband may be guilty at common law as principal in the second degree of a rape upon his wife by assisting another man to commit rape upon her, and under our statute would be liable to be punished in the same manner as the principal felon. An indictment charging him as principal would, therefore, be valid. Of course, it would always be competent for a party indicted to show, in defense of a charge of rape alleged to be actually committed by himself, that the woman on whom it was charged to have been committed was his wife. But it is not necessary to negative the fact in the indictment."

In the case of State v. Williamson, 83 Am. St. Reports, 780 (Utah), it was expressly held that an indictment for rape need not specify the sex of the defendant, nor that the person ravished was not his wife.

These authorities are directly in point, and we have been able to find none holding the contrary view.

We are of opinion that the indictment is a good indictment for the offense charged, and this opinion is ordered to be certified to the lower court as the law of the case.

LATHAM v. LINDSAY.

(Filed September 25, 1908—Not to be reported.)

Instructions—Motion to Strike From Record—Affirm as Delay Case—The motion to strike the instructions from the record must be sustained because there is no order identifying them, but it can not be said from the record that the appeal was prosecuted for delay. The bill of evidence is sufficiently identified to show that it is the genuine bill.

Petrie & Standard for appellant.

Trimble & Mallory and C. A. Denny for appellee.

Appeal from Todd Circuit Court.

Opinion of the court by Chief Justice O'Rear, overruling motion.

Appellee's motion to strike the bill of exceptions from the record must be overruled. There is no bill of exceptions in the record. The "bill of evidence," which is the stenographer's bill, attested by the trial judge, is sufficiently identified to satisfy us; prima facie, it is the genuine bill, and it may stay in the record for whatever proper purpose it may serve on the trial.

The motion to strike the instructions from the record, as copied therein by the clerk, must prevail. There is no order identifying them as the instructions given on the trial. The instructions, to constitute a part of the record, must be identified by an order of court, or be contained in a bill of exceptions, duly signed and filed in the record.

The motion to affirm as a delay case is overruled. The attorneys for appellee failed to endorse the record as required by section 759, Civil Code. Besides, when the appellee feels that he must file a brief—a long brief—on the motion to affirm as a delay case, that itself indicates that the case presents a debatable question. In addition, we cannot say from the record that the appeal was prosecuted merely for delay.

WILSON v. L. & N. R. R. CO.

(Filed September 25, 1908—Not to be reported.)

Railroads—Action Against—Several Causes of Actions—Code Provision—There is no authority conferred by the Code of Practice to bring an action for an injury to a passenger in the county where the carrier agrees to deliver the property, and section 83, of the Code does not remedy this, for under this section one of the conditions precedent to uniting several causes of action is that each may be brought in the same county, and there being no authority given to sue for injury to the passenger as first indicated, it follows that the two causes of action can not be brought in the same jurisdiction.

Grant E. Lilly for appellant.

John T. Shelby, Chas. H. Moorman, Benjamin D. Warfield and J. Tevis Cobb for appellee.

Appeal from Madison Circuit Court.

Opinion of the court by Wm. Rogers Clay, Commissioner, affirming.

Appellant, E. Wilson, who then resided at Afton, Indian Territory, contracted with the "Frisco" line at that point, to transport a car-load of household goods and live stock from Afton to Rice's station in Estill county, Kentucky. By the terms of the contract he had the privilege of riding in the car or on the train carrying the car from Afton to his destination. The car was delivered to appellee, Louisville & Nashville Railroad Company, at St. Louis, and was transported by it from that point to Richmond, Ky. There it was delivered to the Louisville & Atlantic Railroad Company, to be taken to Rice's Station, in Estill county.

After reaching Kentucky, appellant brought this action in the Madison Circuit Court against the Louisville & Nashville Railroad Company and the Louisville & Atlantic Railroad Co. In the first paragraph of his petition appellant asked for the recovery of \$36.80, which he alleged the Louisville & Atlantic Railroad Company wrongfully required him to pay as additional freight on the shipment. In the first clause of the second paragraph of the petition, appellant asked damages on the ground that while the car containing the goods and live stock was on the side track in St. Louis, the Louisville & Nashville Railroad Company carelessly and negligently ran one of its engines, or a portion of its train, against the car with such violence as to break and damage the goods contained therein to the extent of \$50. In the second clause of the second paragraph appellant asked damages in the sum of \$500 for personal injuries sustained by him in the same collision in which his goods were damaged. In the third paragraph of the petition appellant asked damages in the sum of \$50 on account of delay to his shipment at Richmond.

Appellee, Louisville & Nashville Railroad Company, filed an answer in the nature of a plea to the jurisdiction of the Madison Circuit Court as to each of the causes of action set forth in the petition. The lower court adjudged that it had jurisdiction of appellee as to the cause of action for \$50 damages for injury to the household goods and also to the cause of action for the delay at Richmond asserted in the third paragraph of the petition. It further adjudged that it had not jurisdiction of appellee as to the cause of action for \$500 damages on account of personal injuries asserted in the second paragraph of the petition. Appellant's petition as to the last named cause of action was dismissed for want of jurisdiction, and from this judgment the present appeal is prosecuted.

It is the contention of appellant that his cause of action, both for the injury to himself and his property, arises entirely out of the contract of shipment; that the injury which he received, both to himself and to his property, was the result of one wrongful act; that the law does not contemplate that such an action, arising from one wrongful act, shall be split up, and one part of the damages sued for in one jurisdiction and the other part sued for in another jurisdiction. Appellant further contends that, under sections 1 and 6, of section 83, of the Civil Code, express authority is given to joint actions arising from contracts or for injuries to persons and property. For the purpose of discussing the question, we give below the provisions of the Code relative to the point involved:

"Section 73. Excepting the actions mentioned in section 75, an action against a common carrier, whether a corporation or not, upon a contract to carry property, must be brought in the county in which the defendant, or either of several defendants, resides; or in which the contract is made; or in which the carrier agrees to deliver the property. An action against such carrier for an injury to a passenger, or to other person or his property, must be brought in the county in which the defendant, or either of several defendants, resides;

or in which the plaintiff or his property is injured; or in which he resides, if he reside in a county in which the carrier passes.

"Section 83. Several causes of action may be united, if each affect all the parties to the action, may be brought in the same county, and may be prosecuted by the same kind of action; and if all of them be brought:

"1. Upon contracts, express or implied; or * * *

"6. For injuries to person and property."

The first part of section 73 fixes the venue of the action against the common carrier upon a contract to carry property. Such an action may be brought at the residence of the defendant, in the county where the contract is made, or the county in which the carrier agrees to deliver the property. In this case the Louisville & Nashville Railroad Company agreed to deliver the property at Richmond, Madison county, Kentucky. Therefore, it was proper to bring an action growing out of the contract of shipment in the Madison Circuit Court. But the latter part of section 73, expressly provides that an action for an injury to a passenger, "or to other person or his property, must be brought in the county in which the defendant, or either of several defendants, resides; or in which the plaintiff or his property is injured; or in which he resides, if he reside in a county in which the carrier passes." By the latter provision no authority is given to bring an action for an injury to a passenger in the county where the carrier agrees to deliver the property. On this account section 83 does not remedy the matter, for under that section one of the conditions precedent to uniting several causes of action is that each may be brought in the same county. No authority being given to bring the action for injury to a passenger in the county where the carrier agrees to deliver the property, it necessarily follows that the two causes of action can not be brought in the same jurisdiction.

It appears from the record that appellant's residence is in Estill county, Kentucky; that appellee's residence is in Louisville, Kentucky. Madison county, therefore, is neither the residence of appellee nor appellant. The Madison Circuit Court had jurisdiction of the claims for damages relating to the household goods, because the action was instituted in the county where appellee agreed to deliver the property. The Code does not authorize the bringing of a suit in such county for an injury to a passenger. We, therefore, conclude that the judgment of the trial court, in so holding, was proper.

Judgment affirmed.

COMMONWEALTH v. MORRIS, &c.

(Filed September 24, 1908—To be reported.)

1. Landlords—Knowingly Leasing Premises for Unlawful Sale of Liquors—Evidence Necessary—Under Kentucky Statutes, section 2557, imposing a penalty against one who shall knowingly furnish or rent a house in which spirituous liquors are sold, in violation of law, in order to sustain a conviction under said act against the landlord, it is necessary that there should be some evidence, direct or circumstantial, conducing to show that the landlord knew, or had such information, as would put a person of ordinary prudence upon notice, at or before the time the lease was entered into, that it was the purpose of the lessee to sell such liquors in violation of law upon the leased premises.

2. Renting Premises in Good Faith—Legitimate Purpose—Where the owner of property or premises furnishes or rents it in good

faith to be used for legitimate purposes, he can not be subjected to a criminal prosecution under the statute because the lessee violated the law.

3. Same—Right to Cancel Lease—Absence of Statute or Contract—In the absence of a statute or a provision in the contract of leasing authorizing the landlord to cancel the lease or take possession of the rented property if the lessee or occupier violates the law, the mere fact that he does so will not warrant the landlord in ejecting him.

Jas. Breathitt, Tom. B. McGregor and D. A. McCandless for appellant.

Appeal from Barren Circuit Court.

Opinion of the court by Judge Carroll, affirming.

The appellees were indicted for a violation of that part of section 2557, of the Kentucky Statutes, providing that: "Any person who knowingly furnishes or rents a house, room, wagon, or any conveyance or thing in which spirituous, vinous or malt liquors are sold, bartered or loaned, in violation of this act, shall, upon conviction thereof, be fined not less than sixty nor more than one hundred dollars; and the house, wagon, vehicle, land or other thing in which the liquors were sold, bartered or loaned, shall be liable for all fines adjudged against the person selling, bartering or loaning the same."

The charge in the body of the indictment was that they "unlawfully and knowingly furnished and rented to E. T. Willis a certain drug store, on Washington street, in the town of Glasgow, in which spirituous liquors were sold during the month of November, 1907, and at said time and place, and in said house, said Willis sold spirituous liquors, by retail, to T. B. Gibb, and said Mrs. Morris and Lewis Morris rented and furnished said house to said Willis during said month with the knowledge that he would so sell liquor in violation of law at said time and place."

Upon the conclusion of the evidence for the Commonwealth, the court directed the jury to return a verdict of not guilty.

The evidence shows that in July, 1906, the appellee rented to E. T. Willis a storeroom to be used as a drug store for a term of two years, with the privilege, on the part of Willis, of renewing the lease for an additional term of two years. There is no evidence whatever that the lessors knew before, or at the time the lease was entered into, that Willis intended to, or would sell, liquor on the leased premises, in violation of law, or that they in any manner consented to, or approved, of the sale of it; although it appears that in 1907 he did sell and deliver liquor in violation of law to various persons on the leased premises, for which sales he was indicted and convicted in the Barren Circuit Court. And there is evidence conducing to show that appellees knew that illegal sales of liquor were made on the premises in 1907. The question to be determined is, do these facts constitute a violation by appellees of the statute. We think not. To sustain a conviction under this statute it is necessary that there should be some evidence, direct or circumstantial, conducing to show that the owner or controller of the leased property, or premises knew, or had such information, as would put a person of ordinary prudence upon notice, at or before the time the lease was entered into that it was the intention of the lessee to sell, in violation of law, liquor in or upon the property or premises leased. Where the owner or controller of the

property or premises furnishes or rents it in good faith to be used for legal and legitimate purposes, he can not be subjected to a criminal prosecution under the statute because the lessee violates the law. Statutes in some respects similar to the one under consideration, and having the same purpose in view, have been enacted in a number of States. In some of them it is provided that the landlord or lessor becomes liable to a penal prosecution if he permits the tenant or lessee to continue in the use of the premises or property with knowledge that he is conducting in them business in violation of law. To afford the landlord the means of relieving himself from liability, these statutes also provide that he may at any time during the term eject the tenant who has been guilty of violations of the statute. But our statute does not go this far. It does not make the landlord or owner liable because the tenant or lessee, after obtaining possession of the property or premises, violates the statute; nor does it give him the right, for this cause, to eject the tenant and take possession of the premises or property during the term. In the absence of a statute, or a provision in the contract, authorizing the landlord to cancel the lease, or take possession of the rented property if the lessee or occupier violates the law, the mere fact that he does so will not warrant the landlord in ejecting him. Nor do we know of any authority that imposes upon the landlord the duty of stipulating in the contract that a violation of law by the tenant will work a forfeiture of the lease. In the absence of notice, as herein indicated, the lessor who rents his property for legitimate purposes may assume that the tenant will not violate the law, but, if he does, the landlord can not be subjected to criminal liability for his misdoings under the present statute. (17 Am. & Eng. Ency. of Law, page 315; 23 Cyc., pages 203, 322; Crocker v. State, 49 Ark., 60; Cordes v. State, 37 Kan., 48; Hall v. Germain, 131 N. Y., 536.)

Judgment affirmed.

GEARHART v. COMMONWEALTH.

(Filed September 25, 1908—To be reported.)

1. Jurisdiction—Indictment Found in Wrong Court—Transferred to Proper County—Under section 230, of the Criminal Code, where, on the trial of a defendant under an indictment for a misdemeanor, it appeared that the offense was not committed in the county in which the indictment was found, it was proper for the trial court, on the motion of the attorney for the Commonwealth, to discharge the jury and transfer the prosecution to the county in which the offense was committed, as provided in sections 166 and 167, Criminal Code.

2. Same—Indictment Transferred—Proceedings Therein—Bail to Answer—When on the trial of a misdemeanor indictment it was found that the offense was committed in another county, and the indictment and trial was transferred to the county in which the offense was committed, it was not proper for the court to which it was transferred to try the case on the indictment found in another county, but the court to which the indictment was transferred should have held the defendant to bail for his appear-

ance in the latter court to answer any indictment that might be found therein.

Henry L. Wood for appellant.

James Breathitt and T. B. McGregor for appellee.

Appeal from Elliott Circuit Court.

Opinion of the court by Wm. Rogers Clay, Commissioner, reversing.

Appellant, Peter Gearhart, was indicted by the grand jury of Carter county for the offense of selling sperituous, vinous and malt liquors in that county in violation of the local option laws. When the case was called for trial at the special term of the Carter Circuit Court, it developed, upon the hearing, that the offense was committed in Elliott county. Thereupon the Commonwealth's attorney moved the court to transfer the case to the Elliott Circuit Court for trial, which was done over the objection of appellant. The case was not re-committed to the grand jury of Elliott county, but appellant was tried on the original indictment by the Carter county grand jury. The jury returned a verdict of guilty, and fixed appellant's punishment at a fine of \$60 and 20 days in jail.

This appeal involves two questions: 1. Was the case properly transferred from the Carter Circuit Court to the Elliott Circuit Court? 2. Was it proper to try appellant on the indictment returned in the Carter Circuit Court?

Section 230, of the Criminal Code, is as follows: "If, during the trial, it shall appear that the offense was committed out of the jurisdiction of the court, but within the jurisdiction of some other court of this State, the court shall stop the trial, discharge the jury, and take the proceedings in the case directed in sections 166 and 167."

While it is true that sections 166 and 167 apply only to felony cases, there is nothing in section 230 that limits its application to such cases. We, therefore, conclude that it applies alike to felonies and misdemeanors. It follows, that it was proper for the Carter Circuit Court to transfer the case to othe Elliott Circuit Court.

But was it proper for the Elliott Circuit Court to try appellant on the indictment returned by the Carter Circuit Court? The indictment in question charged appellant with the offense of violating the local option laws by selling spirituous, vinous and malt liquors in Carter county. Manifestly, therefore, the Elliott Circuit Court could not try a man for an offense committed in Elliott county upon an indictment for an offense committed in Carter county. In the first place, the Elliott Circuit Court would have no jurisdiction of the offense if committed in Carter county; in the second place, proof to the effect that an offense was committed in Elliott county would not sustain an indictment charging an offense in Carter county. We, therefore, conclude that the action of the Elliott Circuit Court, in trying appellant upon the indictment in question, was erroneous. Instead of trying him upon that indictment, he should have been held to bail to answer for his appearance to an indictment by the Elliott Circuit Court.

For the reasons given, the judgment is reversed and cause remanded, with directions to hold appellant to bail to answer for his appearance to an indictment by the Elliott Circuit Court.

LOUISVILLE & NASHVILLE RAILROAD CO. v. COMMONWEALTH.

(Filed September 25, 1908—Not to be reported.)

1. Railroads—Obstructing Crossing—Use of Word "Willfully" in Indictment—The word "willfully" in an indictment charging a railroad with willfully suffering a train of cars to obstruct a public crossing, was used in the sense that the obstruction was intentional and not accidental, it being proved that the train of cars was intentionally permitted to remain across the street 30 or 40 minutes.

2. Instructions—The use of the expression 30 minutes in an instruction was not a prejudicial error in view of the fact that under an instruction the whole matter as to the reasonableness of time was left to the jury, and whether or not the obstruction was necessary to make repairs.

J. I. Blanton and Benjamin D. Warfield for appellant.

Jas. Breathitt and Tom B. McGregor for appellee.

Appeal from Harrison Circuit Court.

Opinion of the court by Judge Nunn, affirming.

Appellant appeals from a judgment against it for blocking a street crossing in the city of Cynthiana for an unreasonable length of time. The material part of the indictment upon which it was found is as follows:

"The Louisville & Nashville Railroad Company, an incorporated company under the laws of the State of Kentucky, on the 8th day of September, 1907, in the county and State aforesaid, and before finding of this indictment, did unlawfully and willfully suffer, permit, and cause a train of cars under the control, management and directions of said company to obstruct a public highway in the city of Cynthiana by placing and causing to be placed a train of cars of a freight train upon and across a public highway known as the Oddville Road in the said town of Cynthiana, and between Church street and Walnut street in said town, and suffering, permitting and causing said train of cars to remain and obstruct said highway for an unnecessary and unreasonable time, to-wit: for thirty minutes, to the common nuisance of May Ammerman, Mrs. S. A. Mickey there and then and all good citizens there and then in the neighborhood, passing, repassing, and residing and being and then and there having the right to pass, repass, reside, and be."

Appellant asks a reversal, first, for the reason that it was charged that it "willfully" obstructed the crossing, and there was no proof to sustain the charge that it was "willfully" done. This word was used in the indictment as meaning that it was intentionally done and not accidentally. It was proven without contradiction that this train of cars was intentionally permitted to remain across the street for a period from thirty to forty minutes, preventing the passage of twenty-five or thirty persons, who had assembled there, for that length of time.

The defense of appellant was that this was caused by accident which it could not avoid. The stopping of this train across the street was caused by the pulling out of a draw-head in one of the cars near the rear end of the train, which was south of the crossing. The engine and a considerable portion of the train were north of the crossing. The conductor testified that he could not prevent the blocking of the crossing for the reason that he sent, as he was re-

quired to do by the rules of the company, the front brakeman up the road ahead of the train and the other brakeman to the rear for the purpose of protecting his train, and that it left no one but himself to repair the damage to the train. He did not explain why he did not cut the crossing, and let the engine move up and make an opening at the crossing while he was repairing the damage, or why he did not call upon the fireman to aid him do so. The station in Cynthiana was about one block ahead of the engine when it stopped. This station was a signal station, and no train had the right to pass it without a signal given by the agent at the station, authorizing it to do so. The front brakeman testified that he only went to that station to protect his train.

Appellant objected to the use of the words, "to-wit: thirty minutes" for the reason, its counsel says, that by this language the court determined what was a reasonable time in which to clear the crossing and the question should have been left to the jury. The use of these words in the instruction we presume, was caused by the court copying them from the indictment inadvertently, and would have been a prejudicial error but for the fact, under the evidence the jury could not have been misled, and especially when considered with instruction number three, which is as follows:

"If you believe from the evidence that by reason of an accident to the train at the time and place mentioned in the evidence it was necessary to obstruct said highway in order to make the necessary repairs on said train and further believe from the evidence that the defendant, its agents and employes did not obstruct said highway longer than it was reasonably necessary under the circumstances to make the necessary repairs, the law is for the defendant, and it should be acquitted."

Under this instruction the whole matter was left to the jury as to the reasonableness of time, and whether or not it was necessary to obstruct the crossing to make the repairs.

Finding no error prejudicial to the substantial rights of appellant, the judgment is affirmed.

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COURT OF APPEALS OF KENTUCKY.

LEE v. WHEAT.

(Filed September 23, 1908—Not to be reported.)

Goad & Oliver for appellant.

Appeal from ——— Circuit Court.

Bradburn & Basham and J. H. Gilliam for appellee.

Judge Hobson delivered the following response to petition for rehearing, overruling.

A mere mistake in the calls of the deed can not affect the title when the lines and corners are established, and adverse possession is taken and held for over fifteen years to the lines and corners thus established and recognized on the ground.

Petition overruled.

COMMONWEALTH v. BOYD, JR.

(Filed September 25, 1908—Not to be reported.)

Homicide—Self-Defense—Law Of—Instruction—The single error complained of in this record is the failure of the trial court to give an instruction asked for upon the law of self-defense, and while the instruction properly expresses the law of self-defense, it was unnecessary to give it because of one previously given by the court on its own motion which it approved as a correct exposition of the law on this subject. While the verbiage of the instruction may differ somewhat, it is in meaning and substance such as have been approved by the former opinions of this court.

Jas. Breathitt and Tom. B. McGregor for appellant.

Appeal from Laurel Circuit Court.

Opinion of the court by Judge Settle, certifying the law.

The Commonwealth prosecutes this appeal to obtain a certification of the law as to certain alleged erroneous rulings of the circuit court, made upon the trial of appellee under an indictment charging him with the murder of James Sparks. The trial resulted in a verdict and judgment of acquittal.

Numerous errors were assigned in the motion and grounds for a new trial filed in the court below, but only one of them is discussed in the brief of counsel representing the Commonwealth in this court, and as to it he merely expresses a doubt, frankly admitting that in other respects the record seems substantially free from prejudicial error. We, therefore, deem it only necessary to consider this single complaint which is as to the refusal of the trial court to give instruction No. 3, asked by counsel for the Commonwealth. That instruction reads as follows:

"If you shall believe from the evidence that at the time the defendant, R. Boyd, Jr., so shot at and wounded James Sparks, as to cause or hasten his death within a year and a day thereafter, (if you shall believe from the evidence beyond a reasonable doubt that he did so) he believed and had reasonable grounds to believe that he was then and there in danger of immediate death, or the infliction of some great bodily harm, at the hands of the said James Sparks, and that it was necessary or was believed by the defendant, in the exercise of a reasonable judgment, to be necessary, to so shoot at and kill deceased in order to avert that danger, real, or to the defendant, apparent, then you ought to acquit the defendant, upon the grounds of self-defense or apparent necessity therefor."

This instruction properly expresses the law of self-defense, but the giving of it was unnecessary as the court on its own motion had previously given the following instruction on that aspect of the case:

"Although you may believe from the evidence beyond a reasonable doubt that the defendant, Robert Boyd, Jr., did, in Laurel county, Kentucky, and before the finding of the indictment against him, willfully shoot and wound James Sparks, so as to cause or hasten his death within a year and a day thereafter, yet if you further believe from the evidence that the defendant, in the exercise of a reasonable judgment, believed and had reasonable grounds to believe, from all the facts and circumstances proven in this case, that said James Sparks, just preceding the firing of the first shot by the defendant, was about to make an attack upon the defendant, and that by reason thereof, the defendant, in the exercise of a reasonable judgment, believed and had grounds to believe, that he was then and there in danger of suffering loss of life or great bodily harm at the hands of said James Sparks, and that it was necessary or believed by the defendant, in the exercise of a reasonable judgment, to be necessary to so shoot at and kill said James Sparks, in order to avert that danger, real, or to the defendant apparent, then you ought to acquit the defendant upon the grounds of self-defense or apparent necessity therefor."

This instruction, though in some respects differing in language from instruction No. 3, is substantially like it and equally correct. Indeed, in view of the peculiar nature of the facts and circumstances leading to and attending the homicide, we incline to the opinion that it was more appropriate than the one refused. The killing was but the culmination of a hostile attitude, maintained by deceased for a long time toward appellant, which seemed to have manifested itself in numerous insults, threats and demonstrations, which, in connection with the declaration and actions of deceased at the time of the killing, were reasonably calculated to induce appellee to believe, and have reasonable grounds to believe that he was then in

imminent danger of death or great bodily harm at the hands of the deceased.

The law of self-defense has, time and again, been stated in the opinions of this court, but without always employing the identical words. While the instruction given by the court may not precisely conform in verbiage to others that have received its approval, it is, in language and meaning, a correct exposition of the law of self-defense, as applied to the facts of this case.

It is therefore ordered that this opinion be certified to the lower court as the law of this case.

THOMAS v. HOBBS' EX'OR.

(Filed September 25, 1908—Not to be reported.)

Decedent's Estates—Claim Against for Nursing Deceased—Absence of Contract For—The record shows that the care of deceased by appellant was in the absence of an agreement and without expectation that she should be compensated, and the presumption is that it was rendered by one member of a family to another. The claim for services, was therefore, properly disallowed.

Geo. S. Fulton and John A. Fulton for appellant.

J. D. Wickliffe for appellee.

Appeal from Nelson Circuit Court.

Opinion of the court by Judge Hobson, affirming.

Margaret B. Hobbs died in Nelson county, about 86 years of age, leaving an estate worth about \$12,000 or \$15,000. She had no children and made a will by which she disposed of her estate. After her death Alice M. Thomas asserted a claim against her estate for nursing and taking care of her at \$200 a year for the five years preceding her death, amounting in all to \$1,000. The claim was controverted by the executor, and proof being taken, was disallowed by the circuit court. Mrs. Thomas appeals.

Some twenty-two years before Mrs. Hobbs' death, and soon after Mrs. Thomas was married, she and her husband went to live with Mrs. Hobbs in her home, the arrangement apparently being that Mrs. Thomas and her husband would board Mrs. Hobbs for the use of her home. They lived there in this way until Mr. Thomas died, about fifteen years later; and after his death, Mrs. Hobbs and Mrs. Thomas continued to live there together until Mrs. Hobbs' death about seven years afterward. During the life of Mr. Thomas, Mrs. Hobbs paid some of the family expenses, and after his death, the weight of the evidence shows, that she paid the greater part, if not all, of the family expenses. The family consisted of herself and Mrs. Thomas and an old family servant who did the cooking and lived in a cabin near the house, her daughter and her daughter's child being there with them more or less of the time. Mrs. Thomas was a dressmaker by trade, and followed her business of dress-making. Mrs. Hobbs was a fairly well preserved old lady for her age. Four or five years before her death she had a spell of grip from which she was quite sick for about two months. Three years after this she had another attack of sickness, but this did not last very long, and in her final sickness she was sick something like three weeks. Beside these attacks, she had minor attacks from time to

time. During all of these spells Mrs. Thomas waited upon her and took care of her with commendable faithfulness. But the proof utterly fails to show that there was any expectation on the part of Mrs. Hobbs to pay Mrs. Thomas for her services, or that the circumstances under which the services were rendered, were such as to warrant any expectation on the part of Mrs. Thomas that she would be paid. She can not testify as to anything that took place between her and Mrs. Hobbs, and no other witness testifies to any facts from which a promise to pay for these services can be inferred. The two ladies had lived together as one family for twenty-two years; and after Mr. Thomas' death, it is evident that Mrs. Thomas was in straightened circumstances. There is no more reason why Mrs. Thomas should be paid for the last five years' services than for the previous years. They lived together as one family during the last five years just as they had lived before. Mrs. Hobbs, as shown by the weight of the evidence, not only bore the expenses of the family and thus gave Mrs. Thomas a home, but she was a person who did not make debts. She paid for everything as she went and the proof leaves no doubt in our minds that if she had understood that Mrs. Thomas was asserting a claim against her for services, it would have been settled then and there, and the existing arrangement would have been broken up. The facts shown by the proof are sufficient to raise a presumption that the services sued for were rendered by one member of the family to another, without any expectation of a charge being made therefor, and no reason is shown why the claim for the services was not presented to Mrs. Hobbs in her lifetime; and manifestly the entire claim except for the services in the last sickness, could have been so presented.

Under all the evidence we conclude that the circuit court properly disallowed the claim.

Judgment affirmed.

COMMONWEALTH v. CONWAY.

(Filed September 25, 1908—Not to be reported.)

Liquors—Illegal Sale Of—Landlord and Tenant—Construction of Statute—While it may be within the province of the Legislature to do so, it has gone no further than to make punishable the renting of a tenement for its illegal sale of liquors where the owner knew at the time the use to which the property was to be put, and the Legislature has not yet said that the owner is to be responsible for the use to which his premises are put without his knowledge when leasing it, that it was to be so used.

The indictment in this case, as above indicated, was bad on demurrer.

John McChord for appellee.

Jas. Breathitt, Tom B. McGregor and R. L. Durham for appellant.

Appeal from Marion Circuit Court.

Opinion of the court by Chief Justice O'Rear, affirming.

Appellee, owner of a house which was situated in local option territory, was indicted for violating section 2557, Kentucky Statutes, penalizing one who "knowingly furnishes and rents a room to another in which spirituous liquors are sold in a territory where the local option law was in force, in violation of said local option law."

The indictment charges that appellant did "unlawfully" furnish and rent a room to one Putnam in a territory where the local option law was in force, and that appellant "knew said Putnam was selling spirituous liquors, to-wit: whisky, in said room so furnished and rented" in violation of the local option statutes. The indictment was held bad on demurrer, and the Commonwealth has appealed from the judgment dismissing it on that ground. It may be conceded that it is within the competency of the State to make the owner of real property liable for its use for illegal purposes by the tenant, but such is not the statute in this case. The Legislature has gone no further than to make punishable the renting of a tenement for its illegal sale of liquors in certain territory where the owner knew when he contracted that such was the use to which it was to be put. While the sentence in the statute does not express with grammatical accuracy the idea of the owner's liability if he lets his premises to be used for the illegal purpose, with knowledge at the time of the renting that such is its intended use, we gather such to be the legislative intent from the context of the whole section. A renting could scarcely be otherwise than knowingly done. It is a contract, in which the assent of the mind of each party to it is an essential. The adverb "knowingly" must be referable then to some other word or clause than renting or furnishing the room or house. The object of the Legislature was, we think, to reach that class of landlords who enter into the outlawed business by furnishing one of the necessary means for carrying it on, namely, the house or room in which it is to be conducted. The knowledge of the landlord that makes him criminally a party to the illegal transaction is not alone in renting the house. Nor could it well be in the fact after the renting (which might be otherwise perfectly legal) that the tenant put the premises to an illegal use. It is true that if property is rented for one use the tenant can not apply it to a wholly different use without forfeiting his lease; and in such case, if the landlord, after knowledge of the wrongful perversion by his tenant suffers the tenancy to continue, and the illegal traffic be continued in it by his tenant, the case might fall within the statute being considered. But there is no such allegation in this indictment. So, we conclude, that the purpose of the legislation in question was to illegalize the renting of the property for the unlawful traffic in liquors in local option territory, the landlord knowing when he leased it that such was to be its use.

Some States have legislated upon this subject more stringently than Kentucky has. They make leases voidable where, subsequent to their execution, the tenant puts them to use as places for the illegal sale of liquors. (*Machias Hotel Co. v. Fisher*, 56 Me., 321; *O'Connell v. McGrath*, 14 Allen, Mass., 289; *Zink v. Grant*, 25 Ohio Statutes, 352; *Feret v. Hill*, 15 C. B., 207; *Gaelet v. Lawor*, 16 Misc., N. Y., 59; *Prescott v. Kyle*, 103 Mass., 381.) And in those jurisdictions the courts hold that the landlord may be punished who rents or suffers his property to be so used. That is because, as seems likely, that the law gives the landlord a continued control over his premises as to such uses, in spite of his contract. But there is no such statute in this State; and at the common law such use by the tenant for illegal purposes does not avoid the lease, and consequently does not give the landlord the right to re-enter (*Miller v. Forman*, 37 N. J. L., 55.) If the appellant were a druggist, we may say, and if having rented the house in question for a drug store, yet the tenant unlawfully sold liquors therein, the main business for which he rented the property would not necessarily be abandoned, and the landlord, without some reservation in the contract of a right to declare the lease at an end, would have no control over the matter. The Legisla-

ture has not yet said that the owner is to be responsible for the use to which his premises are put, without his knowledge when leasing it that it was to be so used.

The offense denounced by section 2557, Kentucky Statutes, *supra*, is entirely different from those made by sections 2571 and 2572, Kentucky Statutes, the latter sections being aimed at the "person in possession" of premises in which liquors are illegally sold in local option territory, upon the idea that the one in possession of property has complete control over its use by himself and all others.

We think the indictment in this case did not state a public offense. The judgment is therefore affirmed.

SMITH v. COMMONWEALTH.

(Filed September 23, 1908—To be reported.)

1. Horse Stealing—Possession Under Pretense of Hiring—Felonious Intent—Conversion—Where one gets possession of another's horses under the fraudulent pretense of hiring them, but without intending to return them, and with the felonious intent of converting them to his own use, he is guilty of stealing, and in such case the removal of them from the owner's custody is a conversion without proof of a subsequent sale or other wrongful disposition of them.

2. Defense—Unsound Mind—Opinion Evidence—Non-expert Witnesses—The mere expression or an opinion by witnesses who are non-experts that the accused is of unsound mind, is of little weight, where no acts are given showing unsoundness of mind.

Irwin & Irwin for appellant.

Jas. Breathitt and Tom B. McGregor for appellee.

Appeal from Hardin Circuit Court.

Opinion of the court by Judge Settle, affirming.

By the verdict of a jury and judgment of the Hardin Circuit Court appellant, following the return of an indictment against him for horse stealing, was convicted of that crime and his punishment fixed at confinement in the penitentiary for a term of three years. He insists that the judgment of conviction should be reversed because: 1st. The verdict of the jury was contrary to law, and without support from the evidence. 2nd. That the court failed to properly instruct the jury and should have peremptorily instructed them to find him not guilty. 3rd. That he did not receive a fair trial owing to his unsoundness of mind and consequent inability to understand the nature of the crime charged against him, or to inform his counsel of the facts upon which his defense should have been predicated, and was without money to procure the attendance of witnesses or otherwise prepare for trial.

The salient facts furnished by the bill of evidence are, in substance, that appellant went to the livery stable of Harve Bland, at Glendale, Hardin county, and representing himself to be in the employ of the Cumberland Telephone Company, hired of Bland a pair of horses with which to drive to Munfordville, thirty miles distant, for the purpose, as he said of counting the poles supporting the wires of the telephone company between Glendale and Munfordville. Appellant agreed with Bland to pay for the use of the buggy and horses at the rate of \$3.00 per day and return them on the following

day. Upon these terms he received the buggy and horses and leaving Glendale in the morning, reached Munfordville late in the afternoon of the same day. On the way he stopped at the village of Bonnieville at noon, and there got a meal for himself, but did not have the horses fed. Some hours after appellant's departure from Glendale, Bland learned that he did not pay his hotel bill at Glendale or for the noon meal he took at Bonnieville, and also ascertained from the manager of the telephone company owning the line in operation between Glendale and Munfordville, that it belonged to the Home and not the Cumberland Telephone Company, and furthermore that the manager was unacquainted with the appellant and knew nothing of the alleged mission upon which he had gone to Munfordville. The foregoing facts excited the fears of Bland as to the safety of his buggy and horses, and led him to believe appellant an impostor, so he telephoned the sheriff of Hart county, at Munfordville, and directed him to arrest appellant upon his arrival there, which that officer did, at the same time taking in charge the buggy and horses. On the same day the property mentioned was delivered to Bland and appellant taken by rail to Elizabethtown and placed in jail, where he remained until indicted and tried.

It was admitted by appellant on the trial that he did not pay his hotel bill, at Glendale, or for the meal at Bonnieville, but affirmed that he expected to pay both and for the hire of the buggy and horses upon his return to Glendale, and also admitted by him that he had no money when he left Glendale, or upon reaching Munfordville. Indeed, the latter fact was established by the testimony of the sheriff of Hart county, who searched the person of appellant immediately following his arrest. Appellant further admitted that he did not count the telephone poles on the way to Munfordville, but claimed it was his purpose to do so in returning from that place to Glendale.

On appellant's trial it was proved by the Commonwealth that the telephone line, the poles of which appellant claimed to have been employed to count, belonged to the Home and not the Cumberland Telephone Company, and the manager or agent of the Home Telephone Company, residing in Hardin county, and its agent at Munfordville, testified that the former was charged with the duty of keeping the poles and wires of the Home Telephone Company between Elizabethtown and Munfordville, in repair, and neither knew appellant or of his alleged employment to count the telephone poles.

Although at the time of hiring the buggy and horses of Bland, appellant represented that he had been employed by the Cumberland Telephone Company to count the telephone poles between Glendale and Munfordville, he declared upon his trial that he had been employed to do that work by one West, of Louisville, an agent of the Home Telephone Company, under whom he claimed to have worked three months in Louisville before going to Glendale. He was, however, unable to state, upon cross-examination, the first name or initials of West or what position he held in the service of the Home Telephone Company. Appellant was also unable to give the location of West's place of business except to say that it was in the second story of a house somewhere on Chestnut street in the City of Louisville.

No effort was made by appellant, before trial, to procure the attendance of any witness of the name of West, nor was there until his trial began, any intimation from appellant that West had employed him to count the telephone poles between Glendale and Munfordville. The two telephone agents introduced by the Commonwealth did not know and had never heard of West or of his connection with the Home or Cumberland Telephone Companies.

The Commonwealth introduced a witness who met appellant in the public road about three quarters of a mile from Munfordville. According to the testimony of this witness, appellant asked him how far it was to Munfordville, whether there were any horse buyers in the town and their names and how far it was from Munfordville to Rowlett's station, from Rowlett's to Horse Cave and from the latter place to Cave City. The places named are all situated upon the Louisville and Nashville Railroad in the order named and that railroad is the one upon which appellant would travel in going from Munfordville to Tennessee, of which State he claimed to be a resident.

In view of the foregoing facts, we are unable to sustain appellant's contention that there was no evidence to support the verdict of the jury declaring him guilty of the crime charged. Obviously, there was not such an absence of evidence as would have authorized a peremptory instruction, and it was for the jury to determine whether the hiring of the horses by appellant was a pretense and for the fraudulent and felonious purpose of converting them to his own use, or a hiring in good faith with the intent to return them to the owner.

Section 1195, Kentucky Statutes, provides:

"If any person shall steal a horse, mare, jack, or jennet, he shall be confined in the penitentiary not less than two, nor more than ten years."

If appellant got possession of Bland's horses under the false and fraudulent pretense or hiring them, but without intention or returning them to the owner, and with the felonious intention of converting them to his own use and depriving the owner permanently of them, this constitutes horse stealing in the meaning of the statute. And if the possession of the horses was obtained by appellant as we have indicated the mere removal of them by appellant from the owner's custody amounted to a conversion of them to his (appellant's) own use, without proof of a subsequent sale or other wrongful disposition of them by him. On the other hand if appellant hired the horses in good faith with the intention of returning them and was prevented from doing so by the act of Bland, in having him arrested, he was not guilty of the crime charged.

The doctrine in question is thus stated in Robertson's Criminal Law, section 417:

"But if a person with the intent to steal, obtains the actual possession of property, though by delivery of the owner, or an agent authorized to transfer the ownership therein, and the latter intends to part with the possession only, and not the right of property, the taking in this manner in pursuance of the felonious intent will constitute larceny. Thus, where one with the felonious intent to convert to his own use, borrows or hires a horse or carriage or obtains the possession of any other chattel under pretense of a loan, or receives an article of clothing to be delivered to another or a sum of money with which to pay a bill for the other, he commits larceny. In such cases even proof of a subsequent sale or conversion is not necessary." (Robertson's Criminal Law, section 418; *Alexander v. Commonwealth*, 14 Ky. Law Rep., 290.)

Careful examination of the instructions given by the trial court convinces us that they substantially conform to the law as herein announced, and we have been unable to discover that any feature of the law applicable to the facts of the case was omitted from the instructions, consequently, the jury were not improperly instructed.

We do not think appellant should have been granted a new trial upon the ground that he is and was, upon the time of his conviction, of unsound mind. The several affidavits filed in support of this

ground are by no means convincing. None of the affiants knew appellant before his arrest, consequently they are unacquainted with his past life or family history. Without being experts or testifying as to acts showing unsoundness of mind, they merely express the opinion that such was and is his condition. Such testimony is of little weight. If, as stated in the affidavit of one of his counsel, appellant's condition of mind during the trial was such as to prevent his giving assistance to counsel in the preparation of his defense, that fact was known to counsel at the time of and during the trial, yet insanity or imbecility of mind was not relied on as a defense, nor was it then brought to the attention of the trial court, or a continuance asked in order to procure evidence to sustain such grounds of defense.

The testimony given by appellant upon the trial shows him to be a fairly intelligent person. Indeed, many of his statements proved him to be both plausible and resourceful in protecting himself.

We find nothing in the record to convince us that appellant did not have a fair trial.

The judgment is, therefore, affirmed.

MILLER v. COMMONWEALTH.

(Filed September 25, 1908—Not to be reported.)

1. Homicide—Evidence Tending to Show Guilt—This court has no right to reverse a criminal case where there is any evidence tending to show the guilt of the accused.

2. Immaterial Error—An error in an instruction which will not mislead the jury will not authorize a reversal.

J. B. Wickliffe and H. J. Moorman for appellant.

Jas. Breathitt and Tom B. McGregor for appellee.

Appeal from Ballard Circuit Court.

Opinion of the court by Judge Nunn, affirming.

Appellant, Ben Walden, and Bud Miller were indicted in the Ballard Circuit Court for the murder of one Frank Price, by shooting him with a pistol and striking him with a pistol or other deadly weapon—one of them doing the shooting and the other striking him, but which one did the shooting and which one did the striking was unknown to the grand jury, the others then and there being present, aiding and abetting in the shooting and striking. Appellant was given a separate trial, which resulted in his conviction for manslaughter and his punishment fixed at two years in the penitentiary. A reversal is asked for two reasons. First. There was not any evidence presented upon the trial to sustain the charge. Second. The court erred in instruction number two. The first question raised necessitates a recital of the facts of the case. The killing occurred at a picnic and dance at the home of one Kemper, who was a merchant and farmer. His store and dwelling were under the same roof, the store in front facing the river. The dancing pavilion was back of the building, about seventy feet, an eating stand a short distance from it and a cold drink stand, where soft drinks were sold, about twenty feet from it and a little further from the pavilion than the eating stand. Price was killed when about between these two stands, between the hours of ten and eleven o'clock at night. The person who killed him shot about five times, and about the time he

fell he was struck over the head with a stick or some other hard substance. There were two persons making the assault—one did the shooting and the other used the stick. The Commonwealth's theory is that appellant aided and abetted the shooting and struck deceased as he fell. Some minutes before the killing of Price, one Sam Miller, a brother of appellant, was severely cut with a knife while in the dancing pavilion, and was carried and placed upon the porch of DeKemper. It appears that it was not known who cut Sam Miller. Several persons were in attendance caring for Sam Miller when the shooting of Price occurred. Several witnesses testified that Ben Walden did the shooting, but did not know the person that struck Price, but stated that he was not George Miller. George Miller testified that he was with his brother, Sam Miller, at the time Price was killed, and there was some evidence tending to corroborate him in this. The Commonwealth used Ben Walden as a witness. He testified that he did not do the shooting; that Bud Miller fired the shots and George struck Price. The testimony shows that Bud and George Miller were the only relatives of Sam at the picnic, and that Ben Walden was a hired hand on the farm where or near where they lived; that Walden was a dangerous character and had served a term in the penitentiary for kukluxing. The Commonwealth's theory is that the defendants killed Price under the belief that he was the person who stabbed Sam Miller. There was evidence that George Miller made some threats to the effect that he would avenge the injury to his brother. There was also proof that some boy in the crowd cried out, "there he goes now," and one of the two men following Price said to the other, "pull the trigger and keep pulling it as long as there is a load in the gun and I will do the rest." DeKemper testified that he was standing near the pop stand and saw a man in his shirt sleeves and two men following close behind him, coming from the lot at the back of the house; that they continued in this position until they had passed across the line between the two stands and the shooting began. He stated that the man in front was Price, but he did not recognize the two men following him as they passed down to the place of the shooting; but as they passed back by him he thought he recognized one of the men as appellant. Several witnesses testified that a few minutes before the shooting, Ben Walden and appellant left the porch where Sam Miller was, and their dress suited the description of the two men following Price. Ben Walden testified that one George Spears said to appellant, "don't hit the poor fellow again: he is killed now," and appellant answered, with an oath, "if you say any more, I will blow your brains out." Some two or three hours after Price was killed several persons were near the dead body, and, at least, two witnesses testified that Bill Spears stated, "this poor fellow was innocent and had nothing to do with it and got killed," and appellant, in reply, said, "well, he had no business bullying." Appellant testified in chief, and in answer to questions put by his counsel upon these two matters, as follows:

"Q. Did you say anything to Bill Spears immediately after the shooting about shooting him?"

"A. No, Sir."

"Q. Or that you would shoot him?"

"A. No, sir, I never made any such threats at all."

"Q. Did Bill Spears come to you directly after the man was shot and say don't hit him any more?"

"A. He was saying something there, but he was so drunk—"

"Q. I mean immediately after the shooting there?"

"A. No, s'r, he didn't come up then."

"Q. Now, then, down at the place where the corpse was some considerable time afterwards, did Bill Spears say 'This poor fellow was

innocent and had nothing to do with it, and got killed,' and in reply to that did you say 'Well, he had no business bullying?' "

"A. If I said it I don't remember it."

"Q. Who was with you when you was down there?"

"A. My daddy and DeKemper and several going and coming all the time."

Without detailing the evidence, it is sufficient to say that it is reasonably certain that Bud Miller was not present at the time Price was killed; and it is reasonably certain that Ben Walden shot Price, and that someone, other than Walden, struck Price, about the time he fell. The question is: Was there any evidence produced upon the trial tending to show that George Miller was present at the time of the killing; that he struck Price and aided and abetted in the killing? Walden, his accomplice, testified that appellant was present and did the striking. As the jury was not authorized to convict appellant upon the testimony of Ben Walden, unless corroborated by other evidence tending to connect the defendant with the homicide, then the further question is: Was there any evidence tending to corroborate the statements of Walden? In our opinion there was. The fact that his brother had been, a few minutes before, severely wounded, and that he had made threats to avenge his brother's injuries, and the further fact that Price was pointed out to two persons following him as the assailant of his brother, and the opinion of DeKemper that appellant was one of the persons following Price immediately before the shooting, and lastly, the manner in which he answered the question with reference to his threats to shoot Spears when requested to not hit Price any more; and his reply to Spears when he said that Price was innocent of any wrong and ought not to have been killed, to-wit: in effect excusing the killing by saying that Price ought not to have been "bullying around." These facts and circumstances tend to corroborate the statements of Walden, and, under the Code and the repeated decisions of this court construing it, this court has no right to reverse a criminal case when there is any evidence tending to show the guilt of the accused.

The only other ground presented for reversal is error in instruction number two, which is as follows:

"The court instructs the jury that if they believe from the evidence, beyond a reasonable doubt, that in Ballard county, and before the finding of the indictment herein, that Ben Walden, George Miller, and Bud Miller, did willfully, feloniously, unlawfully and not with previous malice, in sudden heat and passion, or in sudden affray, kill and slay Frank Price, by the one or the other, the said Ben Walden or George Miller or Bud Miller shooting the said Frank Price with a deadly weapon, to-wit: a pistol loaded with powder, leaden balls or some other hard substance, or striking and wounding the said Frank Price with a pistol, a deadly weapon, so that the said Frank Price did then and there die therefrom within a few minutes thereafter, the others or the other one, being then and there present, aiding and abetting the same, then you will find defendant, George Miller, guilty of voluntary manslaughter, and will fix his punishment at confinement in the State penitentiary at not less than two nor more than twenty-one years, within the sound discretion of the jury."

Counsel's criticism of the instruction is correct. It authorized the jury, considering it technically, to convict appellant even if he was not present, if Ben Walden and Bud Miller assaulted and killed Price. But, considering all the instructions together and the facts proven in the case, the jury could not have been misled by this error. There was not the slightest testimony by any witness in the case, except Walden, that Bud Miller had anything to do with the

assaulting and killing of Price. So, the words "the others or the other one, being then and there present, aiding and abetting the same," could not have been understood by the jury as referring to Bud Miller. Therefore, it left the jury to consider the instruction with reference to only George Miller and the other person who did the shooting. In addition to this the court, by instruction number five, told the jury that they could not convict appellant, unless there was evidence tending to connect him with the commission of the homicide charged in the indictment. So the jury could not have understood instruction number two as authorizing them to convict appellant, although he was not present and aiding and abetting in the killing.

For these reasons the judgment of the lower court is affirmed.

REAVES, &c. v. BAKER, &c.

(Filed September 29, 1908—Not to be reported.)

Land—Ownership—Trial by Court—Weight Given to Judgment—On considering an appeal from a judgment in a case involving the ownership of land, tried before the circuit judge, weight must be given to his acquaintance with the parties to the action and the witnesses, and no sufficient reason being shown, his judgment should not be disturbed.

J. B. Wickliffe for appellants.

Reeves & Sharp for appellees.

Appeal from Ballard Circuit Court.

Opinion of the court by Judge Settle, affirming.

This action was brought by the appellants in the court below to recover of appellees a 160-acre tract of land, lying in Ballard county, and by this appeal they seek the reversal of the judgment rendered in that court which dismissed the action at their cost.

J. F. Grice, one of the appellees, died after the rendition of the judgment, and thereafter proper orders were entered reviving the action against his heirs at law.

It appears from the answer of appellees that they claim the land in question, each being in possession of a part thereof, and asserting title respectively under deeds from W. T. Reaves, to whom it was conveyed by the master commissioner of the Ballard Circuit Court, in an action brought by C. C. Reaves as administrator with the will annexed of Patience Fondville deceased, former owner of the land, to obtain a decree for its sale to pay certain debts of the latter, there being, as alleged, no personal estate left by her with which to pay them. The decree was granted as prayed and the land sold at public outcry by the commissioner to C. C. Reaves, as the highest and best bidder. C. C. Reaves later assigned his bid to W. T. Reaves who paid for the land, and, upon confirmation of the sale, it was by order of the court conveyed him by commissioner's deed as stated.

On the other hand appellants, who are the children and only heirs at law of Margaret Reaves deceased, wife of C. C. Reaves, claim the land under an alleged deed which they contend was made by their grandmother, Patience Fondville, whereby it was conveyed to their mother, Margaret Reaves, for life, with remainder to appellants.

Appellants admit that the alleged deed thus made by their grandmother to their mother, Margaret Reaves, and her children has been lost or destroyed, but contend that it was duly acknowledged and recorded in the office of the clerk of the Ballard County Court and that the courthouse and records of the county clerk's office, including the deed in question, were destroyed by fire in 1880.

It appears from the depositions of some of the appellants and two of their witnesses, that Patience Fondville was twice married; her first husband was John Stovall, who was a widower and the father of several children at the time of her marriage to him; that her daughter, Margaret, was born of this marriage and upon growing up became the wife of C. C. Reaves, and the mother of appellants; that Patience Fondville, who seemed to have purchased the land in controversy from one Jenkins, after the death of her first husband, Stovall, was, by two of appellants' witnesses, heard to say that as John Stovall had not willed land to his daughter, Margaret Reaves, as he had to his other children, she (Patience Fondville), intended to buy the Jenkins land and deed it to her. These two witnesses and some of the appellants testified that this intention was carried into effect. The two witnesses referred to testified that they saw in Mrs. Fondville's possession, and one of them heard read, a deed from Mrs. Fondville to Margaret, but neither these witnesses nor such of the appellants as claimed to have seen the alleged deed are distinct in the recollection as to its form or phraseology. None of them had any personal knowledge of its having been recorded, or had seen a record of it in the county clerk's office. Some of the appellants claimed to have seen the original deed in the possession of their mother, Margaret Reaves, after the death of Mrs. Fondville and some years before her own death, but were unable to say what disposition was made of it, or to account for its loss. Although Patience Fondville and her first husband, John Stovall, each left a will, neither instrument appears to have been copied into the record, nor do we find in the record any testimony as to the contents of either will. The only proof as to John Stovall having excluded his daughter from sharing in the landed estate is furnished by the incompetent testimony of one or two witnesses that Mrs. Fondville had said so. Such testimony being hearsay, can not be accepted to prove the contents of the will.

Some of the papers of the action brought by the administrator, with the will annexed, of Patience Fondville, for the sale of the 160 acres of land, constitute a part of the record before us. The record of that suit shows that Mrs. Fondville left a will, but is utterly silent as to its provisions. Whether it attempted to dispose of the land in controversy we can not discover. In the action to obtain a sale of the land, Margaret Reaves, the appellant, Sidney Reaves, her eldest child, then an infant, were made defendants. According to appellees' testimony Sidney was the only child she then had; the other appellants having been born later; but from the record in that action we might, however, infer that the will devised the land to Margaret for life, with remainder to the child Sidney, and if this were the case, or the other children were then unborn, the infant Sidney Reaves was a necessary party, as well as the mother, and having been properly represented by a guardian ad litem of the court's selection, whose answer in the infants' behalf and exceptions filed to the report of sale, proved his efficiency, it is not to be presumed, in the absence of a showing to the contrary, that the judgment was erroneous. Whatever may have been the interest of the mother and child in the land under the will of Mrs. Fondville, the devise could not take effect so as to deprive the creditors of the testator of the right to subject the land to the payment of their debts, as there were no personal assets to apply to their liquidation.

The evidence furnished by the depositions taken in behalf of appellees presents many facts and circumstances strongly tending to overthrow appellants' claim as to the execution and delivery of the alleged deed upon which they rely. For example, it is difficult for a reflecting mind to understand why appellants, or some of them, upon first setting up claim to the land in controversy, which was before suit was brought, did so upon the ground that they were entitled to it under the will of Patience Fondville instead of under the alleged deed. 2. It is incredible that their father, C. C. Reaves, administrator, with the will annexed, of Patience Fondville, and plaintiff in the action brought to obtain a sale of the land, should have ignored the existence of a deed, conveying his wife a life estate and his children a vested remainder therein, the production and setting up of which by her would have prevented the sale. It is not less incredible that Margaret Reaves, mother of appellants, and a defendant duly summoned in that action, with knowledge of the existence of the alleged deed from her mother to herself and children, and then having it in her possession should have failed to make defense by setting up her deed and claiming the land under it; and equally strange that from 1877, the year of the institution of the action, down to the date of her death in 1898, she was never heard to complain of the loss of the land or intimate that she had, or there had ever existed, a deed conveying it to her or her children. These facts and circumstances, together with the apparent regularity of the proceedings in the former action to obtain the sale of the land, doubtless had great weight with the circuit judge and caused him to discredit appellants' contention as to the execution and delivery of the deed. Moreover, we must give weight to his acquaintance with the parties to the action and the witnesses introduced by them; this we have done, and upon the whole case can find no sufficient reason for disturbing the judgment, which is, therefore, affirmed.

WILLIAMS v. MURPHY.

(Filed September 29, 1908—Not to be reported.)

This is a controversy as to a boundary line between the parties and is affirmed on the evidence.

C. B. Wheeler for appellant.

Vaughn, Howes & Howes for appellee.

Appeal from Johnson Circuit Court.

Opinion of the court by Judge Nunn, affirming.

One E. S. Turner, prior to the year 1871, owned a tract of land in Leslie county, on Toms Creek, including the land on both sides of "Bear Tree Branch," which flows into Toms Creek. During the year 1871, he conveyed to his sister, Mrs. Stambough, the land on the east side of Bear Tree Branch for the consideration of something over \$1,200; she conveyed it to her sons, they conveyed it to one Daniels and Daniels conveyed it to appellee. Sometime after the year 1871, E. S. Turner conveyed the balance of the survey, which is on the west side of "Bear Tree Branch," to one Smith Powers; he conveyed it to one Stafford, and Stafford conveyed it to appellant.

The issue between the parties to this action is as to the division line between their tracts of land. Appellant concedes that, as E.

S. Turner conveyed to appellee's vendor first, he can not go beyond the true line of appellee. The cause of the dispute is that Bear Tree Branch does not extend the full length of the division line. Their deeds call for top of the ridge and Bear Tree Branch falls short of that point two or three hundred yards. Appellee contends that the true line from the head of Bear Tree Branch is a straight line from a beech and maple at that point to the top of the ridge to what is known as "High Knob." Appellant claims that the true line of appellee is further east of the point named, which would include on his side of the line the timber trees which he cut, and for which alleged trespass this action was instituted. Each party had surveys made under their directions and without any particular reference to their title papers, and for this reason the reports of the surveyor and the plats filed by him are of but little aid in arriving at the true line between the parties. Appellee proved by several witnesses that the line claimed by him began at a point on "High Knob," thence a straight line to the head of Bear Tree Branch; thence down Bear Tree Branch to the point where it flows into Toms Creek, and was established thirty or more years ago; also that Smith Powers and Stafford, through whom appellee's title came, had repeatedly stated that they bought to this line and only claimed to it while they owned the land. Appellee also proved by one or two witnesses that appellant, up to within a short time before he cut the timber referred to, only claimed to this line. Therefore, we are of the opinion that the lower court did not err in adjudging this to be the true line between the parties.

For these reasons the judgment of the lower court is affirmed.

MITCHELL v. ODEWALT'S EX'OR.

(Filed September 29, 1908—Not to be reported.)

1. Judicial Sales—Exceptions—Affidavit of Widow—Consideration—In setting aside a report of sale of land regularly, exceptions should have been filed to the report, but where the affidavit of the widow of the deceased owner was filed it may be treated as her exception to the sale, and the court having so treated it there was no substantial error in the proceedings in this regard.

2. Same—Advance Bids—Consideration by Chancellor—Protecting Rights in Homestead—The chancellor will not in every case accept an advance bid and set aside a sale, but he will do so upon slight circumstances when equity demands it. He will carefully protect the rights of the widow and fatherless, and when a homestead is involved or the home of infants will be taken from them, the rule ordinarily obtaining as to setting aside judicial sales for inadequacy of price does not apply.

Noble & Graham for appellant.

J. A. Skaggs and Skaggs & Mills for appellee.

Appeal from Green Circuit Court.

Opinion of the court by Judge Hobson, affirming.

Jacob Odewalt died a resident of Green county, leaving a will by which he devised his whole estate to his wife, subject to the payment of his debts, and \$1 to each of his children. The widow qualified as executrix, the personal estate proved of little value, the insur-

ance on his life was uncollectible, and the real estate was practically all that was available for the payment of his debts. This consisted of three acres of land on which he resided with his family. It was encumbered with lien debts amounting to about \$1,200, and there were about \$300 of unsecured debts. One of the creditors brought a suit to settle the estate, the debts were proved up, and an order was entered for the sale of the land. The sale was had; R. D. Mitchell became the purchaser for the sum of \$1,460. The sale was reported to the court. The widow, before it was confirmed, moved the court to set aside the sale, and offered to pay into court \$1,600, the amount necessary to pay all the debts and cost. Affidavits were filed on the motion; and it appearing that the widow had paid all the debts and the cost of the action, the court refused to confirm the sale and entered an order setting it aside. From this judgment Mitchell appeals.

Regularly exceptions should have been filed to the report of sale, but the affidavit of the widow which was filed may be treated as her exception to the sale; and the court having so treated it, there was no substantial error in the proceedings in this regard.

The purpose of the proceeding was to secure the payment of the debts of the decedent; and the law requires this to be done by a proceeding in equity that the rights of his widow and heirs at law may be protected as far as possible. The chancellor's aim in all such cases is to secure the creditors without sacrifice of the rights of heirs and devisees, if this can be done. If the sale had been confirmed, a large part of the unsecured creditors would have lost their debts, and the widow and children would have lost their home. The unsecured creditors could not well buy at the sale because their debts were not large enough to justify them in so doing. The widow could not buy because she had not yet gotten her pension. The chancellor will not in every case accept an advanced bid and set aside a sale, but he will do so upon slight circumstances when equity demands it. In view of the fact that by setting aside the sale, he secured the debts of all the creditors and the costs of the action, and saved the home for the widow and children; and in view of her condition, the price the land brought, its value, and the situation of the creditors, he properly refused to confirm the sale, and set it aside. The chancellor will carefully protect the rights of the widow and the fatherless; and where a homestead is involved or the home of infants will be taken from them, the rule ordinarily obtaining as to setting aside judicial sales for inadequacy of price does not apply.

Judgment affirmed.

HOWERTON V. COMMONWEALTH.

(Filed September 29, 1908—Not to be reported.)

1. Criminal Law—Indictment—Statutory Offense—Allegation of Felonious Intent—An indictment for a crime that is felonious under the common law must charge its commission with a "felonious intent," but where the crime is purely statutory and is defined by the statute, the indictment is sufficient if it follows the language of the statute without the use of the term "feloniously" or the words "felonious intent."

2. Continuance—Absence of One Attorney—Other Competent Attorneys Present—It is not error in the court to refuse a continuance of one accused of a felony by reason of the absence of one of

his attorneys, where he had two other skillful attorneys present conducting his defense.

3. Misconduct of Attorney for Commonwealth—Affidavit for Continuance—Charged to be Untrue—Reversible Error—Where, on the trial of one indicted for a felony, it was a reversible error for the trial court to permit the attorney for the Commonwealth to say to the jury that the affidavit of the absent witness for the defendant that had been filed for a continuance and admitted to be read as his deposition, "was untrue and that the Commonwealth was forced to admit it to get a trial."

4. Knowing Female Under Sixteen—Evidence of Age—Competency—On the trial of accused, for criminally knowing a female under sixteen years of age, it was error in the court to exclude evidence offered by the accused, that the monthly sickness of the prosecuting witness had regularly occurred for a period of five years preceding his alleged abuse of her, such evidence being competent to show that she was over sixteen years of age at that time.

J. H. & John A. Moore and R. L. Moore for appellant.

Jas. Breathitt, John L. Grayot and Tom B. McGregor for appellee.

Appeal from Crittenden Circuit Court.

Opinion of the court by Judge Settle, reversing.

Appellant was tried in the court below under an indictment charging him with the crime of carnally knowing a female under the age of sixteen years. The jury, by verdict returned, found him guilty and fixed his punishment at confinement in the penitentiary ten years; judgment was thereupon entered in accordance with the verdict and from that judgment this appeal is prosecuted.

Numerous grounds were filed by appellant in the court below in support of his motion for a new trial.

The evidence introduced by the Commonwealth conduced to prove appellant's guilt of the crime charged. It was to the effect that he repeatedly, and for a period of several months, had carnal knowledge of the prosecutrix, an orphan fifteen years of age, who had been received by his parents from a Louisville asylum to rear and support, and that the girl was made to yield to his lust through fear superinduced by force, and threats, on his part, to take her life if she told of his misconduct. This testimony came from the prosecutrix alone, who was contradicted by much of the evidence introduced in appellant's behalf, which tended to show that the charge against him was devised by her as a means of enabling her to leave the home of his parents, of which she had apparently tired. It is not our province to pass upon the evidence, in view of our conclusion that appellant should have another trial, we refrain from any expression of opinion as to whether or not it was sufficient to authorize his conviction; deeming it only necessary to say that it justified the submission of the case to the jury.

It is insisted for appellants that his demurrer to the indictment should have been sustained because of its failure to allege that the crime charged was committed feloniously or with a felonious intent. The objection is without merit. The crime charged is purely statutory, and being defined by the statute, and the language of the statute followed by the indictment, an allegation of felonious intent was not essential.

In respect to crimes that are felonious under the common law, the indictment to be sufficient, must charge their commission felon-

iously or with a felonious intent, but the rule is different where the crime is purely statutory and is defined by the statute itself. In such case the indictment is sufficient if it follows the language of the statute, without the use of the term "feloniously," or the words "felonious intent." (Higgins v. Commonwealth, 14 Ky. Law Rep., 729; Commonwealth v. Lemon, 18 Ky. Law Rep., 480; Roberson's Criminal Law, section 392.)

We can not agree with appellant that it was error for the lower court to refuse him a continuance on account of the illness and absence of one of his counsel. It was not made to appear by his affidavit that the two attorneys who were present and conducted his defense were not equal to the task. Upon the contrary, the skill and fidelity with which they managed the case throughout the trial, demonstrated their ability, and that appellant was not prejudiced by the absence of the third attorney.

We concur, however, in appellant's contention that the court should not have permitted the following language from the Commonwealth's attorney, viz: "That the affidavit as to Clyde Nations, and what he would swear, if present, were untrue; and that he did not believe they were true, but that they (meaning the Commonwealth) were forced to admit the affidavit to get a trial of this case; that they did not want it worn out by continuances, and that they had to admit the affidavit to get a trial, but did not believe Nations would swear it if he were here."

The affidavit in question had been admitted by the Commonwealth's attorney to be read as the deposition of Nations. He had the right to contradict it by other testimony, and thereby show its falsity; but having admitted that Nations would make the statements attributed to him by the affidavit, if present, he had no right to argue that the witness would not make the statement if present.

Such declarations by the Commonwealth's attorney have repeatedly been declared by this court highly improper and prejudicial to the defendant, and because of such conduct reversals have frequently been adjudged. (Martin v. Commonwealth, 89 S. W., 226; 28 Ky. Law Rep., 295; Darrell v. Commonwealth, 88 S. W., 1060; 28 Ky. Law Rep., 27; Redmon v. Commonwealth, 51 S. W., 565; 21 Ky. Law Rep., 331; Johnson v. Commonwealth, 61 S. W., 1005; 22 Ky. Law Rep., 1885; Shepherd v. Commonwealth, 85 S. W., 191; 27 Ky. Law Rep., 376.)

Other declarations of a highly inflammatory and abusive character were made by both the Commonwealth and county attorney in argument to the jury, to which appellant, at the time, also excepted. And while we would not reverse the judgment for the latter alone, we can not refrain from saying that the declarations were improper and should not have been indulged in by counsel or allowed by the court. We do not mean to say that due allowance should not be made for the indignation counsel for the Commonwealth would naturally feel in conducting a prosecution for a crime as dastardly as that here charged; but they should not forget that it is not a part of their duty to inflict abuse upon a prisoner at the bar in the hearing of the jury, but to see that justice is fairly meted out, and the defendant fairly dealt with in calling him to account for his crime.

We also think it was error for the court to exclude, as incompetent, the testimony offered by appellant, tending to show that the monthly sickness of the prosecutrix had regularly occurred and existed for a period of five years preceding his alleged abuse of her. We think it was competent on the question of her age, for if it continued more than five years before the commission of the crime, it would tend to show that she was over sixteen years of age at that time. While

by no means convincing, it would, in view of the conflicting evidence as to her age, have been a circumstance to the benefit of which appellant was entitled, as it was important for him to show that at the time of his having carnal knowledge of her, if the jury believed he did so, the prosecutrix was over sixteen years of age and, therefore, of sufficient age to consent.

Other alleged errors are complained of in the briefs of counsel, but as they seem to have been inadvertently committed, were not very material and will likely not occur on the next trial, we deem it unnecessary to consider them.

But for the two errors indicated, we feel it our duty to reverse the judgment appealed from. It is, therefore, reversed and remanded, with directions to the lower court, to grant appellant a new trial, and for further proceedings consistent with this opinion.

Whole court, except Judge Nunn, sitting.

COLUMBIA BUILDING, LOAN AND SAVINGS ASSOCIATION'S
ASS'EE V. GREGORY.

(Filed September 29, 1908—To be reported.)

1. Sureties—Married Women—Judgment Against—Failure to Issue Execution for Seven Years—Release of Surety—Under Kentucky Statutes, section 2548, providing that "a surety shall be discharged from all liability under any judgment or decree after the lapse of seven years without any execution issued thereon and prosecuted in good faith," the statute applies to all sureties, and where a married woman, who might have pleaded her coverture, suffered judgment to go against her, the fact that she did not make this plea, does not deprive her of the rights which any other surety would have if execution is not issued within seven years.

2. Courts—Inherent Power Over Its Process—Enforcement—The court has inherent power over its own process, and may quash it where it is issued after the time has elapsed within which it may be lawfully issued or when for any reason it may not be enforced.

3. Same—Validity of Process—Determined on Motion—Whether property levied upon is subject to the execution must be determined by action; but questions which simply go to the validity of the process may be determined summarily on motion.

S. Oppenheimer and A. B. Bessinger for appellant.

Gregory & McHenry for appellee.

Appeal from Jefferson Circuit Court, Chancery Branch, First Division.

Opinion of the court by Judge Hobson, affirming.

A judgment was rendered on February 19, 1898, in the Jefferson Circuit Court in favor of the Columbia Building, Loan and Savings Association against C. R. Gregory and E. B. Gregory. No execution was issued on the judgment until July 12, 1907. An execution having been issued, E. B. Gregory entered a motion in the court to quash the execution upon the ground that she was only a surety in the debt for which the judgment was rendered, and that no execution had issued upon the judgment within seven years. The court sustained the motion and the association's assignee appeals. Section

2548, Kentucky Statutes, is as follows: "A surety shall be discharged from all liability under any judgment or decree, after the lapse of seven years without any execution issued thereon, and prosecuted in good faith for the collection thereof."

The record clearly shows that E. B. Gregory received no part of the consideration and was only the surety of her husband on the note for which the judgment was rendered. It is true that she might have pleaded her coverture, and defeated a judgment on the note, but the fact that she did not make this plea does not deprive her of the rights which any other surety would have if execution is not issued within seven years. The statute applies to all sureties, and it is not material that the record does not show that the defendant is only a surety in the debt. It is the fact of suretyship that controls in the case of a judgment, just as the fact of suretyship controls in a suit on a note; although the note does not show that the person is surety. (Day v. Billingsby, 3 Bush, 157.-

The court has inherent power over its own process and may quash it where it is issued after the time has elapsed within which it may be lawfully issued, or after the judgment is satisfied, or when, for any other reason, it may not be enforced. (Wooley v. Louisville, 118 Ky., 897; 1 Freeman on Judgment, section 77; Garvin v. Neal, 13 B. Mon., 256.)

The proper remedy, where process has been improperly issued, is by motion to quash it. An audita querela was the ancient remedy, but the practice now is to grant summary relief upon motion in cases of this sort.

The case of Hauns v. Central Kentucky Asylum, 103 Ky., 582, involved the question whether the property levied upon was subject to levy and sale. It did not involve the validity of the process. Whether the property levied upon is subject to the execution must be determined by action; but questions which simply go to the validity of the process may be determined summarily on motion. The process here having been issued after the time allowed by law for that purpose, was properly quashed. (17 Cyc., 1154-56; Noe v. Conyers, 6 J. J. M., 574.)

Judgment affirmed.

HAMILTON v. COMMONWEALTH.

(Filed September 30, 1908—Not to be reported.)

1. Criminal Law—Malicious Cutting—Intent—How Gathered—On the trial of one for cutting and wounding another with intent to kill him, the intent is to be gathered not alone from the defendant's declaration, but from the nature and extent of the wounds, the manner of their infliction, the acts and conduct of the accused and all the circumstances of the case.

2. Same—Facts Shown by Evidence—The facts in the case do not furnish any evidence that appellant intended to kill the party, but show he did not so intend. If guilty at all he is guilty of a malicious prank constituting the offense of assault and battery.

Campbell & Campbell for appellant.

Jas. Breathitt and Tom B. McGregor for appellee.

Appeal from McCracken Circuit Court.

Opinion of the court by Wm. Rogers Clay, reversing.

The appellant, William Hamilton, and Will Alexander, alias Coots Eggleston, were jointly indicted for the offense of malicious cutting and wounding with intent to kill, Hamilton being charged as principal and Eggleston as accessory. Appellant was tried and convicted, and his punishment fixed at five years in the penitentiary. A new trial was refused, and he appeals.

One of the principal grounds urged for reversal is that there was no evidence of an intent to kill. For the purpose of discussing this objection it will be necessary to give a brief review of the evidence.

According to the testimony for the Commonwealth, appellant and Coots Eggleston, both negroes, met the prosecuting witness, Mat McKinney, another negro, near Roy Nelson's saloon on Third street, in the city of Paducah, at about 1 o'clock p. m. They were all drinking at the time, and appellant was trying to induce McKinney, the man whom he afterwards cut, to give him a dollar. After remaining at the saloon a while, they left and went up Third street, appellant still insisting that McKinney give him a dollar. After proceeding some distance they separated, McKinney continuing up Third street until he came to the old iron furnace, and then passing along the railroad track until he came to the grounds of the Lack Singletree Company, which he entered for the purpose of seeing a man by the name of Hickory Jones. Not finding Jones there, McKinney came out of the alley leading from the Lack Singletree Company's grounds into Third street, near where it crosses the railroad track. There he met appellant and Eggleston at a point in the alley near a pile of lumber about sixty feet from Third street. Appellant proceeded to curse McKinney and demand of him a dollar. McKinney refused to give appellant the money. Appellant and Eggleston then pulled down McKinney's pants and placed him on the pile of lumber, after which they cut a slit in McKinney's scrotum. This cut was large enough for one of the testicles to go through, but was not such as would of itself result in death. After thus wounding McKinney appellant and Eggleston left him.

The above facts are testified to by McKinney and Eggleston on cross-examination.

According to the testimony for the defendants, Hamilton was not present when the cutting was done. When he heard he was charged with the offense he immediately went to McKinney and inquired what he meant by saying that he had cut him. Several witnesses testified that McKinney was crazy. Whether this be true or not, it is certain that he is a sexual pervert.

The court instructed the jury both as to malicious cutting and wounding with intent to kill, and assault and battery. The jury concluded that appellant intended to kill McKinney. Was there any evidence authorizing this conclusion?

The intent in a case of this kind is to be gathered not alone from the defendant's declarations, but from the nature and extent of the wounds, the manner of their infliction, the acts and conduct of the defendant and all the circumstances of the case. It can not be doubted that, if appellant and Eggleston had intended to kill McKinney, they could have easily done so. He was completely at their mercy. The cutting was done with great deliberation. There was nothing to prevent appellant from plunging his knife into McKinney at any other point in his body, or from making the wound where McKinney was cut so severe that death would have probably ensued. Of course, there may be numerous instances where the use of a knife resulting in a slight cut will authorize a conviction for malicious cutting and wounding with intent to kill. If a defendant strike at another and wound him but slightly, the jury may conclude that the defendant intended to kill. Even in this case, if the appel-

lant, instead of deliberately laying McKinney on his back and cutting him, had struck at him and produced the same wound, the jury might have concluded, from the manner of the infliction of the wound, that appellant intended to kill McKinney. The facts as developed by the record, however, do not furnish any evidence in support of the charge that appellant intended to kill McKinney; instead, they strengthen the view that he did not so intend. If guilty at all, he is guilty only of a malicious prank constituting the offense of assault and battery.

For the reasons given the judgment is reversed and cause remanded, with direction for a new trial consistent with this opinion. Judge Carroll dissents.

HAMILTON v. COMMONWEALTH.

(Filed September 30, 1908—Not to be reported.)

Campbell & Campbell for appellant.

Jas. Breathitt and Tom B. McGregor for appellee.

Appeal from McCracken Circuit Court.

Judge Carroll delivered the following dissenting opinion:

The court holds, as a matter of law, that the accused did not intend, by the cruel and dangerous wound inflicted on McKinney, to kill him, ruling that the question of his intent to kill should be taken from the jury, and that he could only be punished for a mere assault and battery.

Under the facts stated in the opinion I can not agree to this conclusion. In my opinion, whether the accused intended or not to kill McKinney was a question for the jury to determine under appropriate instructions. The mind or heart of the accused in cases of this character, or indeed in any case, can not be looked into to ascertain his intention in doing a particular act. Whether his intention was innocent or malicious, or the deed committed with the purpose to kill, must of necessity be ascertained from the act done and the circumstances surrounding it. That fatal wounds are not inflicted when they might be, or that the person injured does not die as a result of the wounds, does not authorize the court to say, as a matter of law, that the assailant did not intend to kill. When the assault is deliberately and wantonly committed with an instrument that may produce death, and the wound is of such a nature that death may result from the injury inflicted, then, in my opinion, the question of intent should be left to the jury. It is for them to say, from all the evidence and the fair and reasonable inferences that may be deduced therefrom, whether the purpose of the defendant was to commit an ordinary assault and battery or the statutory crime; and when the acts are such that it is difficult to conclude with accuracy what the purpose of the accused was, and depending on inferences to be drawn from them, they might constitute either a simple assault and battery or an assault with intent to kill, the finding of a properly instructed jury should not be disturbed. The doing of the act does not raise the legal presumption that it was done with the intent to kill, nor the legal presumption that it was not the intention to kill. In other words, the law will not rest either a conviction or an acquittal upon the legal presumption that the accused is guilty or innocent. The presumption that every man intends the natural and reasonable consequences of his acts is as

far as the law will go. It is for the triers of the facts to say what the intention was. To hold that a person who, with a knife or other sharp instrument, intentionally, deliberately and wantonly cuts the legs or arms of another, or with a hammer beats and bruises his body, is only guilty of an assault because he did not kill him when he might have done so, does not strike me as being good law. The fact that the accused does not see proper to inflict a fatal wound when he has the means and opportunity to do so, does not, in and of itself, create any presumption of law that he did not intend to kill. If the accused had stabbed McKinney, wounding him in such a way as to imperil his life, leaving the chances of recovery against him, and if the manner of their infliction and all the circumstances surrounding it showed that he intended to kill, it would, nevertheless, be improper for the court to instruct the jury that he intended to kill the person assaulted. The other side of the question should be ruled in the same way.

For these reasons I dissent.

WARD, SHERIFF V. HALL.

(Filed September 30, 1908—Not to be reported.)

Bailbond—Forfeiture—Action to Enjoin Collection—Evidence Conflicting—Affirmed—In the matter of the liability of defendant on forfeited bailbond, the evidence being so conflicting as to leave the mind in doubt, the matters testified to having occurred in the presence of the court, and he being acquainted with the parties, his judgment will not be disturbed.

H. C. Clay, H. L. Howard and J. B. Carter for appellants.

Greene & VanWinkle for appellee.

Appeal from Harlan Circuit Court.

Opinion of the court by Wm. Rogers Clay, Commissioner, affirming.

Appellee, W. F. Hall, was on the bail bond of James Nichels for his appearance in the Harlan Circuit Court at the November term, 1905. Nichels failed to appear, and a formal order of forfeiture was taken and entered. At the February term, 1906, the proceeding was on the Commonwealth's docket near its close. Prior thereto summons had been served on appellee. Judgment was taken against appellee, and he thereafter instituted this action against appellant to enjoin the collection of the judgment and execution issued thereon. The chancellor gave appellee the relief asked for, and M. S. Ward, the sheriff, appeals.

According to the testimony of appellee, he was present when the case was called, but understood that it was to be passed and called again before the expiration of the term, at which time he was to be given an opportunity to make a defense. The judgment, contrary to such understanding, was entered without any knowledge or notice on his part. It also appears that James Nichels, whose bondsman the plaintiff was, had been arrested and returned to the Harlan Circuit Court, and the case against him filed away by the Commonwealth. The testimony for appellants shows that the case was regularly called; that the appellee was in court when it was called, and when the Commonwealth's attorney asked judgment no objection was made

with me until I kill some of them." To yet another he said, in talking about Gayle's hog getting into his garden, that "if the hog got back in the garden he intended to kill the hog, and if Gayle said anything about it he would kill him." And to others he made remarks of a less threatening nature about deceased, tending to show a hostile feeling.

The homicide occurred on Monday about midnight. On the Saturday previous the Clark woman went to Leach's house to visit her son, who had been there since the May previous, and she remained until after Gayle was shot, and was in the house with her son, Leach, and his wife when the shooting was done. About 10 o'clock on Monday night Leach said to John L. Butler as he, Leach, and the deceased and his brother, Bob Gayle, were on their way home from Butler's store, where Leach and the Gayles had been transacting some business: "You tell Gayle that he has got to take that woman away from here right now." This message Butler at once delivered to Gayle. Mrs. Clark testifies that when Leach returned to his house from Butler's store, Gayle came with him and said to her in the presence of Leach that he had come to take her away, and would be back after her in fifteen or twenty minutes, or as soon as he could hitch up his buggy; that then Gayle left, and in a short time came to the front door and knocked, when Leach said, "whose there" three separate times, and Gayle to each request replied: "Tom, it is 'Dutch' (Gayle's nick-name); open the door." While this conversation between Leach and Gayle was going on the witness testifies that Mrs. Leach and herself said to Leach, who had his gun in his hand, "don't shoot, it is 'Dutch;'" but notwithstanding this warning and information he fired through the door, which was closed, the shot taking effect in the body of Gayle, who was standing immediately outside on the porch.

Leach's version of the affair is that Monday afternoon Gayle took Mrs. Clark out buggy riding, and that night on their return from Butler's store Gayle, who was drinking, came to his house and said, "I am going to take this woman away," when he replied, "it would not do to take her away at night;" to this Gayle answered, "all right," and then left, saying that he would see him in the morning; that Gayle did not, with his knowledge or consent, come to his house again that night; that during the night some person walked upon the front porch and scratched on the door, when the dog growled and he heard the person say, "I'll shoot your brains out if you bite me;" that he then asked three times who it was, and not receiving any reply fired, but did not know that it was Gayle he had shot until after he fired. Leach further testified that he had about forty dollars in his house, and that the night preceding the killing of Gayle a person unknown to him put paper in the door lock so as to prevent it from locking, and he felt some uneasiness about his money.

From this brief history of the case it appears that there was ample evidence from which the jury might well conclude that Leach deliberately, willfully and without excuse or provocation shot and killed deceased. It remains to be seen whether or not the trial court committed any prejudicial errors of law.

Three alleged errors are relied on by his counsel. First, the failure of the trial court to permit witnesses to testify as to the relations that existed between the deceased and the Clark woman; second, in giving to the jury an instruction upon the subject of the insanity of the appellant, and third, in failing to properly instruct the jury as to the right of Leach to shoot if he believed the person he shot was at the time attempting to break into his house or commit a felony.

Rebecca Clark, who was the chief witness for the Commonwealth, was not inquired of concerning her immoral intimacy with the deceased, but Bassitt and other witnesses introduced in behalf of the accused were asked if they knew what the relations between Mrs. Clark and Gayle were. The court refused to permit the witnesses to answer this question. What answer the witnesses would have made the record does not disclose, as no avowal was made. It would have been competent to have inquired of Mrs. Clark what the relations had been between herself and the deceased, and she might have been required by the court to disclose them, although improper; and this fact might have been shown independent of her by other witnesses if she was not questioned on the subject, or, if questioned, had denied the immoral relations. (*Morrison v. Commonwealth*, 24 Ky. Law Rep., 2923.) It is proper to permit, and if necessary to require, a witness to relate his or her relations with the parties to the litigation, and in Commonwealth cases with the accused or the prosecuting witness, or the deceased, if the prosecution is for homicide, for the purpose of showing his bias or prejudice or interest in the result of the trial, so as to enable the jury to place a proper estimate upon the weight that should be given to his evidence. We do not mean to be understood as declaring that a witness may be required to answer a question that would subject him to a criminal or penal prosecution, but the fact that the answer may degrade, disgrace or humiliate a witness will not excuse him. (*Underhill on Criminal Evidence*, section 248; *Greenleaf on Evidence*, section 450.) This rule does not conflict with section 597, of the Civil Code, providing, among other things, that a witness may not be impeached by evidence of particular wrongful acts. (*Commonwealth v. Welch*, 111 Ky., 530; *Britton v. Commonwealth*, 29 Ky. Law Rep., 857.) Under the Code, as construed in these and many other cases, a party can not impeach the testimony of a witness by evidence of specific acts, with the exception mentioned in the section *supra*. To ask a witness questions for the purpose of impeaching his credibility or morality is one thing, and to make inquiries that will show his interest, bias or prejudice is another, although in some respects the end sought to be accomplished by each line of interrogation is the same. The impeachment of a witness is confined to his own life and character, without respect to his interest in the case or his relations to the parties to the controversy. The attack is made upon the witness as an individual independent of his interest or bias or prejudice in the case upon trial. On the other hand, the reputation of the witness for truthfulness or morality is not necessarily involved in inquiries made for the purpose of showing his feelings of kindness or hostility towards the parties or his social or family or business or other relations with them, although in instances like the matter we are considering inquiries along this line would reflect upon the character of the witness. But the purpose of the examination is not particularly to discredit the reputation of the witness for truth or morality, as it is when he is sought to be impeached; and the rule that protects a witness attempted to be impeached from investigation into specific or particular acts in his life can not be invoked to save him from disclosures touching his relations with the party in whose behalf he is testifying, although such disclosures may develop particular acts that have a tendency to degrade or disgrace the witness.

As the record fails to show what answer Bassitt and other witnesses would have made to the question, the assigned error in declining to permit them to answer the question can not be considered by this court. (*Nichols v. Commonwealth*, 11 Bush, 575; *L. C. & L. R. R. Co. v. Sullivan*, 81 Ky., 624.) It may be remarked, however,

that other evidence reasonably sufficient to convince the jury that immoral relations did exist between the Clark woman and the deceased was heard by the jury from other witnesses, so that the accused had before the jury substantially the same evidence that his counsel in their brief say would have been made by Bassitt and others.

Several witnesses were introduced by appellant who said that, for a number of years, he had been subject at intervals to epileptic fits, and that while under the influence of this disease he was prostrated mentally and physically, but when he recovered from the effects of the disorder, which only continued for a few hours, he was not legally incompetent to form a criminal intent or commit a crime. But as no evidence was introduced affecting the mental capacity of the accused at the time he killed Gayle, his counsel argue that the evidence relating to epileptic fits was offered only to show his weak condition generally, and not for the purpose of resting upon it an instruction upon the subject of insanity; and the complaint is made that the court erred to the prejudice of appellant in giving to the jury an insanity instruction. It may be conceded that the evidence introduced in behalf of appellant did not authorize the court to submit to the jury an instruction upon the subject of his mental soundness at the time of the homicide, but we are unable to perceive in what respect the giving of this instruction could have been prejudicial to the accused. It gave to him the benefit of an instruction he was not entitled to under which the jury might have acquitted him. The error of the court was prejudicial to the Commonwealth rather than the accused.

It is insisted that none of the instructions given to the jury presented the defense of appellant. His counsel contend that, as he believed at the time he fired the fatal shot, that the person at whom it was fired was attempting to enter his house, that he had the right to shoot to prevent such entry. A man has a right to kill a burglar or thief who is at the time committing a felony by attempting to break into his house. And so he may, if necessary to protect himself or family from death or bodily harm, shoot an assailant. But a person has no legal or moral right to kill another merely because, in the night time, he comes upon his premises, or even knocks on the door of his house. The owner, controller or occupant of premises who, in the night or day time, shoots and kills an intruder or trespasser, can not excuse or justify his conduct upon the ground that the person killed was a burglar or thief, and upon the premises for the purpose of committing a felony, or attacking with evil intent the persons in possession of the premises, in the absence of some evidence conducing to establish this defense. (Kentucky Criminal Law and Procedure by Roberson, sections 155-7; Bishop's New Criminal Law, section 858; Chapman v. Commonwealth, 12 Ky. Law Rep., 704; Utterback v. Commonwealth, 20 Ky. Law Rep., 1515; Baker v. Commonwealth, 93 Ky., 302; Saylor v. Commonwealth, 97 Ky., 184; Wright v. Commonwealth, 85 Ky., 123; Sparks v. Commonwealth, 89 Ky., 644.) If there was any evidence that Gayle, at the time he was shot, was forcibly and wrongfully attempting to enter or break into the house of Leach, or any evidence that Leach believed, or had reasonable grounds to believe, that the person on his porch was a burglar in the act of entering into his house, the court should have instructed the jury upon the law applicable to this state of facts. So that the question narrows down to the proposition whether or not the evidence of Leach was sufficient to warrant the court in giving an instruction that, if the jury believed from the evidence that Leach believed, and had reasonable grounds to believe, that some

one was trying to break into his house to commit a felony, he had the right to take the life of the intruder, if necessary, or believed by him in the exercise of a reasonable judgment to be necessary, to prevent him from committing the contemplated crime. A careful consideration of Leach's evidence convinces us that it did not authorize an instruction upon this branch of the law. Leach did not testify that he believed, or had any grounds to believe, that the person on his front porch was a burglar, or had come to his house for the purpose of doing him or any of his family any injury, or for the purpose of committing any offense against his property. Hence, there was no evidence to warrant the court in giving the instruction counsel insist their client was entitled to. Indeed, it is very questionable if, under the evidence the appellant was entitled to, the instruction given by the court, or to any instruction that would authorize the jury to find him not guilty upon the ground that the shooting was either excusable or justifiable.

After a careful consideration of the entire record and the well-prepared argument of his counsel, we find no error that would authorize us in granting a new trial.

The judgment of the lower court must be affirmed.

HARGIS, &c. v. BEGLEY, CLERK, &c.

(Filed September 29, 1908—To be reported.)

Bail Bonds — Forfeiture — Defendant Accidentally Disabled While Absent From State—Sufficiency of Plea—Where a defendant, who was a resident of the State, went with his brother to another State on a hunting trip, and while there accidentally shot himself so that he could not attend the term of the court at which his case was set for trial, which facts were made to appear by the sureties on his bail bond in an action to set aside the forfeiture of his bond and it also appearing that he had subsequently returned and executed another bond, it was error in the court to sustain a demurrer to the plea of his sureties.

Cleon K. Calvert and J. J. C. Bach for appellants.

Ira Fields and Jas. H. Jeffries for appellees.

Appeal from Leslie Circuit Court.

Opinion of the court by Judge Nunn, reversing.

Prior to October, 1906, one Doug Hays was indicted in the Leslie Circuit Court, charged with a felony, and his bail fixed at \$500. Appellants, James Hargis, Ed. Callahan and S. B. Stidham, executed the usual bond for the appearance of Doug Hays at the October term of the Leslie Circuit Court to answer the charge. He failed to attend and there was an order made forfeiting his bail bond and another bench warrant issued and his bail fixed at \$1,000, and summons was awarded against his sureties, appellants. At the February term, 1907, of the court appellants failed to answer and a judgment was rendered against them for the amount of the bond. This action was instituted by appellants to enjoin the collection of this judgment. As reasons why appellants should not be compelled to pay this judgment they presented the following: That they and Doug Hays resided in Breathitt county, about forty-five miles from Hyden, in Leslie

county, the place where the judgment was rendered; that shortly after the bail bond was executed Doug Hays went to the State of Minnesota on a visit to his brother, who resided there; that while there Doug Hays and his brother went on a hunting trip and Doug Hays accidentally shot and wounded himself, and it was impossible for him to appear at the Leslie Circuit Court in October in fulfillment of the bond; that after he became able to travel he returned to Breathitt county and executed another bail bond for the \$1,000. It is made to appear that they failed to attend the Leslie Circuit Court, which began on the first Monday in February, 1907, for the reason that they did not know that there was a February term of that court; that they believed the term began on the third Monday in March, 1907; that they relied upon the "Bradley & Gilbert Co." court calendar for the year 1907, which fixed the term for the Leslie Circuit Court on the third Mondays in March, June and November; that they did not know of the change fixing the terms of the Leslie Circuit Court to begin in February, May and October. They filed with their pleadings the court calendar of Bradley & Gilbert Co., for the year 1907, and it substantiates their claim. The lower court concluded that, notwithstanding these alleged facts, which were not disputed, appellants had no cause of action.

Appellee's counsel contends that appellants, the sureties of Doug Hays, acted at their peril when they permitted him to leave the State to visit his brother; and it was no defense to the action to recover the amount of the bond that Hays was accidentally shot and thereby prevented from appearing at the October term of the Leslie Circuit Court; and refers to the cases of *Starr v. Commonwealth*, 7 Dana, 243; *Alguire v. Commonwealth*, 3 B. Mon., 349, and *Withrow v. Commonwealth*, 1 Bush, 17, and other cases of similar import, as sustaining their position. These cases are unlike the case at bar. The seventh Dana case was one where an infant was defendant in the indictment, and he failed to appear to answer it, and the sureties on the bail bond defended upon the ground that the infant's mother had taken him out of the State and kept him away until after the bond was forfeited. The court adjudged that this defense was insufficient. The third B. Monroe case was where the defendant had not appeared because he was imprisoned by the State authorities in the city of Louisville, Kentucky. This fact was pleaded as a defense to the forfeiture of the bail bond and was held insufficient because it was defectively pleaded. The first Bush case was one where one Catlin, who was charged with murder in Marion county, Kentucky, was arrested and gave bond; then went to the State of Indiana, where he was arrested and imprisoned for the violation of the law in that State. While thus imprisoned in the State of Indiana his bail bond was forfeited for his appearance in the Marion Circuit Court, and the court held that his enforced absence in the State of Indiana, at the time the forfeiture proceeding was had, was not a defense to the forfeiture. In the last two cases referred to the defendant was prevented from attending court in compliance with their bail bond on account of wrongful acts committed by them. They were imprisoned for committing other crimes. When the sureties executed bond in the first case referred to they knew that the infant was in the charge of his mother, and when they permitted her to take him from the State they took the risk of her permitting him to return, or of his returning of his own will in spite of her objections. If it had been made to appear in those cases that the defendants had been prevented from appearing in answer to their recognizance, not on account of any wrongful act or dereliction on their part, but on account of unavoidable accident

or sickness, over which they had no control, the results would have been different. (Commonwealth v. Terry, 2 Duvall, 383; Bonner v. Commonwealth, 27 Ky. Law Rep., 652.)

The second proposition presented by appellee's counsel is, that the judgment was rendered in February, 1907, and this action was not instituted to set aside the judgment until the 31st day of May, that year; and that one court had passed between the date of the judgment and the institution of this action, and the court was without power to vacate or modify it, except upon the grounds set out in section 518, of the Code of Practice, which is claimed are not presented in this proceeding. This contention of appellee's counsel is correct, except the last proposition to the effect that appellants present no grounds for vacating or modifying the judgment under section 518, of the Code. The seventh sub-division of that section is as follows: "For unavoidable casualty or misfortune, preventing the party from appearing or defending."

Casualty is that which happens without design or without being foreseen. If Hays was "accidentally shot" it was without design on his part, and if he was prevented from appearing at the Leslie Circuit Court by reason thereof it would be the same as if he had become seriously ill and was thereby prevented from attending court. If Hays had been at his home in Breathitt county and had been sick and thereby prevented from attending the Leslie Circuit Court, it would not be contended that his sureties could not have successfully defended for his not appearing; and there is no reason why that defense would not avail them if his sickness had occurred to him while on a visit to his brother. It is true, appellants in their pleadings, did not use the words, "that Hays was prevented from attending the Leslie Circuit Court by reason of an unavoidable casualty or misfortune," but the facts stated by them, if true, show these facts.

We are of the opinion that the lower court erred in sustaining a demurrer to appellants' pleadings. The judgment is reversed and remanded for trial; and if appellants' contentions are found to be true, the court will set aside the judgment and render judgment according to the justice of the case as provided in section 98, of the Criminal Code, which is as follows: "If, before judgment is entered against the bail, the defendant be surrendered or arrested, the court may, at its discretion, remit the whole or part of the sum specified in the bail bond."

BLANTON v. COMMONWEALTH.

(Filed September 30, 1908—Not to be reported.)

1. Homicide—Husband Killing Wife—Accidental or Intentional—Question for Jury—On the trial of accused for homicide by shooting his wife with a pistol, in which he claimed the shooting was accidental, but which the evidence for the Commonwealth tended to show was intentionally done because he was enamored of another woman, it was peculiarly the province of the jury to weigh the evidence, and considering it all, decide which theory was correct.

2. Same—Trivial Errors—A case should not be reversed for trivial, immaterial or unprejudicial errors.

W. F. Hall for appellant.

Jas. Breathitt and Tom B. McGregor for appellee.

Appeal from Harlan Circuit Court.

Opinion of the court by Judge Lassing, affirming.

This is the second appeal of this case. Appellant was indicted, tried and convicted for the murder of his wife, and, upon appeal to this court, the case was reversed because the trial judge failed to give an instruction embodying appellant's theory of how the killing occurred, to-wit: That it was an accidental shooting. The former opinion is found in 31 Ky. Law Rep., 800. Upon a re-trial appellant was again found guilty and his punishment fixed, as in the former trial, at confinement for life in the penitentiary. The facts, as developed in this last trial, as shown by the record before us, are practically the same as those brought out on the first trial, which are fully set out in the former opinion.

Three grounds are relied upon by appellant for reversal: First, that the verdict is not supported by the evidence. Second, that in the involuntary manslaughter instruction the law is not correctly stated. And, third, that the court erred in failing to instruct the jury that if they believed appellant proven guilty beyond a reasonable doubt, but entertained a doubt as to the degree of his guilt, that they should convict him of the lower degree, to-wit: involuntary manslaughter.

It is the theory of the Commonwealth that appellant deliberately shot and killed his wife for the purpose of getting rid of her, and, in support of this theory evidence was offered which tended to show that appellant was unduly intimate with another woman, and on several occasions was caught in a compromising position with her; that he had said to, and in the presence of different persons, that he wanted to get rid of his wife, and would do so even if he had to blow her head off, and other similar expressions. The pistol with which the shooting was done was furnished by this "woman in the case."

On the other hand, appellant introduced evidence which tended to show that it was an accident; that he stayed at the house and waited on her after she was shot; that she stated that it was an accident, and insisted upon having him wait upon her and care for and minister to her from the time she was shot until she died. It was peculiarly the province of the jury to weigh the evidence, and considering it all, decide which theory was correct. They accepted the theory of the Commonwealth and rejected the contention of appellant that it was an accident. If the testimony offered for the Commonwealth was true, as they must have believed it was, the proof amply supports their finding and verdict.

The instruction complained of by appellant is as follows: "If the jury believe from the evidence that the accused had reasonable grounds to believe, and did believe, there was no danger in handling the pistol as he did, and that it was done without any purpose of harm upon his part, and further believe from the evidence to the exclusion of a reasonable doubt that the killing resulted from the careless use of the weapon, they should find him guilty of involuntary manslaughter, and fix his punishment at a fine or imprisonment, in the county jail, either or both, in your discretion; but if they believe the killing was accidental and without carelessness, he should be acquitted."

This is the instruction which this court, upon the former appeal, said appellant was entitled to have been given. It is not subject to the criticism which appellant's counsel is disposed to make of it, but expresses fairly and fully appellant's legal right under his theory

of how the killing occurred. It would have been the better practice for the trial judge to have given the jury an instruction telling them that although they believed appellant guilty beyond a reasonable doubt, yet, if they entertained a doubt as to the degree of his guilt, they should find him guilty of involuntary manslaughter, as defined by instruction number two, but his failure to give this instruction did not prejudice appellant's right. The jury was not misled by such failure, for there was no proof offered which tended to show that appellant handled the pistol in a careless or reckless manner, unless such can be inferred from the facts to which he testified about the manner in which the shot was fired.

A case should not be reversed for trivial, immaterial or unprejudicial errors. Two impartial juries have tried this case and each rejected the theory of appellant as to how the killing occurred, and accepted the theory of the Commonwealth that appellant had become enamored of the charms of another woman and killed his wife in order to get her out of his way.

Under the proof the jury had either to find appellant guilty, as they did, or else acquit him, and, under the evidence in this case, the failure of the court to give the instruction which it is now contended he should have given furnishes appellant no ground for reversal, and the judgment is, therefore, affirmed.

JAMES, AUDITOR V. CROMWELL.

(Filed September 30, 1908—Not to be reported.)

Kentucky Senate—Unauthorized Service Rendered—Copying Bills, &c.—Countersigned by Chief Clerk—Compensation Denied—Section 249, of the Constitution, and sections 342 and 1992, of the Statutes, provide for the appointment of the employes of the House and Senate, and these sections are a limitation upon the right or power of either the House or Senate to hire officers or employes; therefore, a claim for services by one who is not an employe in copying bills, resolutions and other papers for the Senate, though endorsed and countersigned by the chief clerk thereof, can not be allowed under the head of contingent expenses or otherwise.

Jas. Breathitt and John F. Lockett for appellant.

James T. Buford and Wm. Cromwell for appellee.

Appeal from Franklin Circuit Court.

Opinion of the court by Judge Lassing, reversing.

Appellee filed her suit in the Franklin Circuit Court, in which she alleged that, during the 1908 session of the Legislature, at the instance and request of the chief clerk of the Senate, she performed services in copying bills, resolutions and other papers necessary to be done as a contingent expense of the Senate, and which work it was impossible for the clerks of the Senate to do. That these services on her part, were reasonably worth \$314.75. That the chief clerk of the Senate endorsed and countersigned her said claim for services as correct, and she thereafter presented same to the Auditor of Public Accounts, and requested that he issue his warrant on the Treasurer, directing him to pay them. That the said Auditor refused to issue his warrant for said sum, or any part thereof. She asked

that a mandamus be issued, directing the Auditor to issue his warrant on the Treasurer for the payment of said claim. To this petition the Auditor of Public Accounts filed a general demurrer, and pending same filed his answer, in which he denied that the work which appellee alleged she had done was such as could be properly charged to the contingent expense of the Senate, under section 342, of the Kentucky Statutes, and denied the right and authority of the chief clerk to make such employment, or to endorse and countersign her said account, and pleaded affirmatively that the plaintiff was not employed by the joint action of the two houses of the General Assembly, and denied that the right existed in any one to employ plaintiff without such action on the part of the General Assembly.

To this answer plaintiff filed a general demurrer and pending same filed as part of the petition the certificate of William Cromwell, chief clerk of the Senate, to the effect that the itemized account of plaintiff, amounting to \$314.75, was just and correct as a contingent expense of the Senate. The court thereupon overruled the demurrer to the petition, as amended, and sustained the demurrer to the answer with leave to amend, and the Auditor declining to amend, a judgment was entered, directing him to draw his warrant upon the State Treasurer, in favor of plaintiff for the amount of her claim, to-wit: \$314.75. From this judgment the Auditor prosecutes an appeal.

For appellee it is admitted that the only authority for allowing this claim is that given by section 342, of the Kentucky Statutes, which is as follows: "The pay and mileage of the Lieutenant Governor, President pro tem. of the Senate, and Speaker of the House of Representatives, and members of both Houses of the General Assembly, the compensation to the officers of the two Houses, except the chief clerks thereof to be made on the certificate of the respective clerks of the amount due; the compensation of the chief clerks upon the order of each House stating the amount due; all other contingent expenses of the General Assembly upon the production of the vouchers, countersigned by the clerks of the respective Houses."

Section 249, of the Constitution, provides: "The House of Representatives of the General Assembly shall not elect, appoint, employ, or pay for, exceeding one chief clerk, one assistant clerk, one enrolling clerk, one sergeant-at-arms, one doorkeeper, one janitor, two cloak room keepers, and four pages; and the Senate shall not elect, appoint, employ, or pay for, exceeding one chief clerk, one assistant clerk, one enrolling clerk one sergeant-at-arms, one doorkeeper, one janitor, one cloakroom keeper, and three pages; and the General Assembly shall provide by general law for fixing the per diem or salary of all of said employees."

This section of the Constitution is clearly a limitation upon the right or power of either the House or Senate to hire officers and employees. It was evidently passed for the purpose of preventing either body from creating needless offices at the expense of the State.

The case of Walker v. Coulter, Auditor, 24 Ky. Law Rep., 530, is very like the case at bar. In that case Walker was employed as a porter in the Senate at \$2.50 per day for seventy-one days. His employment covered the entire time that the Legislature was in session; whereas in the case at bar the time during which appellee rendered services extended throughout the full legislative session. A distinction is attempted to be made between the two cases, in this, that in the case of the porter an attempt was made to charge the State for a fixed price per day during the legislative session,

whereas in the case at bar appellee has presented a claim for the sum which she says her services during the legislative session were reasonably worth. It is a distinction without a difference, the one is no more contingent than the other.

It is evident that the makers of the Constitution intended that all the work of the legislative bodies should be performed by the officers and employes as defined by section 249, above referred to. And, it may be presumed, that in designating the names and numbers of such employes the Constitutional Convention was fully advised, for in addition to having among its members men of broad experience in the conduct of the affairs of both House and Senate, it had access to the public records showing the number of employes that had heretofore been required. That they did so is made manifest by their express declaration that neither body should pay for the services of any employe other than those designated in section 249. It could hardly be contended that the chief clerk had authority to do that which the Senate itself is expressly prohibited from doing.

It is urged that work of the character which was performed by appellee was absolutely necessary in order that the business of the Senate might be expeditiously carried on. This argument would address itself most forcibly to the Legislature as a reason why the Constitution should be amended so as to give to the respective legislative bodies more employes than those designated in section 249, if it should be found necessary to have such employes in order to properly conduct its business. Such an argument, however, has no place and can not be considered here. Again it is urged that these services should be paid for as a contingent expense of the Senate. We can not agree with learned counsel that an employment of this character could be paid for as a contingent expense, for, if one copyist could be so employed and paid, the number could be multiplied ad libitum, and the very purpose and aim of the Constitutional provision defeated.

Counsel for appellee rely upon the case of McDonald v. Norman, Auditor, 16 Ky. Law Rep., 137, to support her contention, but, in so doing they evidently overlooked the fact that in the more recent case of Walker v. Coulter, Auditor, this court said, in referring to the McDonald case:

"That case can, therefore, not be considered authority upon the construction of this clause of the Constitution (249), and in the light of this clause was incorrectly decided, and would doubtless not have been so decided had the attention of the court been called to the Constitutional provision."

Again, on June 11, 1893, section 1992, of the Kentucky Statutes, was enacted, which provides:

"No other employes shall be elected, appointed, employed, or paid for, without the joint action of both houses."

So that, even if it should become necessary for either house to have the services of additional employes, before they could be legally employed, a joint resolution to that effect would have to be passed, if section 1992 is constitutional, which is not now decided.

With the case of McDonald v. Norman, Auditor, practically overruled in Walker v. Coulter, Auditor, and section 249, of the Constitution, prohibiting the Senate from giving to appellee the employment for which she seeks compensation, we are of opinion that the trial court erred in overruling the demurrer to the petition, as amended. The case is, therefore, reversed, and remanded with instructions to sustain the demurrer to the petition, as amended.

FIBLE v. CRABB.

(Filed September 25, 1908—Not to be reported.)

Bankruptcy—Discharge—Schedule of Debts—Failure to Give Proper Notice—Effect—The bankrupt law of 1898, requires the bankrupt to submit with his petition "a list of his creditors showing their residence, if known, if unknown that fact to be stated, the amounts due to each of them, the consideration thereof," &c., where a bankrupt in his schedules listed among his liabilities, "D. M. Fible estate, Chicago, Ill., \$12,000," when he knew that D. M. Fible was dead and that his estate belonged to his two daughters to whom he had made payments since their father and mother's death, his failure to give their names and address in his schedule, did not operate to discharge their claims.

W. O. Bradley for appellant.

W. S. Pryor for appellee.

Appeal from Henry Circuit Court.

Opinion of the Court by Chief Justice O'Rear, reversing.

W. L. Crabb and D. M. Fible were partners in a whisky distillery in the seventies and later. They incorporated their business, the stock to have issued equally to each of them. But before the shares were actually issued and delivered, D. M. Fible died. By his will he bequeathed the stock to his widow, Harriet Fible. Certificates were subsequently issued to her by the corporation, and delivered by Crabb. Later she sold her shares to appellee, Crabb, for about \$15,000, about \$12,000 of which was deferred and represented by certain notes now sued upon in this action. Crabb made small payments on the notes from time to time. Harriet Fible died intestate at Chicago. Her two daughters were her only heirs. One of them administered upon her estate and the Crabb notes were divided between them. He was apprised of the fact of their ownership. Besides he was on intimate terms of acquaintance with them, knew their post office addresses and received letters from them and wrote letters to them on the subject of these notes, making a number of small payments on them to the two daughters.

In 1903 appellee, having some years previously made a deed of assignment of all his property for the benefit of his creditors, filed his petition in the United States District Court for the Eastern District of Kentucky, to be discharged of his debts and liabilities. In his schedules he listed among his liabilities as follows: "D. M. Fible estate, Chicago, Ill., \$12,000." Notice was mailed to that address, but neither appellant nor her sister (who were the two daughters of the late Mrs. Harriet Fible) received the notice, nor had any notice or knowledge of the pendency of the bankruptcy proceedings.

Appellant recently sued appellee to recover judgment upon the notes which she held, and which had been assigned to her by the administrator of Harriet Fible. Appellee relied on his discharge in bankruptcy. The question is, was the debt sued on sufficiently scheduled in the bankrupt's proceedings to bring it within the benefit of the statute?

The Bankrupt Law of 1898 (U. S. Court Statutes, page 3425, section 7), requires the bankrupt to submit with his petition "a list of his creditors, showing their residence, if known. If unknown that fact to be stated, the amounts due to each of them, the consideration thereof, &c. And by section 17, Ibid (page 3428) it is provided:

"A discharge in bankruptcy shall release a bankrupt from all his provable debts except such as (1) are due as a tax levied by the United States, the State, county, district or municipality in which he resides: (2) a judgment in action for frauds or obtaining property under false pretenses or false representations, or for willful and malicious injuries to the person or property of another; (3) or have not been duly scheduled in time for proof and allowance, with name of the creditor if known to the bankrupt, unless such creditor had notice or actual knowledge of the proceedings in bankruptcy."

The benefits of the statute can be had only by a compliance with its conditions. A discharge is obtainable from provable debts by "duly scheduling" such debts, which is to list the creditors, showing their residence, if known, and if unknown to state that fact. It is allowed, we see, that the debtor may not know his creditor's residence, or where he may be expected to be found, but it is not allowed that the creditor's name be omitted from the list at all. The statute is specific in its declaration that "unless the name of the creditor is given" the discharge shall not operate upon his claim unless he had actual knowledge or notice of the proceedings.

The bankrupt law was designed to relieve overwhelmed debtors from their liabilities, if they but freely and truly surrendered all their property, saving exemptions, to all their creditors. Unless they should be compelled to give a correct list of all their creditors, so that they might be brought into the proceedings by the court, it might happen and frequently would, that the debtor would not give a correct list of all his property; the unworthy would thus use the statute, passed for the benefit of the unfortunate, as the means of perpetrating a fraud upon his creditors. No one else is so apt to know all a man's property as his creditors are. All his creditors are required to be named, else by selecting such as he knew were ignorant of his property, and omitting such as had knowledge of it, the debtor could still work a fraud on his creditors, and make the law and its machinery the means of doing it. So the statute wisely requires the bankrupt, as a condition precedent to obtaining a discharge from his debts, that he shall name all his creditors, and as to such as not named (unless they themselves had notice) the discharge shall not operate to discharge their claims. The statute ought to be applied strictly, else its real purpose will be but an incident of its existence, while its perversion to ignoble ends will be its main use.

We find that appellee did not list appellant as a creditor. The listing of "D. M. Fible estate, Chicago, Ill., \$12,000," was not enough. D. M. Fible's estate was not his creditor, and had never been. Whether appellee made an error, due to misrecollection in making out his list, as we think likely, or whether he designedly omitted the name of appellant, is not material. His good faith, or lack of it, does not affect the question, as the statute makes no allowance on account of mistakes. Appellant's name not being given in the list filed with appellee's petition in bankruptcy, the benefits of that act as to her claim, by the express exception of the statute, do not apply, and her claim is unaffected by those proceedings.

There was an effort made to show that appellant had actual notice of the pendency of the proceedings. Mr. A. D. Hudson testified that while she was visiting his home in 1905 he discussed with her the bankruptcy proceedings. Appellant denied the fact. But whether one or the other was mistaken, or mis-remembered, the matter is immaterial, as appellee was discharged in bankruptcy in March 1903, and there is no evidence to show she had any knowledge or notice of the proceedings before that date.

The judgment should have been in appellant's favor.

Reversed and remanded, for proceedings consistent herewith.

REED, &c. v. FORD.

(Filed September 25, 1908—To be reported.)

Action for Damages—Unlawful Assault of Another—Damage to Third Party—Allegations—Sufficiency—A petition which charges that the defendant in a drunken condition, came to plaintiff's house and in front of her room and in her hearing assaulted a defenseless man in a room near hers, by cursing, abusing and threatening to kill him, by which she was frightened, made sick and threatened with miscarriage, she being then pregnant, does not allege such acts of negligence that will support an action for damages, it not being alleged that the defendant saw or knew that plaintiff was in the room or sick, or that defendant did not lawfully enter the house.

Duff & Hutchison for appellants.

Baird & Richardson for appellee.

Appeal from Barren Circuit Court.

Opinion of the court by Judge Settle, affirming.

Appellants complain of a judgment of the Barren Circuit Court sustaining a demurrer to their petition, as amended, and dismissing the action. The appeal, therefore, presents for our consideration but one question, viz: Do the facts alleged in the petition state a cause of action? The original petition is as follows:

"The plaintiffs, Nettie May Reed and her husband, I. W. Reed, state that during the month of September, 1907, the defendant, Harry Ford, came to their house in Glasgow, Ky., during the darkness of the night, in a drunken condition, and in front of the rooms in which they resided, and in the hearing of the plaintiffs, assaulted one Jas. D. McConnell, who occupied a room near them, and then and there in a loud and boistrous manner, cursed and abused said McConnell and threatened to kill him; that the defendant remained in front of this said room for a half hour or longer and continued to curse and abuse said McConnell and to threaten to take his life, who was perfectly defenseless and unable to resist him.

"The plaintiffs state that the plaintiff, Nettie May Reed, at the time was pregnant with child, that she was greatly alarmed and frightened at the action of the defendant, as aforesaid, so much so that she was compelled to take her bed and remain there ten days; that her nervous system was greatly shocked; that she has since been threatened with a miscarriage in consequence of the fright received by her; that she has suffered great mental agony and physical pain from said fright and that her health has been greatly, and as they fear and believe, permanently impaired as the result of the fright aforesaid."

The following are the averments of the amended petition:

"Amending their petition herein, the plaintiffs state that the assault on Jas. D. McConnell took place in the hall immediately in front of the room occupied by the plaintiffs at the time and within three or four feet from the plaintiff, Nettie May Reed, that the plaintiff, Nettie May, was made violently sick by the fright which she received; that she was compelled and did take her bed for at least ten days, as the result of said fright, and they state that her health has been greatly impaired and they fear permanently destroyed, as the result of the fright aforesaid; and they further state she sustained physical injuries, in consequence of the fright aforesaid, and has been and was damaged, as set out in the original petition herein, in the sum of \$500, which injuries are, and were, the direct and

proximate result of the fright complained of by her in said original petition."

A careful analysis of the language of the petition and amendment will demonstrate that the sole ground of recovery alleged is that injury and damage resulted to the appellant, Nettie May Reed, from fright superinduced by the conduct of appellee in committing an assault upon, and using in her hearing and within a few feet of her, profane and abusive language toward a third person, one Jas. D. McConnell. That the fright given her by the misconduct of appellee toward McConnell caused her great physical and mental suffering, made her ill for ten days, nearly produced a miscarriage and perhaps permanently impaired her health.

While it is alleged in the petition that appellee's assault upon and abuse of McConnell occurred in her house at night, where he had gone in a drunken condition, these facts did not necessarily make him a trespasser as to the person or premises of Mrs. Reed. It is alleged that McConnell occupied a room in the same house near hers, and not alleged that appellee did not lawfully enter the house. He may have gone there upon McConnell's invitation or to see him on a business matter, and for some reason, whether with or without provocation, became angry with and abusive toward him, after entering the house.

It will be observed that neither the original nor amended petition alleges that appellee, at the time of his assault upon or abuse of McConnell, was seen by Mrs. Reed; that he saw her; knew she was in hearing, or in a room near him, or that she was then an occupant of a room in the house, nor does either aver that the door to the room she was occupying was open; thereby affording appellee an opportunity to discover her presence therein.

It is also true that the petition does not charge that appellee assaulted the appellant, Nettie May Reed; that he knew she was pregnant, or that anything said or done by him was directed to or at her. On the contrary its only averments on that point are to the effect that McConnell, who was not a member of her family or related to her, was alone the subject of appellee's wrath and abuse. It is patent from the averments of the petition, as amended, that appellee committed no assault upon or trespass against the appellant, Nettie M. Reed. The pain and suffering alleged resulted solely from fright and were unaccompanied by any physical injury. The damages sought to be recovered are too remote and speculative. The injury is more sentimental than substantial; being easily simulated and hard to disprove, there is no standard by which it can be justly or even approximately compensated. As said by this court in *Reed v. Maley*, 25 Ky. Law Rep., 209, a case in which the question here involved was considered:

"The objection to a recovery for injury occasioned without physical impact, is the difficulty of testing the statements of the alleged sufferer; the remoteness of the damages and the metaphysical character of the injury, considered apart from physical pain." (*Railway Company v. Elliott*, 55 Fed. Rep., 950; *Keys v. Railway Company*, 36 Minn., 290; *Moore v. C. & O. Railway Company*, 25 Ky. Law Rep., 1160.)

It is equally certain that no right of recovery can be asserted in this case upon the ground that appellee's assault upon or abuse of McConnell, occurring at the house of the appellant, Nettie M. Reed, and in her hearing, constituted negligence for which he should be made to respond in damages for the alleged injury resulting to her. It seems to be well settled that no recovery can be had for injuries resulting from mere fright, caused by the negligence of another when no immediate personal injury is received. (*Thompson on Negligence*,

sections 156-157; *Mitchell v. Rochester Railway Co.*, 455 E., 354; *Gulf, &c. Railway Co. v. Hoyter*, 77 Am. State Rep., 860.)

Moreover, under the facts alleged, negligence can in no event be imputed to appellee in this case, or regarded as the proximate cause of appellant's injuries; for not seeing appellant, being unseen by her, and not knowing of her presence in the adjacent room, it can not be claimed that he could have foreseen or reasonably anticipated that any injury would probably result to her from his assault upon or abuse of McConnell.

Being of the opinion that the petition fails to state a cause of action, the judgment sustaining the demurrer thereto, is affirmed.

Whole court sitting.

HUBER v. COMMONWEALTH.

(Filed September 25, 1908—To be reported.)

Intoxicating Liquors—License to Sell—Confined to One Barroom— Under Kentucky Statutes, section 4198, providing that "all licenses, except as to peddlers, shall specify the place where the business is to be conducted, nor shall the privilege granted be exercised in any other place;" one who has a license to sell spirituous liquors can not run two barrooms in separate and distinct buildings under one license.

C. L. Raison, Jr., and W. A. Burkamp for appellant.

Jas. Breathitt and Tom B. McGregor for appellee.

Appeal from Campbell Circuit Court.

Opinion of the court by Judge Hobson, affirming.

George P. Huber owns several small lots. On one of these is a brick building, in the upper part of which he lived with his family, and in the lower part he carried on business as a saloon keeper. Fifty or one hundred feet from this building there was a large frame building which was used for picnics and the like for a while, and afterwards was used as a pool-room. He got a license from the county court to sell spirituous, vinous and malt liquors. Under this license he conducted his saloon in the brick building; and while he was running the poolroom business in the frame building, he opened another bar in that and was selling liquor there. For this he was indicted, and having been fined in the circuit court, he appeals.

Section 4198, Kentucky Statutes, provides as follows:

"All applicants for license except peddlers shall state the county, city, town and place therein where it is proposed to carry on the business, and all licenses except to peddlers, shall specify the place where the business is to be conducted, and no one but the person named in the license shall sell under or exercise the privilege granted; nor shall the privilege granted be exercised in any other place than that mentioned in the license, except that retail dealers in spirituous, vinous or malt liquors, in any incorporated city or town, may remove their place of business to some other place in the same city or town by the consent of the county court and municipal authorities of such town or city, entered of record and indorsed on the license. But when the place is once changed the party shall not be allowed to change the location a second time or sell at the original place without first procuring a license."

It is clear from this statute that it was not contemplated that a man under one license could run two bar rooms in separate and distinct buildings. If he could thus run two, he could run as many bars as he saw fit, under one license. His ownership of both buildings does not affect the question. If he had owned only one and rented the other, or owned neither, the rule would be the same. The license is to run one business and at one place of business; and when Huber opened and conducted the bar in the brick building, he exhausted his license. His opening the bar thereafter in the frame building was the running of that bar without license. It is earnestly insisted that as he had a right to run one bar, it can not be said which of the two, was unlawful; and that therefore the selling in the frame building, for which he was indicted, was not unlawful. This argument overlooks the fact that the business in the frame building was begun after he had located his license by conducting his saloon in the brick building. In addition to this a man who under one license opens two bars in separate and distinct buildings can not maintain that he can not be punished for maintaining either as one or the other was lawful. When the Commonwealth has fined him for conducting one of the bars, it is an election by the Commonwealth to treat the other place as the one that is licensed.

The instructions of the court aptly submitted to the jury whether the two bars were separate and distinct, and the proof before the jury left no doubt that they were in separate and distinct buildings.

The indictment was not defective. It gave the name of the offense with sufficient certainty to apprise the defendant of what was meant, and in the descriptive part of the indictment describes it in the usual form.

The court properly refused to allow proof to be heard to the effect that other men in Campbell county were running two bars under one license, just as he was doing; or to the effect that the county officials had so construed the statute. One violation of the law can not justify another, nor can the county officials make nugatory the statutes of the State.

Judgment affirmed.

STEELY v. COMMONWEALTH.

(Filed September 30, 1908—To be reported.)

1. Homicide—Indicted as Principal—Convicted as Aiding or Abetting—Although one is indicted as a principal he may be convicted on the showing that he was present at the time the crime was committed, counseling, aiding, advising or assisting the real perpetrator thereof.

2. Instructions—Based on Evidence—On the trial of one for homicide no instruction should be given based upon any theory which is not supported by some evidence.

3. Joint Indictment—Mother and Son—Apparent Damage by Deceased—Defending Each Other—On the trial of an indictment against the mother jointly indicted with her son, for a homicide, if the conduct of the deceased at the time of the killing, was such as to justify the son in the belief that deceased was then about to inflict upon his mother or himself great bodily harm, he should go acquit on the ground of self-defense, and if the son is justified the mother should likewise be excused for having been present urging and advising him to do so.

R. S. Rose and J. K. Watkins for appellant.

Jas. Breathitt and Tom B. McGregor for appellee.

Appeal from Whitley Circuit Court.

Opinion of the court by Judge Lassing, reversing.

Appellant and her son, Granville Steely, were indicted for the murder of Martin B. Snyder. She demanded and was given a separate trial. The jury having found her guilty and fixed her punishment at five years confinement in the penitentiary, she appeals and seeks to reverse the judgment predicated on that verdict on several grounds, the principal of which, however, is that the court did not properly instruct the jury.

The facts in the case, as developed by the testimony of both the Commonwealth and the accused show that on the night of the third of July, 1908, appellant was living with her husband and two sons about twelve and sixteen years of age respectively, in a small cottage on the bank of the river in the town of Williamsburg. Her husband was not at home on that night, and a short time before midnight, the deceased, accompanied by some six or eight of his gentlemen friends, took a sixteen gallon keg of beer to the home of appellant for the purpose of drinking it. The keg was placed in the middle room on the floor and tapped. Deceased and his friends, and appellant and her son, Granville, all engaged in drinking. While the drinking was in progress the deceased, Granville Steely and others of the men assembled were shooting dice on the floor by the light of a small lamp. Later in the night, sometime between one and two o'clock, the crowd had become somewhat boisterous, and appellant ordered them from the house. Deceased took offense at being ordered from the house, and threatened to take the lamp, which was the only light, away with him. This threat on his part brought on a wordy war between himself and appellant in which she several times ordered him from the house. The lamp was taken from the floor by some one and in being lifted up went out.

In the meantime appellant had gotten possession of an axe and was approaching deceased in a threatening manner with it when one of her guests caught hold of the axe so as to prevent her from using it, and while he was so holding the axe deceased struck appellant over the shoulder and neck with the lamp. This blow, at least, staggered appellant, and, according to the weight of the testimony, which supports her contention, knocked her down. She immediately exclaimed that she was killed, and called to her son to cut deceased, and he was stabbed twice. Just when this cutting was done, or whether in the house or outside is not clear, for it was dark in the house at the time and no witness saw deceased cut, though Granville Steely testified that he cut him when deceased attacked his mother. From the effects of these wounds, there inflicted upon deceased, he died two days later.

For appellant it is urged that as the Commonwealth utterly failed to show that she cut or stabbed deceased, the jury should have been peremptorily instructed to find for her at the conclusion of the Commonwealth's testimony, and certainly it should have been so instructed at the conclusion of all of the testimony, when it had been clearly established that the cutting was done by Granville Steely.

This contention is without merit, however, for it has been expressly decided that although one is indicted as a principal, he may be convicted on the showing that he was present at the time the crime was committed, counseling, aiding, advising or assisting the real perpetrator thereof. In the case of *Evans v. Commonwealth*, 11 Ky. Law Rep., 573, the appellant was jointly indicted with others charged with the crime of house-burning. The lower court instruct-

ed the jury that if the burning was done by either of the persons indicted with appellant, and he was present aiding or abetting, they should convict him, and in passing upon the correctness of this instruction, upon review here this court said:

"The indictment charges the accused with the burning. It does not speak of aiding or abetting. If, however, the torch was applied by a co-defendant of the accused, and he was then present aiding and abetting he was, under our law, a principal, and the indictment, therefore, authorized such an instruction."

And in the more recent case of *Reed v. Commonwealth*, 30 Ky. Law Rep., 1212, the same principal was approved in a most elaborate and exhaustive opinion by Judge Settle.

The objection to the instructions given is well taken. The instructions in every case should present the law of the case as warranted by the particular facts proven. No instruction should be given based upon any theory which is not supported by some evidence, and certainly an instruction should not be given upon any theory where all of the evidence in the case tends to show that the converse is true.

In the case at bar appellant was charged with having cut and stabbed deceased, from the effects of which he died. There was not a particle of proof offered which tended to show that she did so; on the contrary there was positive proof offered which tended to show that the cutting was done by her son. No instruction, therefore, should have been given based upon the idea that she herself did the cutting, hence, instructions one and three are superfluous.

The instruction on self-defense is also objectionable in that it fails to submit to the jury the idea that if at the time he did the cutting Granville Steely believed and had reasonable grounds to believe that either he or his mother were in danger of suffering death or some great bodily harm at the hands of deceased, then he had the right to use such means as seemed necessary under the circumstances, as they appeared to him, to repel such threatened bodily harm or danger to himself or his mother. Certainly if the conduct of deceased at that time was such as to justify Granville Steely in the belief that deceased was then about to inflict upon his mother or himself great bodily harm, he should go acquit on the ground of self-defense, and, if Granville Steely is justified and excused for cutting deceased, appellant should likewise be excused for having been present urging and advising him to do so.

Upon a re-trial of the case, if the evidence introduced is substantially the same as that offered upon the last trial, the court will give the following instructions:

1.

"If you believe from the evidence beyond a reasonable doubt that Granville Steely, in Whitley county, Kentucky, before the finding of the indictment herein, willfully, feloniously and with malice aforethought, and not in the necessary, or to him apparently necessary, defense of himself or his mother, with a knife or dirk, a deadly weapon, cut, stabbed and wounded one Martin B. Snyder, from the effects of which cutting, stabbing and wounding, the said Snyder then and there, presently died, and if you further believe from the evidence, beyond a reasonable doubt, that at the time he did so the defendant, Sarah Steely was then and there present willfully, feloniously and with malice aforethought, and not in her necessary or to her apparently necessary, self-defense, counseling and advising the said Granville Steely to do said cutting, stabbing and wounding, or aiding or assisting the said Granville Steely in doing said cutting, stabbing and wounding, then, in that event, you should find the said Sarah Steely guilty, as charged in the indictment, and

fix her punishment at confinement in the State penitentiary for life, or at death, in your discretion.

2.

"If you believe from the evidence in this case beyond a reasonable doubt that Granville Steely, in Whitley county, Kentucky, and before the finding of the indictment herein, did unlawfully, willfully, feloniously in sudden affray, or in sudden heat or passion, without previous malice, and not in the necessary, or to him apparently necessary, defense of himself or his mother, cut, stabbed, and wounded Martin B. Snyder with a dirk or knife, a deadly weapon, from which cutting, stabbing and wounding the said Snyder then and there presently died, and if you shall further believe from the evidence beyond a reasonable doubt that at the time the said Granville Steely so cut, stabbed and wounded the said Martin B. Snyder, the said Sarah Steely was then and there present, unlawfully, willfully, feloniously in sudden affray, or in sudden heat of passion, and not in her necessary, or to her apparently necessary, self-defense, counseling and advising the said Granville Steely to do the said cutting, stabbing and wounding, or aiding or assisting the said Granville Steely in doing said cutting, stabbing and wounding, then you should find the said Sarah Steely guilty of voluntary manslaughter, and fix her punishment at confinement in the State penitentiary for any length of time not less than two years nor more than twenty-one years, in your discretion.

3.

"Although you may believe from the evidence beyond a reasonable doubt that the defendant, Sarah Steely has been proven guilty, yet, if you entertain a doubt as to the degree of her guilt, you should give her the benefit of the doubt, and find her guilty of voluntary manslaughter, as defined in instruction number two.

4.

"Although you may believe from the evidence beyond a reasonable doubt that Granville Steely cut, stabbed and wounded Martin B. Snyder, from which cutting, stabbing and wounding, he then and there presently died, and that the defendant, Sarah Steely was then and there present, aiding, advising and counseling the said Granville Steely to cut, stab and wound the said Snyder, yet, if you shall further believe from the evidence that at the time the said Granville Steely so cut, stabbed and wounded the said Snyder, either the defendant, Sarah Steely, or her son, Granville Steely, had reasonable grounds to believe and in good faith did believe that the said Snyder was then and there about to take her life or inflict upon her some great bodily harm, then the said Granville Steely had the right to use any means at his command that were necessary, or to him apparently necessary, to protect the life of defendant, Sarah Steely, or to ward off the then impending, or to him apparently impending danger; then the defendant, Sarah Steely, under such circumstances, had the right to advise and counsel her son Granville Steely, to do so, and you should find the defendant, Sarah Steely, "not guilty" on the ground of self-defense and apparent necessity.

5.

"If, upon the whole case, you entertain a reasonable doubt as to whether or not the defendant has been proven guilty, you should find her 'not guilty.'"

Certain other objections are made by counsel for appellant in their brief, but as these questions can not arise on another trial we deem it unnecessary to consider them.

For the reasons indicated the judgment is reversed and cause remanded, for a new trial consistent with this opinion.

JONES' ADM'R v. JONES' ADM'X, &c.

(Filed October 2, 1908—Not to be reported.)

Vendor and Purchaser—Sale with Mortgage Back—Failure to Pay—Remedy of Vendor—A sale of a stock of goods and fixtures, used in operating a restaurant, for \$800, to be paid in installments of \$20 per month, and in default of any payment the whole stock to belong to the vendor, must be considered as an absolute sale with mortgage back, and the vendor's remedy on default of payment was a suit in equity to enforce his mortgage lien, and have the property subjected to the balance of the purchase price.

J. B. Paxton for appellant.

P. M. McRoberts for appellees.

Appeal from Lincoln Circuit Court.

Opinion of the court by Judge Lassing, reversing.

In June, 1905, L. R. Jones sold to his son, J. T. Jones a stock of goods and fixtures, used in operating a restaurant and soda fountain, for \$800, to be paid in monthly installments of \$20 per month. The contract of sale provided that in the event of default of any monthly payment the whole purchase price was to become due, and L. R. Jones thereupon had the right to resume possession, and treat any installment that might have been paid as rent. It further provided that the entire stock was to remain in the possession of L. R. Jones until the purchase price was paid, and when so paid it was then to become the property of J. T. Jones. It further provided that J. T. Jones should keep and maintain the stock of goods up to or above its standard of excellence at the date of sale.

Both contracting parties died before the institution of this suit. Appellant was appointed administrator of L. R. Jones, and Woodie S. Jones, wife of J. T. Jones, was appointed administratrix of his estate. The administrator of L. R. Jones filed suit to recover of Mrs. Woodie S. Jones, individually and in her capacity as administratrix, the purchase price of the stock of goods, to-wit: \$800 less \$480.65, alleged to have been previously paid.

In the first paragraph of the petition it is alleged that the sale was conditional, that the covenants thereof had been broken, in that the decedent, J. T. Jones, had failed to pay any installment as it fell due, and that the defendant, Mrs. Woodie S. Jones, had wrongfully converted all of the articles named in the contract to her own use, and he prayed judgment against her for the purchase price, less the credit to which the same was entitled, as above indicated.

In the second paragraph plaintiff charged that the administratrix, Mrs. Woodie S. Jones, had committed waste, and converted the property to her own use, and failed to account for it as administratrix, and he asked that, in the event the court should construe the contract to be an absolute sale with mortgage back, that he should be given judgment against administratrix and her bondsman for the amount due. To each paragraph of the petition, a demurrer was sustained, and plaintiff declining to plead further, his petition was dismissed, and he appeals.

The contract, which is the basis of this litigation, is as follows:

"This contract of agreement made and entered into this 6th day of June, 1905, by and between L. R. Jones, party of the first part, and J. T. Jones, party of the second part, both parties of Lincoln county, Kentucky.

Witnesseth: Whereas the party of the first part has this day sold to J. T. Jones, party of the second part, all his right, title and interest

in and to a restaurant, stock of goods, furniture and fixtures, soda fountain, show cases, and all other property contained in store room on the south side of Main street in Stanford, Kentucky, for the sum of \$800. Said sum is to be paid as follows: \$20 to be paid on the 15th day of October, 1905, from this date, and \$20 on the 15th day of each month thereafter. and in addition thereto the said second party is to pay the interest on all sums remaining unpaid on the 6th day of each month, at the rate of six per cent. per annum or half per cent. interest per month on all sums remaining unpaid. In the event the second party should default on any monthly installment with the accumulated interest, then in that event the entire sums remaining unpaid shall become due and payable, and the first party may at once assume charge and resume possession of the entire stock of goods.

"The monthly payments herein are only to be in the way of rental and the entire stock, &c., aforesaid are to remain in the possession of the first party, until the entire \$800, with interest is paid, and when so paid the second party becomes the owner thereof, and not till then.

"The second party agrees to keep up the stock in as good or better condition as when bought, shall he fail in this particular, then the entire sum becomes due and payable. It is the distinct understanding that the business is to be run in the name of J. T. Jones the second party hereto, and in no event and in no way is the first party hereto, L. R. Jones to be liable for any indebtedness that first party may in any way incur."

Similar contracts have frequently been before this court, and the rule announced by Justice Story has been followed, to-wit:

"Wherever a conveyance, assignment, or other instrument transferring an estate, is originally intended between the parties as a security for money, or for any other incumbrance, whether the intention appear from the same instrument or from any other, it is always considered, in equity, a mortgage."

In the case of Baldwin & Company v. Crow, &c., 86 Ky., 679, Baldwin & Company had sold to a man named Dennis, a piano, for which Dennis had executed to them three notes for \$150 each, payable in six, twelve and eighteen months. Each of said notes contained the following provision:

"This note is of a series given for the purchase of the instrument mentioned below, the conditions of which purchase are, that said instrument remains the property of D. H. Baldwin & Company until all notes given for the instrument are paid, and in default of payment of any of said notes at maturity, or at any time after such default, before accepting payment of amount thus due, or in case said instrument, before payment in full, is removed from Nicholasville, Kentucky, without written consent of D. H. Baldwin & Co., they may receive possession of said instrument without any liability on their part to refund any money previously paid on account of said purchase. Loss in case of fire to be borne by me.

"A. J. DENNIS."

It will be observed that the contract in that case was very much like the one in the case at bar, and the court there said:

"It is manifest the object of the contract under consideration was to secure payment of the agreed purchase price, and it should, therefore, be regarded as an absolute sale and mortgage back, and such has been the uniform ruling of this court in similar cases."

No contrary rule has ever been announced by this court.

Applying this rule to the case at bar, the contract must be considered to be an absolute sale with mortgage back, hence, appellant's remedy was a suit in equity to enforce his mortgage lien, and have

the property subjected to the payment of the balance of the purchase price due thereon.

The first paragraph of the petition alleged a default on the part of the purchaser in the payment of the monthly installments, which default, according to the terms of the contract, precipitated the maturity of the entire debt. It is also alleged that the defendant, Mrs. Woodie S. Jones, had taken all of said property, every article thereof, and converted it to her own use, and he asked that he be given judgment against her for the balance of the debt due his intestate. This paragraph of the petition stated a good cause of action against the defendant, for the demurrer admits that she was wrongfully in the possession of the mortgage property, viz: not an innocent purchaser for value and, hence, she was answerable for the return of the property or the value thereof at the election of the plaintiff.

The suit should have been upon the equity side of the docket and, in the absence of a motion to transfer it, the court should have done so on its own motion.

Upon its return the case should be transferred to the equity docket, and either party permitted to amend his pleading, and appellant permitted to subject the property covered by the mortgage to the satisfaction of the balance, if anything, due upon the purchase price thereof.

Judgment reversed and cause remanded, for further proceedings consistent with this opinion.

WEISINGER, &c. v. SOUTHERN RY. CO. IN KY.

(Filed October 6, 1908—To be reported.)

1. Carriers—Shipping Live Stock—Designation of Car—Duty of Carrier—Where a shipper takes live stock to a railroad station for shipment, it is the duty of the railroad company to designate the car in which the stock should be loaded, and it does not perform its full duty merely by using ordinary care.

2. Same—Shipper Loading Without Inquiry—Risk Assumed—Direction of Company—Injury by Removal—Liability of Company—If a shipper without first having made inquiry as to the car in which his stock is to be loaded, should load it in the wrong car, he would do so at his own risk. But if on his application the company designates the wrong car, it is liable for such damage which naturally results from removing the stock where such removal is regulated by the company.

Beard & Marshall and Muir Weisinger for appellants.

Willis & Todd for appellee.

Appeal from Shelby Circuit Court.

Opinion of the court by Wm. Rogers Clay, Commissioner, reversing.

Appellants, Harry Weisinger and son, are engaged in the business of farming and stock raising, and live about two miles from Shelbyville, Kentucky. On August 7th, 1907, they contracted with appellee to furnish them a car suitable for shipping fine hogs from Shelbyville to Lexington, Kentucky, where they were to be exhibited at the Blue Grass Fair. Appellants had six hogs which they desired to ship, and arrangements were made by which these hogs were to be placed in the same car in which one Frank Smith proposed to

ship his hogs appellants to have the use of one-half of the car and Smith the use of the other half.

On August 10th, 1907, about 8:30 p. m., appellants' six hogs were brought to appellees' depot in Shelbyville for the purpose of being loaded for shipment to Lexington. Smith, who was to use the other half of the car, reached the depot shortly before the employees of appellants. The latter, upon arriving at the depot, went immediately to appellee's agent for the purpose of obtaining directions as to which car the hogs should be loaded in. According to the testimony for appellants, appellee's agent designated as the car in which the former's hogs were to be shipped the car that was by Henry Moxley's car and in which Smith had already loaded his hogs. The testimony of appellee is to the effect that its agent stated to appellants' employees that their car was next to Moxley's car; that he had shown it to Smith's son, and that they would probably find him at that car. Appellants' employees then went to the car in which Smith had been loading his hogs, and proceeded to load their hogs in the same car. Shortly thereafter appellee's agent came to the car and notified appellants' employees that they had loaded their hogs in the wrong car; that it would be necessary for them to unload the hogs and place them in the car, which had been ordered for that purpose. Appellants' employees stated that it would be dangerous to remove the hogs at that time, and that they would only do so at the risk of the company. Appellee's agent says that he gave them the privilege of letting the hogs remain in the car in which they had been placed. This is denied by appellants' employees, who assert that they were required to remove them at the time. Among the six hogs which appellants' employees brought to the station for shipment was one fine, large boar weighing 600 or 700 pounds, and it is claimed the agent was notified that the removal of this boar would in all probability result in his death. The hogs were then unloaded and moved into another car soon thereafter the boar died.

Appellants instituted this action for the value of the hog, which the petition alleges was \$1,500, claiming that its death was due to the negligence and carelessness of appellee, its servants, agents and employees. Appellee denied any negligence on its part, and also pleaded contributory negligence on the part of appellants. The jury returned a verdict in favor of appellee. From the judgment based upon that verdict the appellants appeal.

Appellants ask a reversal upon three grounds: First, the verdict was contrary to the evidence; second, errors in instructions; third, the admission of incompetent testimony.

First. In view of the fact that the court has determined to reverse the judgment on other grounds, it will be unnecessary to set forth the evidence at length for the purpose of determining whether or not there is any merit in appellants' first contention.

Second. Appellants asked an instruction to the effect that it was the duty of the defendant to designate the car in which the stock was to be shipped, and if, by reason of the negligence of the defendant, the stock was loaded in the wrong car and had to be unloaded, and that such unloading and reloading caused the death of the hog, the jury should find for the plaintiffs the reasonable, vendible value of the hog. This instruction was refused. The court thereupon instructed the jury that it was the duty of the defendant and its agents to exercise ordinary and reasonable care under all the facts and circumstances of the case to properly indicate to the plaintiffs, or their agents, the car in which the hogs were to be loaded for transportation to Lexington; that it was also the duty of plaintiffs, or their agents, on the same occasion, to exercise ordinary and reasonable care under all the facts and circumstances of the case to ascertain, before proceeding to load their hogs, the proper

car in which the same should be loaded for transportation to Lexington, and to exercise ordinary and reasonable care to avoid loading their hogs in the wrong car; that if the jury should believe from the evidence that the defendant negligently failed to discharge the duties required of it in the instructions, and if by reason of any such negligence on its part the hogs of plaintiffs were loaded in the wrong car, so that the removal of them from the wrong car became or was necessary, and should further believe that the defendant, or its agent, negligently ordered the removal of the hogs, at a time or in a manner which in view of the condition of plaintiffs' hog in question in this case, would naturally or reasonably result in the death of said hog, the jury should find for plaintiffs, unless they believed from the evidence that the plaintiffs, or their agents, were themselves guilty of contributory negligence. Other instructions were given, which are not complained of.

We are of opinion that the above instruction does not present the law of the case. When a shipper appears at the station of a railroad company with live stock which he intends to load and ship in the latter's cars, it is the duty of the railroad company to designate the car in which the stock should be loaded. It does not perform its full duty merely by, using ordinary care. If the shipper, without first having made inquiry as to the car in which his stock is to be loaded, should load it in the wrong car, he would do so, of course, entirely at his own risk. But, if he first inquires of the railroad company and asks that the proper car be designated, and the latter designates the wrong car, it is liable for such damages as naturally result from the removal made necessary by the improper directions, where such removal is required by the company.

Upon the next trial, the court will instruct the jury as follows:

"No. 1. If you believe from the evidence that the defendant, or its agent, designated the car in which Frank Smith's hogs were loaded as the car in which plaintiffs should load their hogs, and that plaintiffs did load their hogs in said car, and that the defendant, or its agent, required plaintiffs to unload the hog in question and load him in another car, at a time when it was not reasonably safe to do so, and that plaintiffs' hog died as a result of such removal, you will find for plaintiffs the reasonable market value of the hog at said time unless you believe that plaintiffs failed to use ordinary care in removing and handling said hog, and that by reason thereof the death of the hog resulted.

"2. If, however, you believe that plaintiffs' hog was in such condition that he would have died notwithstanding such removal, or that defendant's agent gave plaintiffs the privilege of letting the hog remain in the car in which it was first loaded, until it could be safely removed or that the defendant did designate the proper car for plaintiffs to load their hog in, and that the plaintiffs were themselves negligent in not loading their hog in the car so designated or that the hog's death resulted from the careless and negligent manner in which it was removed and thereafter handled; then, in any one of these events, you will find for the defendant."

No. 3. Appellants insist that the court erred in permitting one J. M. Logan to testify that he heard a hog squealing as it passed his house on the night in question. The purpose of offering this testimony was to show that the hog was very hot at the time and would have probably died even though it had not been loaded in one car and subsequently removed to another. On the next trial this evidence should not be admitted unless the hog that squealed is sufficiently identified as that belonging to appellants.

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October 15, 1908

No. 9

COURT OF APPEALS OF KENTUCKY.

HILL, &c. v. PETTITT, &c.

(Filed October 6, 1908—Not to be reported.)

Appeals—Jurisdiction of Appellate Court—An attorney for petitioners in a proceeding in the county court, under the drainage law, moved the court to allow him a fee of \$250, which the court refused and allowed him \$100, from which he appealed to the circuit court, and thence to this court. Held—That as the fee sought to be recovered was only \$250 and the lower court allowed \$100, the amount in controversy as to appellant is only \$150 of which sum this court has no jurisdiction.

R. G. Hill for appellants.

J. R. Hays for appellees.

Appeal from Daviess Circuit Court.

Opinion of the court by Judge Carroll, dismissing appeal.

This was a proceeding under the drainage law of the State found in the Kentucky Statutes, section 2380.

The appellants here, first appealed from the county court to the circuit court. The order of the county court appealed from sets out that R. G. Hill moved the court to allow him an attorney's fee of \$250 as attorney for the petitioners, to be taxed as costs and apportioned among the parties. This motion was objected to, and upon hearing the matter, the county court allowed Hill \$100, and further adjudged that this sum, together with the remainder of the costs in the action, be apportioned among the parties—then follows the names of the parties and the respective amount that each is directed to pay—the judgment further providing that if the amounts charged to each party were not paid by a designated day they should be placed in the hands of the sheriff of Daviess county for collection. To so much of this order as fixed his fee at \$100, in place of \$250, R. G. Hill appealed to the circuit court. In the circuit court, the following judgment, which is the basis of the appeal to this court, was rendered:

"This action coming on to be heard upon the pleadings and proof, and the court, after hearing argument and being fully advised, adjudges that R. G. Hill, as attorney for the petitioners herein, be and he is allowed a fee of \$100; and the court further adjudges that the costs of the action was properly assessed; and overrules the objection to the manner of assessing the same; to all of which the petitioners object and except and pray an appeal to the Court of Appeals, which is granted."

Unless there is something in the record aside from the question concerning the attorney's fee, this court has no jurisdiction of the appeal. Jurisdiction is denied where the amount in controversy in cases for the recovery of money or personal property is less than \$200. As the attorney's fee sought to be recovered was only \$250, and the lower court allowed \$100, it is clear that the amount in controversy as to appellant is only \$150. Therefore this court would have no jurisdiction.

Appellants complain of the manner in which the costs in the action were apportioned between the parties. The record discloses the amount of costs each party is adjudged to pay, but we are not informed as to what each should pay if the contention of appellant was sustained. To put it in another way, appellant complains that the appellees are credited by amounts to which they are not entitled, the result being that they are not required to pay such costs as they should be; but how much costs they should be required to pay, is not stated. Therefore, we are unable to determine whether or not the judgment of the lower court is correct. Nor can we tell what the amount, if any, in controversy is outside of the attorney's fee.

It results from these conclusions that this court has no jurisdiction of the appeal and it must be dismissed, and it is so ordered.

LOUISVILLE & NASHVILLE R. R. CO. v. MELTON.

(Filed October 7, 1908—To be reported.)

Benjamin D. Warfield and Waddill & Dempsey for appellant.

Clay & Clay and Gordon, Gordon & Cox for appellee.

Appeal from Hopkins Circuit Court.

Judge Barker delivered the following dissenting opinion:

I find myself unable to concur in the opinion affirming the judgment in this case, and the duty I owe myself, as well as that due the appellant, constrains me, much against my natural inclination, to state the reasons for dissenting from the conclusion reached by a majority of my brethren.

On March 2, 1905, a carpenter's force of the Louisville & Nashville Railroad Company were constructing coal chutes near, but not upon, the tracks or roadway of the railroad company, at the mines of the Ingle Coal Company, at or near Howell, Indiana. The force consisted of seven laborers, including the foreman, one W. C. Shrode, and appellee Melton. In raising, with an ordinary pulley, block and tackle, a bent of timber weighing about one thousand pounds from a partly horizontal to an upright position, the bent fell by reason of a latent defect in the welding of one of the links of the chain, with which one of the pulley blocks was temporarily attached to the frame-work. In falling the bent fell upon Melton and produced a

concussion of his spine, resulting in partial paralysis of his lower extremities. For this injury Melton brought his action against the railroad company in the Hopkins Circuit Court, and elected to proceed under the statute of the State of Indiana, commonly known as the "Employers' Liability Act." A trial of the action resulted in a verdict for compensatory damages in the sum of twenty-two thousand dollars.

As Melton's cause of action is rested upon the Indiana statute regulating the liability of corporations for injuries received by their employes, the first question with which we are confronted is, whether or not that act, as construed by the majority opinion, is constitutional, or whether, on the contrary, it is inimical to that provision in the fourteenth amendment of the Federal Constitution, which guarantees to all the equal protection of the law, or, as has been said, the protection of equal laws. As the act in question is fully set out in the opinion of the court, it is not necessary to incorporate any part of it here. It is deemed sufficient to say that it prescribes a different rule of liability for those employers who may be brought within its purview from that imposed by the laws of Indiana upon other employers for injuries occurring to their employes, and unless it can be differentiated by a reasonable classification from those laws, it must be held violative of the Federal Constitution.

It is earnestly contended by counsel for appellant, that the Indiana court of last resort has construed this act to be applicable only to those employers operating railroads; and further, that it has limited its application to injuries occurring to employes engaged in the hazard of the actual operation of the railroad at the time they were hurt. Whether this be so or not, I shall not now investigate. This court has enforced the act as applying to injuries occurring to all railroad employes, whether they be at the time engaged in the active operation of the railroad as such, or whether they are engaged in what may be termed collateral occupations, among which may be included all those occupations which are merely auxiliary to the active operation of the railroad and not subject to the extreme hazard which exists in the active carrying forward of its operation. This conclusion makes it necessary to inquire whether the act, as construed, is or not inimical to the equality clause of the Federal Constitution.

As said before, it is not permissible, under the Federal Constitution, to impose arbitrarily upon one class burdens which are not imposed upon the community in general; nor may a Legislature arbitrarily impose a liability upon one class of employers which is not imposed upon others. Undoubtedly, the State may regulate the liability of employers to their employes if the classification for regulation be based upon just and reasonable principles; but it may not arbitrarily select one class whose liability is to be ascertained by rules more stringent than apply to employers generally doing a similar business.

This principle has nowhere been more clearly and forcibly expressed than by the Supreme Court of the United States in *G. C. & S. F. R. Co. v. Ellis*, 165 U. S., 150, where the question we have in hand is discussed. In the opinion, it is said:

"But it is said that it is not within the scope of the fourteenth amendment to withhold from States the power of classification, and that if the law deals alike with all of a certain class, it is not obnoxious to the charge of a denial of equal protection. While, as a general proposition, this is undeniably true (citing many cases), yet it is equally true that such classification can not be made arbitrarily. The State may not say that all white men shall be subject-

ed to the payment of the attorney's fees of parties successfully suing them and all black men not. It may not say that all men beyond a certain age shall be alone thus subjected, or all men possessed of a certain wealth. These are distinctions which do not furnish any proper basis for the attempted classification. That must always rest upon some difference which bears a reasonable and just relation to the act in respect to which the classification is proposed, and can never be made arbitrarily and without any such bases. * * *

"But arbitrary selection can never be justified by calling it classification. The equal protection demanded by the fourteenth amendment forbids this. No language is more worthy of frequent and thoughtful consideration than these words of Mr. Justice Matthews, speaking for this court in *Yick Wo v. Hopkins*, 118 U. S., 368-369: 'When we consider the nature and the theory of our institutions of government, the principles upon which they are supposed to rest, and in view of the history of their development, we are constrained to conclude that they do not leave room for the play and action of purely personal and arbitrary power.' The first official action of this nation declared the foundation of government in these words: 'We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain inalienable rights, that among those are life, liberty and the pursuit of happiness.' While such declaration of principles may not have the force of organic law, or be made the basis of judicial decision as to the limits of right and duty, and while in all cases reference must be had to the organic law of the nation for such limits, yet the latter is but the body and the letter of which the former is the thought and the spirit, and it is always safe to read the letter of the Constitution in the spirit of the Declaration of Independence. No duty rests more imperatively upon the courts than the enforcement of those constitutional provisions intended to secure that equality of rights which is the foundation of free government. * * *

"It is apparent that the mere fact of classification is not sufficient to relieve a statute from the reach of the equality clause of the fourteenth amendment, and that in all cases it must appear not only that a classification has been made, but also that it is one based upon some reasonable ground—some difference which bears a just and proper relation to the attempted classification—and is not a mere arbitrary selection. Tested by these principles, the statute in controversy can not be sustained."

Upon the same subject, the Supreme Court, in *Connolly v. Union Sewer Pipe Co.*, 184 U. S., 540, said:

"The difficulty is not met by saying that, generally speaking, the State when enacting laws may, in its discretion, make a classification of persons, firms, corporations and associations, in order to subserve public objects. For this court has held that classification 'must always rest upon some difference which bears a reasonable and just relation to the act in respect to which the classification is proposed, and can never be made arbitrarily and without any such basis. * * * But arbitrary selection can never be justified by calling it classification. The equal protection demanded by the fourteenth amendment forbids this. * * * It is apparent that the mere fact of classification is not sufficient to relieve a statute from the reach of the equality clause of the fourteenth amendment, and that in all cases it must appear not only that a classification has been made, but also that it is one based upon some reasonable ground—some difference which bears a just and proper relation to the attempted classification—and is not a mere arbitrary selection.'"

To the same effect are *Cotting v. Kansas City Stock Yards Company, &c.*, 183 U. S., 79, and *Ballard v. Mississippi Cotton Oil Com-*

pany, 81 Miss., 507, 62 L. R. A., 407; Cooley on Constitutional Limitations, 7th edition, pages 560-563.

In view of the foregoing authority, the question recurs: Does the statute under discussion, as construed in this case, afford a reasonable or just classification when it establishes one rule of liability for injuries occurring to all railroad employes without regard to whether they are engaged in the hazard of railroad operation, leaving the liability of all other employes subject to a less stringent rule of liability? It is a matter of common knowledge that only a small per cent. of a railroad corporation's employes are engaged in its active operation. Outside of the men operating the railroad, there is a very large class of employes who are engaged in mere clerical work, and who have no more to do with the actual operation of the railroad as such, than the clerks and bookkeepers of any mercantile establishment. Railroads employ many lawyers, surgeons and clerks; some of them keep large forces of men engaged in cutting cross-ties in the forests, or in the breaking of stone for ballast, and in mining coal for the use of the engines. All are engaged in precisely similar business to that carried forward by other employes who are confessedly not within the purview of the act. The appellee, himself, at the time he was hurt was engaged as a carpenter in building a coal chute or tipple at the Ingle Coal Mines, near or on the railroad's right of way. It does not appear whether this chute was for the benefit of the railroad or the mining corporation; but I shall assume, in order to eliminate any question of fact, that the chute was being constructed for the purpose of coaling the railroad's engines. Now, let us suppose that the coal company had had a force of carpenters building coal chutes by the side of those being built by appellee, for the purpose of putting its coal on the cars for shipment, and that a similar accident had happened at the same time to one of its employes; the employe of the coal mining corporation, if he had sued, would have been forced to ground his action upon the common law prevailing in Indiana, while if the majority opinion be sound, appellee could maintain his action under the statute. Assuming, for the purpose of the argument, that the two accidents were caused by identically the same mishap, we would have different rules regulating the remedy of the injured persons, although the occupation of each was precisely the same. Such illustrations could be multiplied indefinitely; but they would throw no additional light upon the discussion. The appellee, in building the chute by the side of the railroad, was subject to no more hazard than would have been the employes of the coal company, had they been engaged in building chutes for their employer. It seems to me utterly fallacious to say that the statute, when made to apply to the cases of those employes who are hurt in collateral occupations, does not prescribe an arbitrary rule of liability for railroad corporations for injuries to their employes, from which other employes doing identically the same business are exempt.

The view I have expressed above is supported by very high authority. In the case of *Kline v. Minnesota Iron Co.*, 93 Minn., 63, 66, the Supreme Court of Minnesota, in construing a statute of that State identical in principle with the one under discussion, said:

"This statute has been before the court in numerous cases, and we have uniformly held that it was intended by the Legislature to apply to 'railroad hazards,' and not to railroads as such; that the character of the employment was the test to be applied in determining its validity, and not the character of the employer. It was first construed in *Lavallee v. St. Paul, &c., R. Co.*, 40 Minn., 249, 41 N. W., 974, where it was held that, if the statute be held to apply to railroad corporations, as such, it would be invalid and unconsti-

tutional as class legislation, for it is beyond the power of the Legislature to single out a particular class of employers, and impose upon them a distinct rule of liability for personal injuries; but, if construed to apply to the character of the employment, the legislation was valid. It was accordingly held in that case that the Legislature intended that it should apply to the hazards and dangers peculiar to the use and operations of railroads, and the decision there made has been followed in all subsequent cases."

In the case of *Deppe v. Chicago, &c., R. Co.*, 36 Ia., 52, 55:

"But if the statute be so construed as to apply to all persons in the employ of railroad corporations without regard to the business they were employed in, then it would be a clear case of class legislation, and would not apply upon the same terms to all in the same situation, and hence would be unconstitutional, and manifestly so. To illustrate, suppose a railroad company employ several persons to cut the timber on its right of way where it is about to extend its road, and the land owner employs a like number of persons to cut the timber on a strip of equal length alongside such right of way. If one of each set of employes shall be injured by the negligence of a co-employee, and the employee of the railroad company can, under the statute, maintain an action against his employer and the other can not, then it is clear that the law does not apply upon the same terms to all in the same situation. The law, then, would not have uniform operation, but would be violative of the Constitution just as much as a law that should prescribe under the same circumstances different liabilities for merchants, for mechanics, and for laborers. The manifest purpose of the statute was to give its benefits to employes engaged in the hazardous business of operating railroads. When thus limited it is constitutional; when extended further it becomes unconstitutional."

To the same effect is *Jemming v. G. N. R. Co.*, 104 N. W., 1079; *R. Co. v. Pontius*, 52 Kan., 264; *Johnson v. St. Paul & Duluth R. Co.*, 8 L. R. A., 419; *Lavallee v. St. P., M. & M. R. Co.*, 40 Minn., 249; *Ballard v. Mississippi Cotton Oil Co.*, 81 Miss., 507.

I can not agree to the assumption that the Supreme Court of the United States, in *Tullis v. Lake Erie & Western Railroad*, 175 U. S., 348, upheld the constitutionality of the act in question as construed in the opinion. An examination of the opinion in the case of the *Bedford Quarries Co. v. Bough*, 80 N. E., 529, and the various opinions reviewed therein, will show that the Supreme Court of Indiana limited the application of the statute to the injuries of railroad employes engaged in the hazard of the active operation of the road; and it was this construction that was upheld by the Supreme Court in the case referred to above.

The opinion of the Supreme Court of the United States and that of the Supreme Court of Indiana show that these courts both held that the Indiana statute, as construed by the latter court, was practically the same as the statutes of Kansas and Iowa, as construed by the supreme courts of those States; these statutes were construed without doubt to apply only to the hazard of railroading, and it was expressly said if they had been intended to apply to all employes of railroads they would be violative of the Federal Constitution. (*Deppe v. Chicago, &c., R. Co.*, supra; *Atkinson v. Chicago, &c., R. Co.*, 106 Ia., 54, 56; *Railroad Co. v. Pontius*, 52 Kansas, 264; *Railway Co. v. Mackey*, 127 U. S., 205.)

To show that the Supreme Court of Indiana was of opinion that the statute under discussion, as construed by it and sustained by the Supreme Court of the United States, is identical with the statutes of Kansas and Iowa, as construed by the supreme courts of those States, I copy the following excerpt from the opinion in *Bedford Quarries Co. v. Bough*, supra:

"The Employers' Liability Act of Kansas was the same as the Iowa act above set out. (Mo. Pac. R. Co. v. Haley, Adm'r., 25 Kan., 35, 53), and the Supreme Court of that State, following the construction given by the Iowa Supreme Court, held in 25 Kan., supra, page 53, that it 'embraced only those persons exposed to the hazards of the business of railroading.' (Missouri, &c., R. Co. v. Medaris, 60 Kansas, 151, 154, 155; Mo. Pac. R. Co. v. Mackey, 33 Kan., 298, 302.)

"It was held, in effect, by this court in Pittsburg, &c. R. Co. v. Montgomery, 152 Ind. 1, 8-14, that the Employers' Liability Act of this State was capable of severance, by putting railroads in a class by themselves, and that such classification was proper on account of the dangerous and hazardous business of the operation of railroads, and that so construed, said act, as applied to railroads, was not in violation of either said section 23, of article 1, of the Constitution of this State, or of the fourteenth amendment of the Constitution of the United States, even if unconstitutional as to the other employers and employes mentioned.

"In Tullis v. Lake Erie, &c., R. Co., 175 U. S., 348, it was held that this court in the Montgomery case treated the Employers' Liability Act as practically the same as said statutes of Iowa and Kansas, and that so construed, it did not arbitrarily classify railroads by name, but with regard to the business in which they were engaged, which was a proper classification on account of the dangerous and hazardous business of operating railroads, citing Mo. Pac. R. Co. v. Mackey, 127 U. S., 205; Minneapolis, &c., R. Co. v. Herrick, 127 U. S., 210, which sustained the constitutional validity of a like statute.

"In Pittsburg, &c., R. Co. v. Lighteiser, 166 Ind., —, 78 N. E., 1033, 1041, 1043, this court approved the Montgomery case, gave the Employers' Liability Act, as applied to railroads, practically the same construction as had been given to the statutes of Iowa and Kansas on that subject, and held that putting railroads in a class by themselves was proper classification on account of the dangerous and hazardous business of operating railroads, and that such classification is not based upon the difference in employers, but upon the difference in the nature of the employment."

Nor can I agree to the statement in the opinion, that Melton was engaged in the hazard of the operation of the railroad, because he was building a coal chute and coal is necessary to the operation of a railroad. The chute was entirely separated from the railroad's right of way, and the carpenters who were building it were in no danger from anything done in its operation. Railroads, in order to be operated, must have cross-ties and ballast, they must have clerks, bookkeepers and auditors to keep their accounts, lawyers to defend their suits, and telegraphers to despatch their trains; but none of the men employed in these occupations can be said to be engaged in the hazard of the operation of the railroad.

Believing that the statute under which this suit was brought violates the equality clause of the Federal Constitution, and is, therefore, void, I can not concur in the opinion of the court.

I am authorized to say that Judge Lassing concurs in this dissent.

CLARK, &c. v. NORTHERN COAL & COKE CO.

(Filed October 1, 1908—Not to be reported.)

1. Deeds—Name of Grantee—It is not necessary that a grantee in a deed be mentioned by name. If the designation or description is sufficient to identify the person intended, the deed is effectual.

2. Same—Construction of Deeds—A deed, like any other instrument, must be construed to effectuate the intention of the parties, and it seems to have been intended by the makers of the deed herein that the title to both the land and personalty should vest in Russell Pinson.

P. B. Statton and C. M. Whitt for appellants.

York & Johnson for appellee.

Appeal from Pike Circuit Court.

Opinion of the court by Judge Hobson, affirming.

This appeal involves the proper construction of the following deed:

"This deed made this 9th day of February, 1876, between John King and Malissa King, of Pike county, and Ann Adams, heirs of Henry Pinson, deceased, of the county of Pike and State of Kentucky of the first part, and Russell Pinson and wife, heirs of Henry Pinson, deceased, of the second part; that the said Russell Pinson, is to take care of his mother during her natural life, and is to have the following described tract of land:

(Here follows description.)

"And the said Russell Pinson is to have all the personal property belonging to said Henry Pinson, deceased, for taking care of Mary Pinson, his mother. I do hereby acknowledge my right of dower to the above tract of land.

"In testimony whereof the said John King and Malissa King, Henderson Adams and Ann Adams of the first part have hereunto subscribed their names the day and year first written herein. The parties of the first part do hereby warrant generally the title to the property hereby conveyed.

"In testimony whereof, the parties of the first part have hereunto subscribed their names the day and year aforesaid.

"ANN ADAMS,

"JOHN KING,

her

"MALISSA x KING."

mark

About the year 1886, Russell Pinson's wife died; and in 1892 he conveyed the coal and other minerals on and under the land to the remote grantor of the Northern Coal & Coke Company. This action was brought by the children of Russell Pinson and wife against the coal and coke company, claiming that under the deed their mother took an undivided half interest in the land, and that this at her death descended to them. The circuit court sustained a general demurrer to the petition and they appeal.

It is not necessary that a grantee in a deed be mentioned by name. If the designation or description is sufficient to identify the person intended, the deed is effectual. Thus a deed to a man and his wife or to a man and his children is good as to the wife or children, although their names are not given. A deed, like any other instrument, must be construed to effectuate the intention of the parties and the proper construction of the deed must depend upon all its provisions. While Russell Pinson and wife are named in the caption of the deed in question as "of the second part," the wife is not named in any other part of the deed than in the caption; and in the body of the deed it is provided that Russell Pinson is to take care of his mother during her life and is to have the tract of land. It is also provided that he is to have all of the personal property

for taking care of Mary Pinson, his mother. While the instrument is awkwardly drawn, when taken as a whole, we think it was manifestly intended to vest the title to both the land and the personal property in Russell Pinson. The deed is made evidently between the heirs of Henry Pinson, deceased. Russell Pinson was an heir of Henry Pinson; his wife was not. The sum of the instrument is that the other heirs of Henry Pinson vest in Russell Pinson the title to the personal property and this piece of land, and that he is to take care of his mother during life. The consideration of the deed moved from him; it did not move from his wife so far as appears from the instrument. She was under the disability of coverture and could make no contract. The deed does not show that any obligation was imposed upon her. Upon the whole instrument we conclude that the word "wife" was used in the caption by inadvertence, or was left there by inadvertence; that the deed was intended to embody a family settlement between the Pinson heirs; that no obligation was assumed by her; and no part of the property was vested in her.

Judgment affirmed.

COMMONWEALTH, FOR USE, &c. v. CATLIN, &c.

(Filed September 29, 1908—To be reported.)

Judicial Sales—Infant's Real Estate—Code Provisions—Lien of Infants on Land—Payment by Purchaser to Commissioner—Effect—Under section 497, Civil Code, providing that "in an action mentioned in sub-section 2, of sec. 490, the share of an infant * * * shall not be paid by the purchaser, but shall remain a lien on the land, bearing interest until the infant becomes of age, or until the guardian of the infant * * * executes bond, as required by section 493, of the Code," where a purchaser of land belonging to infants, at a judicial sale, paid the purchase price to the commissioner of the court, who squandered it, in an action by a guardian subsequently appointed for the infants against the purchaser and commissioner and his surety, Held—1st. The court would have had no authority to direct payment except in accordance with the letter of the statute, and the payment by the purchaser on his own motion was unauthorized and void so far as the interest of the infants was concerned. 2d. The court correctly sustained the demurrer of the commissioner and his surety to the petition, but erred in sustaining that of the purchaser of the land at the judicial sale, and his subsequent vendees.

Finley Shuck for appellants.

John McChord for appellees.

Appeal from Marion Circuit Court.

Opinion of the court by Judge Barker, reversing.

In 1892 W. D. Catlin died, intestate, domiciled in Marion county, Kentucky, leaving a wife and seven children, two of whom were infants of tender years. His son, P. D. Catlin, was appointed and qualified as administrator of the estate. The personal property was sufficient to pay off all the indebtedness left by the decedent, and his real property being indivisible without material impairment of its value, the administrator instituted an action in the Marion Circuit Court, under sub-section 2, of section 490, of the Civil Code of Practice, for a sale and division of the proceeds among the heirs.

All of the children and the widow of W. D. Catlin were made parties to this action, it being No. 2129, in the Marion Circuit Court. In this action such proceedings were taken and had that judgment was rendered, ordering a sale of the real property left by the decedent for division among his children, as prayed in the petition. The property, consisting of about one hundred and fifty-seven acres, which is described by metes and bounds in the petition, was sold by the commissioner of the Marion Circuit Court in pursuance of the judgment above referred to, and purchased by the appellant, P. D. Catlin, who executed purchase bonds payable to the commissioner, E. L. England. Afterwards the purchaser paid into court all his purchase money, including the shares of the two infants, W. T. Catlin and Nanie M. McCallip, although the infants had no statutory guardian to execute bond in accordance with the provisions of section 497, of the Civil Code. The shares of the infants, amounting to five hundred and nineteen dollars and fifty cents, were received by the commissioner, and, upon the order of the court, loaned out at interest, but afterwards the order loaning it out was set aside and the money collected back by the commissioner, who, it is alleged, has squandered it and left the State, becoming a non-resident. Thereafter the appellant, J. B. Hundley, was appointed and qualified as the guardian of W. T. Catlin and Nanie M. McCallip, executed the bond required by sections 497 and 493, of the Code, and then instituted this action, setting forth in his petition the facts recited in this opinion, seeking to enforce the statutory lien given by section 497, of the Code, to his wards to secure their part of the purchase money due for the sale of the land involved in this action, he also made E. L. England, the commissioner, and the United States Fidelity and Guaranty Co., surety on his bond, parties defendant, and prayed judgment against them. All of the defendants (appellees) filed general demurrers to the petition, which were sustained by the court, and the plaintiff (appellant), declining to amend, the petition was dismissed.

Section 497, of the Code, in so far as applicable to the case in hand, is as follows: "In the action mentioned in sub-section 2, of section 490, the share of an infant, or of a person of unsound mind, shall not be paid by the purchaser; but shall remain a lien on the land bearing interest until the infant becomes of age, or the person of unsound mind becomes of sound mind, or until the guardian of the infant, or the committee of the person of unsound mind, executes bond, as required by section 493."

The infants having no guardian to whom their respective shares of the purchase money could be paid, by the express terms of the Code these remain a lien upon the land, bearing interest, and the purchaser was prohibited from paying the money over to any one prior to the time they became of age, except to their statutory guardian after the execution of the bond required by section 493. The court would have had no authority to direct payment except in accordance with the letter of the statute, and the payment by the purchaser on his own motion was unauthorized and void so far as the interests of the infants are concerned. The rights of the infants are fixed and secured by the provisions of the Code cited, and the lien on the land could not be lifted or discharged except in the manner pointed out by the letter of the law. No order of the court made concerning the money wrongfully paid to the commissioner by the purchaser could affect the rights of the infants; and when the appellant qualified as their guardian, and executed the proper bond in accordance with the provisions of the Code, *supra*, he had a right to demand and receive the purchase money belonging to them and to enforce the statutory lien which secured it.

The provisions of the Code herein referred to were enacted for the express purpose of securing the interests of infants in their patrimonial estates, and to protect them from the very calamity which has occurred in this case. It would practically abrogate the law, enacted for the benefit of infants, to allow a purchaser to violate its provisions as is detailed in the petition in this case. This court has uniformly enforced the requirements of the Code for the protection of the interests of infants, and we see nothing in the case under consideration which warrants us in relaxing so salutary a rule. It follows, from the conclusion herein set forth, that the court correctly sustained the demurrers of the commissioner, England, and his surety, the guaranty company, but erred in sustaining that of the purchaser of the land at the judicial sale, and his subsequent vendees.

Judgment reversed, for further proceedings consistent herewith.

PARSON v. COMMONWEALTH.

(Filed September 29, 1908—Not to be reported.)

1. Impeachment of Witness—Exclusion of Testimony of One Convicted of Felony—The Code authorizes the impeachment of a witness' testimony by showing that he has been convicted of a felony, and appellant's rights were not prejudiced by the exclusion of the testimony of his witness that he had been pardoned. The pardon being the best evidence, oral testimony of its existence was properly excluded.

2. Commonwealth's Attorney—Improper Statements By—Action of Court in Excluding—When the court directs the jury not to consider improper remarks of the Commonwealth's attorney in argument, justice to the defendant requires nothing further in order to secure an impartial verdict.

Morrow & Morrow for appellant.

Jas. Breathitt and Tom B. McGregor for appellee.

Appeal from Pulaski Circuit Court.

Opinion of the court by Judge Barker, affirming.

Appellant, John Parson, was indicted by the grand jury of Pulaski county, charged with willfully and maliciously shooting at and wounding Marshall Lewis with intent to kill him. A trial of the case resulted in appellant's being found guilty, and his punishment fixed at confinement in the penitentiary for a term of five years. From the judgment based upon this verdict he is here on appeal.

It is not questioned that the evidence for the Commonwealth was sufficient to take the case to the jury, or claimed that any error of law was committed by the trial court in the written instructions given for their guidance in reaching a verdict. The defense of appellant was that he fired the shot, which wounded Lewis, in defense of his own life, and one of his witnesses on this plea was Kirk Shelton. The Commonwealth sought to impeach the testimony of Shelton by asking him if he had not been convicted of a felony and sentenced to the penitentiary, which he answered in the affirmative; whereupon the defendant asked the witness if it was not true that he had been pardoned by the Governor and released from prison within three months from the time of his conviction. To this the

Commonwealth interposed an objection because of its incompetency, and the objection was sustained by the court. The defendant then avowed that the witness would answer in the affirmative. There was no evidence as to what offense the witness had committed which caused him to be convicted and sentenced to the penitentiary; nor was it offered to be shown upon what ground the Governor pardoned him. The pardon of the Governor did not restore the character of the witness in so far as it was besmirched by the commission of the felony of which he was convicted. The Code authorizes the impeachment of a witness' testimony by showing that he has been convicted of a felony, and we are unable to see how any substantial right of the defendant was injured by the exclusion of the testimony that he had been pardoned. Besides all this, the pardon itself was the best evidence of its being granted, and the court properly excluded oral testimony of its existence.

The Commonwealth's attorney, in arguing the case to the jury, spoke of the witness, Kirk Shelton, as follows: "Why, gentlemen of the jury, who would believe anything Kirk Shelton said? Think of it, the principal witness of this defendant who was sent to the penitentiary for the burning of his neighbor's house." Undoubtedly, the Commonwealth's attorney committed a gross error in stating to the jury that the witness had been sent to the penitentiary for burning his neighbor's house, there being no evidence in the case upon which to base this statement; but upon motion of the appellant the court excluded this statement from the jury by telling them that they should pay no attention to it; and the Commonwealth's attorney, himself, before the jury, admitted his error, withdrew his statement, and asked the jury to give it no weight in considering the case. It must be presumed that the action of the court and of the Commonwealth's attorney effaced from the minds of the jury any evil effect which might have followed from the unauthorized statement complained of, and there was no error on the part of the court in refusing to discharge the jury from further consideration of the case. It would seriously impair the administration of the criminal law, if, when a Commonwealth's attorney is swept by the zeal of advocacy beyond the rules of fairness or propriety, it should be held necessary to discharge the jury from further consideration of the case. We do not believe that, when the court instructs the jury that the statement of the attorney for the Commonwealth is improper and directs them not to consider it, justice to the defendant requires anything further to be done in the premises in order to secure a fair and impartial verdict.

Appellant also complains that the Commonwealth's attorney spoke of one of the witnesses for the Commonwealth as follows: "Jim Davis is as fine a man with as fine a character as any man in this country." The witness had been before the jury; they had seen him and heard his testimony; they had observed his deportment; and the employment by the State's attorney of this ordinary laudation indulged in by lawyers in describing their own witnesses, did not injure the substantial rights of the defendant. It seems to us the matter is too trivial to be the subject of serious complaint.

On the whole case, we believe appellant obtained a fair and impartial trial, and that no injury was done him, either in the rulings of the court or the verdict of the jury.

Judgment affirmed.

EVANS v. DOBBS, &c.

(Filed September 29, 1908—Not to be reported.)

1. Contracts—Construction of—Trespass—In this action for trespass, the question turns upon a construction of a timber contract and the evidence, and it appears from the evidence that the contract was exhausted before its assignment to appellant who, therefore, acquired no rights under it. Hence, he was a mere trespasser in his attempt to cut and remove timber from it.

2. Same—Time in Which a Contract May be Executed—Where no time is fixed for the execution of a contract, the law implies that it is to be carried into effect within a reasonable time.

Joe Bertram and Stone & Stone for appellant.

J. N. Sharp and T. A. Wallace for appellees.

Appeal from Wayne Circuit Court.

Opinion of the court by Judge Barker, affirming.

This action was instituted by the appellees, claiming to be the owners of the fee-simple title of a tract of land situated in Wayne county, Kentucky, and which is described in the petition, against the appellant, alleging that he was trespassing upon the land, cutting down timber and manufacturing staves therefrom and committing irreparable injury to them. Appellant answered, setting up title to all of the white oak timber upon the land in question and the right to cut the same and manufacture it into staves under a certain contract made by his grantor, D. Hungerford, with William Dobbs, Sr., the grantor of appellees, and who at the time of the contract owned the land. The merits of this case turn upon a proper construction of this contract, which is as follows:

"This indenture made this 11th day of September, A. D., 1899, between William Dobbs, of Wayne county, Kentucky, party of the first part, and D. Hungerford, of Nashville, Tenn., party of the second part.

"Witnesseth: That said party of the first part has this day sold and does hereby convey to said second party, all the white oak timber suitable for the manufacture of staves, now growing on the hereinafter described land, at the following prices per thousand staves in the tree, to-wit:

Staves 60 inches in length, 5 inches, 1¾ inches thick, at.....	\$8.00
Staves 60 inches in length, 4 to 5 inches wide, 1½ thick.....	7.00
Staves 60 inches in length, known as merchantable culls	5.00
Staves 44 inches in length 4½ inches wide, 1½ inches thick.....	5.00
Staves 44 inches in length, 4½ inches wide, 1¼ inches thick	5.00
Staves 44 inches in length, known as merchantable culls	5.00
Staves 34 inches in length, 4½ inches wide, 1¼ inches thick	4.00
Staves 34 inches in length, known as merchantable culls	4.00

"Merchantable culls are such as do not fill the specifications for the grade which they are made, but may be cut down so as to fill the requirements of a shorter or smaller stove.

"The timber is to be paid for on the following terms, to-wit:

"Eight hundred (800) dollars cash in hand on delivery of this indenture, receipt of which is hereby acknowledged, and the balance of purchase price in advancements as follows: When a sufficient number of staves shall have been made and delivered on the banks of the creeks to amount to the eight hundred dollars first paid on purchase price, one-half of the balance of purchase price, as near as can be estimated, shall become due and payable, and when a suffi-

cient number of staves shall be delivered on the banks of the creeks to balance the payment thus made, one-half of the then remaining purchase price shall become due and payable, and further payments shall be made in like manner, until the balance of purchase price, as estimated, shall not exceed two hundred (\$200) dollars, in which case the last payment shall not become due and payable until the balance of the timber is manufactured into staves and delivered on the banks of the creeks.

"It is understood that second party has this day let the contract to manufacture said timber, and deliver the staves on the banks of the creeks to John Dobbs, John C. Hurst, William Dobbs, Jr., and Jesse W. Evans, and that said parties have agreed to pay a certain bonus to said first party as a part of the consideration for which this timber is sold.

"It is also understood and agreed that in case of the death of any of said parties, or for any other cause the manufacture and delivery of said staves shall pass into the hands of any other party or parties, said D. Hungerford or his assigns or legal representatives, shall be bound, as a part of the consideration for which this instrument is given, to see to it that the said William Dobbs, Sr., gets promptly, at the date of the other payments of the purchase price, the amounts of the bonus due as per the contract with said parties, Messrs. Dobbs, Hurst and Evans, above mentioned.

"The boundaries of the lands on which the said timber stands are as follows, to-wit:

"First tract known as the 'Flint Work tract,' bounded on the east, south and west by what is known as the 'Washington Young ten thousand-acre tract,' and on the north by State line between Kentucky and Tennessee, and situated in Pickett county, Tennessee, containing 500 acres, more or less.

"Second tract, known as the 'Step tract,' entered by Eli Phipps, containing 50 acres, situate in Wayne county, Kentucky.

"Third tract, known as a part of the 'consolidated survey,' bounded on the east by the lands of Diancess Blevins, on the south by the State line between Kentucky and Tennessee, on the west by the lands of Cooper Burnett and F. B. Dobbs, the Gobson lands, the lands of J. L. Smith, and the lands of Wm. Dobbs, Jr., and on the north by the lands of F. B. Dobbs and William Dobbs, Jr., and the big road, containing eleven hundred acres, more or less, situate in Wayne county, Kentucky.

"In witness whereof the parties hereto have subscribed their names this day and year above written.

(Signed) "WILLIAM DOBBS, SR.,
"D HUNGERFORD,"

It will greatly simplify the issues in this case to say in advance that the record shows that the appellant acquired, and now owns, all of the rights which his remote grantor, D. Hungerford, had under the foregoing contract, and that it is also true that the appellees have acquired, by regular conveyance, the fee-simple title to the land in question, which was formerly owned by William Dobbs, Sr., but that they took it with full knowledge of Hungerford's contract, and, therefore, subject to his rights thereunder.

As we understand it, appellant advances two theories: First, that by the terms of the contract William Dobbs, Sr., sold to D. Hungerford all of the white oak timber growing upon the land covered by the contract; and, second, that if this be not true, and it should be held that, under the terms of the contract, Hungerford only acquired such white oak timber as was suitable at the time to be manufactured into staves, then it is true that neither his grantor nor he

has cut all such timber, and he is entitled to finish up the contract and now cut whatever remains standing upon the land.

The theory of the appellees is that, under the terms of the contract, Hungerford only acquired such white oak timber as was then suitable for the manufacture of staves, and that he at once proceeded, and did cut and manufacture into staves and remove from the land, all of the trees which were then suitable for that purpose, and, therefore, the contract is now exhausted and was exhausted at the time it was assigned to appellant.

A reference to the contract above set forth, shows the class of timber conveyed to Hungerford by its terms. Its language on the subject is as follows: "That said party of the first part has this day sold, and does hereby convey to said second party all the white oak timber suitable for the manufacture of staves, now growing on the hereinafter described land, &c." It is clear, from this, that Hungerford only acquired, by the terms of the contract, such timber as was then suitable for the manufacture of staves, and did not acquire any right or title to trees which at that time were not suitable for the manufacture of staves.

On the same day that the contract between William Dobbs, Sr., and D. Hungerford was entered into, Hungerford entered into a contract, in writing, with William Dobbs, Jr., John Dobbs and Jesse W. Evans to cut the timber he had purchased from William Dobbs, Sr., and manufacture it into staves. This contract throws a strong cross light on the contract between William Dobbs, Sr., and Hungerford as to the character of timber that Hungerford acquired, and the time when it was to be removed from the land. The contract contains the following provisions: "Said second parties also agree to work out all timber closely that is suitable for the manufacture of rived staves. * * * Said second parties expressly manufacture to work said timber with the least possible waste, and to manufacture not less than 25,000 staves per year until the timber is exhausted." We think these stipulations show that it was the intention of the parties to the contract for the sale of the timber that only such timber as was suitable for the manufacture of rived staves were sold; and, also, that the timber was to be cut and removed as soon as this could reasonably be done, the work to be commenced at once.

The evidence for the appellees is to the effect that Hungerford proceeded to cut and manufacture the timber he had purchased from William Dobbs, Sr., into staves, and that this work progressed from 1899 until 1901, at which time all of the timber purchased had been manufactured into staves and the parties had abandoned the field; that Hungerford, by agents, pointed out the timber which he considered suitable for the manufacture of staves, and all of this was cut and manufactured. On the other hand, the evidence for the appellant tends to show that while a part of the timber purchased was cut and manufactured between 1899 and 1901, all of it was not cut, and there remains upon the land a large number of trees which were suitable to be manufactured into rived staves at the time the contract was made. This, of course, is a question of fact, but we think the preponderance of the evidence is with the appellees. As the contract between William Dobbs, Sr., and D. Hungerford fixed no time in which it was to be executed, the law implies that it was to be carried into effect within a reasonable time; and this seems to have been the contemporaneous construction given it by the parties themselves, because it is undisputed that Hungerford proceeded at once with the cutting of the trees and their manufacture into staves, that this was carried forward continuously for three years, and then the further cutting was abandoned until 1905, a period of four years.

We think the undisputed acts of Hungerford with reference to the execution of the contract between him and William Dobbs, Sr., and the positive testimony of the appellees and their witnesses, that they cut for Hungerford all of the timber suitable for the manufacture of staves and exhausted the contract, fully sustains the chancellor's judgment in the conclusion that he evidently reached, that the contract between Hungerford and William Dobbs, Sr., had been exhausted before it was assigned to appellant; and Hungerford having no further rights thereunder, appellant acquired none, and, therefore, he was a mere trespasser, and the appellees, being the owners of the land trespassed upon, were entitled to an injunction against appellant as a wrongdoer.

For these reasons the judgment is affirmed.

COMMONWEALTH v. CINCINNATI, NEW ORLEANS & TEXAS PACIFIC RY. CO.

(Filed September 30, 1908—Not to be reported.)

1. Railroads—Indictments—Nuisance—An indictment charging appellee with conveying to its premises and permitting to assemble there in large numbers persons who engaged in dancing, drinking, swearing and so on, the grounds being on a public highway, and further charging that such acts disturbed the peace, happiness and pleasure of those residing at, on and near the said highway, sufficiently states a public offense, and it was error to sustain a demurrer to it.

2. Dancing—When Constituting Public Offense—Where dancing and drinking are accompanied by swearing and being drunk, making loud noises and otherwise misbehaving, such acts constitute a public nuisance.

Jas. Breathitt and Tom B. McGregor for appellant.

N. L. Bronaugh for appellee.

Appeal from Jessamine Circuit Court.

Opinion of the court by Wm. Rogers Clay, Commissioner, reversing.

The grand jury of Jessamine county, Kentucky, at the June term, 1907, of the Jessamine Circuit Court returned the following indictment:

"The grand jury of Jessamine county, in the name and by the authority of the Commonwealth of Kentucky, accuse the Cincinnati, New Orleans & Texas Pacific Railroad Company of the offense of suffering a nuisance, committed as follows, viz: That said Cincinnati, New Orleans & Texas Pacific Railroad Company on the 5th day of June, 1907, in the county aforesaid, and on divers other days and times before the finding of this indictment, it, the said Cincinnati, New Orleans & Texas Pacific Railroad Company, being then the owner occupying and having control of a certain tract of land lying and being situate in and at a point in said county, known as High Bridge, said tract of land being known as the palisade and right of way of said railroad company, did unlawfully and willfully suffer and permit divers persons, men as well as women there to be and remain on said land, and cause same to be brought upon said lands, and there to be and remain and congregate in large numbers upon and

about said premises on Sunday, and engage in dancing, drinking, tippling, cursing, swearing, being drunk, making loud noises and otherwise misbehaving. The said ground being on and near a public highway, commonly known as the Shaker Ferry road, it, the said road, being then a public highway, it, the said grounds, being located in and near to a village known as High Bridge, and at and near to divers dwelling houses of various persons residing in said village, and on and near said highway, thereby disturbing the peace, happiness, comfort and pleasure of persons residing in said village and at, on and near said highway. To the common nuisance of all the citizens of the Commonwealth of Kentucky, and especially those residing in said neighborhood and living in said village and along said highway and passing, repassing along said highway. It, the said Cincinnati, New Orleans & Texas Pacific Railroad Company, being then a corporation duly incorporated under the laws of the State of Kentucky, and some other State of the United States of America, the exact State being unknown to this grand jury, and owning and operating a railroad in and through said county, and owning lands and rights of way in and through the said village of High Bridge, against the peace and dignity of the Commonwealth of Kentucky."

The trial court sustained a demurrer to the indictment, and the Commonwealth appeals.

Counsel for appellee insists that the allegations of the indictment are not sufficient in that the acts complained of are not alleged to have been taken place within the sight or hearing of those passing or repassing appellee's premises, or living in the vicinity thereof. In this connection we are cited to authority holding that an allegation in an indictment that certain facts were to the common nuisance of all good citizens of the State, will not make it a good indictment for a common nuisance unless these facts be of such a nature as may justify that conclusion as one of law as well of fact. (Wharton's Am. Crim. Law, 4th edition, section 2362.) Perhaps there would be some merit in counsel's contention if the acts complained of were unaccompanied by any other allegation than that they were to the common nuisance of all good citizens of the State, &c. The indictment under consideration, however, not only charged the appellee with conveying to its premises and permitting to assemble there large numbers of persons who engaged in dancing, drinking, tippling, swearing, being drunk, making loud noises and otherwise misbehaving, but also charged that the grounds were "on and near a public highway, commonly known as the Shaker Ferry road * * * and being located in and near to a village known as High Bridge, and at and near to divers dwelling houses of various persons residing in said village, and on and near said highway." It further charged that the acts complained of disturbed the "peace, happiness, comfort and pleasure of persons residing in said village and at, on and near said highway." We think the latter allegation sufficient to overcome the failure to allege that the acts were committed in the presence or hearing of the various persons residing in or near said village.

While it is true that dancing is frequently an innocent amusement and drinking may be engaged in without becoming a nuisance, yet if the dancing and drinking are accompanied by swearing and being drunk, making loud noises and otherwise misbehaving, there can be no doubt that such acts will constitute a nuisance.

In the case of *Rex v. Moore, B. & Ad., 184*, the defendant kept an inclosed lot near a highway for the purpose of allowing persons to practice at rifle shooting, by shooting at marks and at pigeons; and

as a consequence large numbers of people frequented the place for those purposes, many of whom were idle and disorderly persons, armed with firearms, and by their noise and conduct disturbed the king's subjects, and put them in peril. It was held that he was chargeable for a nuisance. In the case of *Inchbald v. Robinson*, L. R., 4 Ch., 388, it was held that a noise made by a disorderly crowd at a place of public amusement may be a nuisance. In the *Am. & Eng. Ency. of Law*, volume 21, page 698, it is said: "The noise arising from the exercise of lawful amusement may be a nuisance when it materially interferes with the comfort of those in the vicinity." And this court, in the case of *Jung Brewing Co. v. Commonwealth*, 29 Ky. Law Rep., 939, held that a corporation, though having a license to sell whisky by wholesale or even by retail, in a small town, has no right to allow the assembling around its premises of noisy, drunken, boisterous crowds, whose insolence and profanity make the use of the highway in the neighborhood always unpleasant and some times dangerous, and may be indicted for maintaining a public nuisance on its premises.

In our opinion, the indictment herein sufficiently states a public offense, and the trial court erred in sustaining a demurrer thereto.

For the reasons given, the judgment is reversed and cause remanded, with directions to overrule appellee's demurrer to the indictment.

COMBS v. COMMONWEALTH.

(Filed September 30, 1908—Not to be reported.)

1. Indictments—Principal—Aider and Abettor—Under the indictment, although John Combs is charged to be the slayer, and Henry Combs, the aider and abettor, both were equally guilty as principals and either or both might be convicted as such. (30 Ky. Law Rep. 1212, for a full consideration of this question.)

2. Instructions—Assault Upon Sister of Defendants—It was error to fail to instruct the jury as to the right of appellant to shoot and kill deceased if they believed that at the time he was attempting to commit an assault upon their sister, and that the contemplated assault could only be prevented by taking his life.

Thos. F. Cope and Hazelrigg, Chenault & Hazelrigg for appellants.

James Breathitt and Theo. B. Blakey for appellee.

Appeal from Breathitt Circuit Court.

Opinion of the court by Judge Carroll, reversing.

This appeal is prosecuted from a judgment of the Breachitt Circuit Court, sentencing each of the appellants to confinement in the State penitentiary for twenty-one years. The conviction was had under an indictment charging them with the murder of Thomas Combs. Three grounds for reversal are relied on: first, that the verdict is not sustained by the evidence; second, that the court misinstructed the jury and failed to give the whole law of the case; and third, because of misconduct on the part of one of the jurors during the trial.

The indictment averred that the act of killing was committed by John Combs, who was aided, abetted and encouraged by Henry Combs. There is some conflict in the evidence as to whether the shot that killed Thomas Combs was fired by Henry or John Combs. There is, however, no dispute that it was fired by one of them. A

witness for the Commonwealth testifies that John Combs did the shooting; while both Henry and John say that Henry fired the shot. Each of them, at the time, was armed with a gun, and there is some evidence conducing to show that the appellants said they would kill Thomas Combs if they found him at their father's house. Appellant, Henry Combs, who admits the shooting, claims that he fired to prevent Thomas Combs from killing his brother, John, and to protect his sister.

The facts leading up to the homicide, as related by appellants and witnesses in their behalf, are substantially as follows: On Sunday afternoon the deceased, who was drunk and also had a jug of whisky, went, in company with Frank Clemmons, to the house of his cousin, Jerry Combs, the father of appellants, and remained there until he was killed, the following afternoon. During the time the deceased, who bore the reputation of being a quarrelsome and dangerous man when drinking, was noisy and troublesome, and created considerable disturbance in the little house where Jerry Combs, with a large family, lived. He made several indecent proposals to Mary, the daughter of Jerry Combs, and sought on more than one occasion to compel her to submit to his desire. There is also evidence that on Monday morning he forcibly required a son of John Combs, who was at the house, to drink such a quantity of whisky that it made the little boy deathly sick. When this happened, Henry Combs left his father's house and went to the home of his brother, the appellant John Combs, who lived about four miles distant, arriving there at noon on Monday. After relating to John the conduct of the deceased, they each procured a gun and went to the house of Jerry Combs, where the deceased was. They each testify that, as they approached the house, and when within a few steps of the front porch, they saw Mary Combs running out of the front door, closely followed by the deceased, who had a large pistol in his hand. That when he saw them, he stopped, and pointing his pistol at John Combs, endeavored to shoot him, but the pistol failed to fire. That while he was in the act of trying to shoot John, Henry, who was standing back of the deceased, shot him in the head, killing him instantly.

The first ground of reversal urged is that Henry could not be convicted as principal because he was not indicted as such, but as an aider and abettor; and that John could not be convicted as an aider and abettor because Henry was not indicted as principal. Neither of these contentions is good. Under the indictment, although it charges John as the perpetrator of the act and Henry as aider and abettor, both were equally and alike guilty as principals and either or both of them might be convicted as such, and it was not necessary that the court, in the instructions, should designate either of them as principal or aider and abettor. This question is fully considered in *Reed v. Commonwealth*, 30 Ky. Law Rep., 1212; and *Sarah Steely v. Commonwealth*, decided Sept. 30th, 1908, and it is not necessary to devote further attention to it here.

A technical error was committed in instruction number four, but the serious error is found in the failure of the court to instruct the jury as to the right of appellants to shoot and kill deceased if they believed or had reasonable grounds to believe that at the time he was attempting to commit an assault upon the person of their sister, and they believed and had reasonable grounds to believe that the contemplated assault could only be prevented by taking his life. There is evidence tending to show that when the deceased was shot, he was pursuing Mary Combs, whom he had previously attempted to force to yield to his lust, and this evidence authorized an instruction submitting this feature of the case to the jury. The appellants

had the same right to shoot and kill deceased to prevent him from committing an assault upon the person of their sister as they did to prevent him from doing them some great bodily harm. Upon another trial of the case, if the evidence is similar to that upon the trial from which this appeal is prosecuted, the court should give to the jury the following instructions:

"1. If the jury believe from the evidence beyond a reasonable doubt that the defendants, John Combs and Henry Combs, or either of them, both of them being present aiding, abetting and assisting each other, in Breathitt county, Kentucky, before the finding of the indictment, willfully, and feloniously, did then and there kill Thomas Combs, by shooting him with a gun loaded with powder and ball or other hard and explosive substances, when it was not necessary or apparently necessary as defined in instruction number four, to protect them or either of them or their sister, Mary Combs, from immediate danger of death or great bodily harm, or the person of Mary Combs from attempted rape by deceased, they will find each of the defendants guilty. Guilty of murder, if the act was done willfully, feloniously and with malice aforethought; guilty of manslaughter, if the act was done in sudden heat and passion or sudden affray and without previous malice and not in the defense of their persons or the person of their sister, as defined in instruction number four. If the jury find the defendants guilty of murder, they will fix their punishment at death or confinement in the penitentiary for life, in their discretion. If the jury find the defendants guilty of manslaughter, they will fix their punishment at confinement in the penitentiary for not less than two nor more than twenty-one years.

"2. If the jury believe that the defendants have been proven guilty by the evidence, beyond a reasonable doubt, but have a reasonable doubt whether they have been proven guilty of murder or manslaughter, they should find them guilty of manslaughter, and fix their punishment as described in instruction number one. If the jury have a reasonable doubt of the defendants having been proven guilty, they should find them not guilty.

"3. the jury may find either of the defendants guilty and the other not guilty; or they may find both of them guilty or both of them not guilty.

"4. If the jury believe from the evidence that the defendants, or either of them, believed and had reasonable grounds for believing that at the time the deceased was shot and killed he was then and there about to take the life or inflict upon them or either of them some great bodily harm, or was about to take the life or inflict some great bodily harm upon their sister, or take forcibly possession of her person for the purpose of having carnal knowledge of her, and there appeared to the defendants or either of them, in the exercise of a reasonable judgment, no other safe way to avert the then impending danger, or to the defendants or either of them apparent danger to themselves or either of them or Mary Combs, but to shoot and kill deceased, then they, or either of them, had the right to shoot and kill him, and the jury should acquit them.

"5. The word 'willful' as used in these instructions means intentional, not accidental. The phrase 'malice aforethought' means a pre-determination to do the act of killing without legal excuse, and it is immaterial how suddenly or recently before the killing such determination was formed."

The judgment is reversed with directions for a new trial in conformity with this opinion.

CITIZENS SAVINGS BANK v. LEIGH, &c.

(Filed September 30, 1908—Not to be reported.)

Former Appeal—Statement of Facts—Evidence—(31 Ky. Law Rep., 253, for a statement of facts in this case.) The additional testimony does not strengthen appellant's case, and the evidence makes it clear that the chancellor's finding is correct.

J. D. Mocquot for appellants.

D. G. Park for appellees.

Appeal from McCracken Circuit Court.

Opinion of the court by Judge Lassing, affirming.

This is the second appeal of this case, the former opinion is to be found in the 31 Ky. Law Rep., 253. The facts out of which this litigation grew are fully set out in that opinion, and a repetition of them here is unnecessary. All questions were settled in that opinion same one, to-wit: whether or not there was any consideration for the \$2,000, note in suit. The case was remanded to the circuit court and the right given both parties to take further proof, and the court directed to determine from all of the proof whether or not the note of Leigh & Shinn, executed on September 14th, was simply given as an additional security for the \$2,000 note of Mrs. Shinn, which was then held by the bank, or whether this note was executed for money which Leigh & Shinn then got from the bank, and whether there was any consideration for the note and mortgage of December 5th, other than the debt represented by the \$2,000 note of Mrs. Shinn.

Upon the filing of the mandate in the lower court the plaintiff, Effie L. Leigh, tendered a supplemental petition, in which she prayed for a judgment in accordance with the mandate and opinion of this court. Over the objection of the defendant this supplemental pleading was permitted to be filed. It appears that, after the rendition of the judgment and before the case was reversed in this court, the plaintiff had paid to the defendant bank the sum of \$2,200, in satisfaction of the judgment. In the supplemental petition she prayed for a judgment directing a return of this money, with six per cent. interest from the date of its payment to her, and a cancellation of the lien which the bank held to secure same against her property.

Thereafter, the deposition of W. F. Paxton, cashier of the bank, was re-taken and plaintiff took the deposition of Wilson Shinn. These two depositions, together with all of the evidence in the original record bearing upon the validity of the debt in question, were considered by the chancellor. Upon the whole record he found in favor of plaintiff and entered a judgment accordingly directing the said bank to cancel the lien of record, which it held against her property and repay to her the money which it had received from her, with six per cent. interest from the date of its payment, and he also dismissed the cross-petition of the bank against certain other parties, with judgment for costs. From that judgment the bank appeals.

The question for our consideration upon this appeal is, does the evidence support the finding of the chancellor? The only evidence on behalf of the bank which was before the chancellor upon this trial, which was not considered at the time the former opinion was written, is the testimony of the cashier, Paxton, and a careful consider-

ation of his testimony shows no fact which was not brought out in his former deposition. It is true he states in his last deposition that on the 14th of September, 1892, he, as cashier, paid to Wilson Shinn, or some one, for his wife, \$2,600; that \$600 of this sum was placed to the credit of Mrs. Shinn, in his bank, and he gives no satisfactory account of what was done with the remainder of this money, Wilson Shinn testifies that he received no money whatever at that time from the bank, nor at any time thereafter, either from the bank or from the firm, other than some small sums from the firm, which were used in defraying the ordinary expenses of his household. He further testifies that he attended to all business for his wife, and that if any such sum as \$2,000 had been paid to her he would certainly have known of it.

The bank was placed in the unfortunate position of not being able to produce the "Daily Statement," a book which should have shown this transaction more fully than did the "blotter."

For plaintiff it is insisted that \$2,000 of the \$2,600 was used by the bank in taking up the \$2,000 note of Mrs. Shinn, which was surrendered to her husband on that date. This theory of the transaction is the only one which can be drawn from the testimony of the cashier, when read in connection with the entries on the "blotter," and the testimony of Wilson Shinn. Mrs. Shinn owed to the bank \$2,000, she received on that day a check for \$2,600, the bank cancelled her note and surrendered it to her, thus disposing of \$2,000 of the check, and placed the remaining \$600 to her credit in the bank, which was later withdrawn by her. Her husband received her note but no money. We are unable to understand why the entire \$2,600 was not placed to the credit of Mrs. Shinn if no portion thereof was deducted to settle the note which was that day surrendered to her husband for her. Neither such books of the bank as were exhibited, nor the cashier offer any satisfactory explanation of this transaction.

"On the evidence now before us Mrs Leigh should not be required to pay the note in controversy."

The additional testimony which has been taken, by the bank in no wise strengthens its case, but, when the testimony of Wilson Shinn is taken into consideration, it is made clear that the chancellor was correct in his finding and judgment that the bank was not entitled to recover.

The judgment is, therefore, affirmed.

WESTERN UNION TELEGRAPH COMPANY v. WILLIAMS

(Filed September 30, 1908—To be reported.)

1. Parties to Action—Taking Deposition of Adverse Party—Refusal to Give—Under Civil Code, section 606, providing that "a party may be examined, as if under cross examination, at the instance of the adverse party, either orally or by deposition, as any other witness," a party to an action can not refuse to give his deposition when called on by the adverse party, on the ground that it will enable one party to get the benefit of the testimony of the adverse party, and that if the adverse party, whose deposition is sought, actually appears at the trial and testifies, the party seeking his deposition can not complain because he failed to take it.

2. Same—Grounds for Continuance—Prejudicial Error—By section 537, of the Code, the right is given the defendant to begin taking depositions immediately after filing his answer. In such case the failure of the plaintiff to give his deposition, when called on by the defendant

after answer filed, was ground for continuance by the defendant, and a failure to grant the continuance was prejudicial error.

3. Telegram—Illness of Mother—Failure to Deliver—Non-arrival of Son—Disappointment of Mother—In an action for damages against a telegraph company for mental anguish in failing to deliver a telegram announcing the illness of a mother, where the plaintiff was a physician, it was error in the court to permit the plaintiff to testify that he had treated his mother frequently before, and that she yielded to such treatment and speedily recovered, and that she was disappointed and depressed when she heard that he had not arrived and that this hastened her death, which would be a recovery for the mother's anguish instead of her son's.

4. Mental Anguish—Evidence—Statement of Facts—Harrowing Recitals—In cases of this kind the party suing should be confined to a statement of the mere facts of mental anguish, and should not be permitted to introduce testimony of the nature referred to for the mere purpose of harrowing the feelings of the jury and increasing the size of the verdict.

Richards & Ronalds, Geo. H. Fearons, J. W. Brown and J. W. Alcorn for appellant.

Bethurum & Bethurum for appellee.

Appeal from Rockcastle Circuit Court.

Opinion of the court by William Rogers Clay, Commissioner, reversing.

On February 1, 1906, about nine o'clock in the evening, W. J. Sparks sent the following message from Mt. Vernon to appellant, J. M. Williams, 654 Fourth street, Louisville, Ky.:

"Lovell says you had better come. Mamma no better.

(Signed) "W. J. SPARKS."

This telegram reached the Western Union office in Louisville at 10:56 p. m. It was not delivered until shortly after eight o'clock the next morning—too late for appellee to take the morning train for his mother's home. Had he taken this train he would have reached Mt. Vernon at 1:24 p. m. His mother died at 3:20 p. m.

Appellant instituted this action to recover damages for his mental anguish resulting from the failure of appellant to deliver the telegram to him in time to enable him to reach his mother's bedside before her death. Appellant answered denying negligence on its part, and pleading contributory negligence on the part of appellee. According to the testimony for appellant, its night delivery clerk made an effort to call appellee over both telephones immediately upon receiving the telegram. Being unable to reach him, a messenger boy proceeded to 654 Fourth street. After considerable search, he found appellee's office. There was no one there, and he left a note stating that the Western Union had a telegram for Dr. J. M. Williams. According to the testimony for appellee, he had a telephone connection in his sleeping apartments, which were immediately over his office, which rang whenever his office was called. He was in his apartments at the time it is alleged the boy attempted to deliver the message, and also at the time appellant claims to have called him over the 'phone, and he heard no call of any kind. When he received the message the next morning, a little after eight o'clock, it was then too late for him to take the 8:10 train for the home of his mother. The jury awarded appellee damages in the sum of \$750.00. A new trial was refused, and the telegraph company prosecutes this appeal.

The case was assigned to the 27th day of September, 1907, for trial. On the 24th day of September the defendant tendered a motion for an order to require the plaintiff to give his deposition, as provided by sub-section 8, of section 606, of the Code of Practice, and to continue the case until such time as appellant could take the deposition of plaintiff and summon or take the deposition of witnesses to rebut such portions of his testimony as it should desire. In support of said motion appellant filed the following affidavit, which was sworn to by its attorney, A. G. Ronald:

"Affiant, A. G. Ronald, says that he is one of the attorneys for the defendant herein; that on the 19th day of September, 1907, plaintiff, Dr. J. M. Williams, and his attorney, Mr. Herman Nettleroth, were present at the office of the Clerk of the District Court of the United States for the Western District of Kentucky for the purpose of taking the deposition of certain witnesses on behalf of the defendant herein; that while plaintiff and his counsel were thus present, the defendant, as its attorney, called the plaintiff as a witness for the purpose of examining said plaintiff, as provided under sub-section 8, of section 606, of the Kentucky Code of Practice; that the plaintiff declined and refused to testify or to answer any questions that might have been put to him by this affiant as attorney aforesaid, and on advice of his counsel left the room.

"Affiant says that he thereafter, on said day, caused a subpoena to be issued by an officer duly authorized to issue same summoning plaintiff to appear as a witness to testify in this case, as provided in sub-section 8, of section 606, of the Kentucky Code of Practice, at the office of Clarence E. Walker, Louisville Trust Building, Louisville, Ky., on the 21st day of September, 1907, at 3 o'clock in the afternoon, and that said subpoena was duly served upon said plaintiff and also a notice that his deposition would be taken as aforesaid; that the plaintiff and his counsel did appear at the office of said Clarence E. Walker, notary public, at the time and place named in said subpoena, but that this plaintiff declined and refused to give his deposition, and upon the advice of his counsel declined and refused to answer any questions which might have been put to him by affiant as attorney aforesaid.

"Affiant says that this action has been instituted in a court which sits more than one hundred miles distant from the place where the occurrences which are made the basis of the suit transpired; that the only way to rebut any claim or statement that may be made by the plaintiff is to bring its witnesses to the place where the court is held or to take their depositions; that neither the defendant nor affiant nor any of its counsel have any knowledge or information as to what statement or claims will be made by the plaintiff, and do not know the witnesses whose depositions it will be necessary to take or to have present as witnesses.

"Affiant says that defendant can not properly prepare this case for trial or can not properly prepare its defense without taking the deposition of plaintiff, as provided for in the section of the Code of Practice above referred to; that under said section it has the right to take the deposition of plaintiff in order that it may know what evidence it has to rebut, and what witnesses to call; that after plaintiff gives his testimony on the witness stand at the trial of this cause there will not be sufficient time for it to secure the attendance of the witnesses who would rebut same, or take their depositions.

"Affiant says that this motion is not made for the purpose of delay, but only that it may be placed in a position where it can properly prepared its defense; that unless it is given an opportunity to examine plaintiff and he is required to submit to said examination, this defendant will be deprived of a substantial right; that it can

not safely go to trial without the exercise of the right of examination of plaintiff granted to it by the Code of Practice, and without the opportunity of procuring witnesses to rebut the testimony if it should so desire. Affiant says that had said plaintiff submitted to an examination or given his testimony upon either of the occasions upon which he was called as a witness by the defendant, it would have had sufficient time to rebut his testimony if it so desired, and would have been ready to go to trial."

The court refused to allow either the motion or the affidavit to be filed, but passed the matter to the day upon which the case was set for trial. On said day the court allowed the motion and affidavit to be filed, but overruled the motion, to which ruling the defendant excepted. The case then proceeded to trial. At the conclusion of the testimony of appellee in chief as a witness in his own behalf, appellant avowed that it was taken by surprise by the testimony of appellee to the effect that the telephone in his office was at all times connected by wire with the telephone in his sleeping apartments, and that when the telephone in his office was rung the telephone in his sleeping apartments was also rung for the same call; also by the statement that the rule of the railroad company was that it would not postpone the departure of its trains except to await the coming in of a connecting train. Appellant further avowed that it could introduce testimony to rebut the statements made by appellee, but was then unable to do so because the witnesses it required for that purpose lived so far away that their presence could not be obtained or their depositions taken. Appellant thereupon moved the court to set aside the swearing of the jury and continue the case or postpone the trial until such reasonable time as would give appellant an opportunity to take the depositions of said witnesses, all of whom it alleged resided in the city of Louisville. This motion the court overruled, and appellant excepted.

In support of its contention that the trial court erred in failing to grant it a continuance when it was made known to the court that appellee had declined to give his deposition, appellant relies upon sub-section 8, of section 606, of the Civil Code of Practice. This section is as follows:

"A party may be examined as if under cross-examination at the instance of the adverse party, either orally or by deposition as any other witness; but the party calling for such examination shall not be concluded thereby, but may rebut it by counter testimony."

It is insisted by counsel for appellee that the only purpose of this provision is to enable one party to get the benefit of the testimony of the adverse party at the trial; that, therefore, if the adverse party, whose deposition the other party sought to take, actually appears at the trial and testifies, and subjects himself to cross-examination, the party seeking his deposition can not complain because he failed to take it. While this view appears plausible, the Code itself does not place any such restriction upon the right of one taking the deposition of the adverse party. It gives to one party the absolute right to take the deposition of the adverse party, as that of any other witness. It appears that appellee, whose deposition it was sought to take, lived more than twenty miles from the county seat where the trial was to take place, and in addition to this he was a practicing physician. If, then, he were a witness other than the plaintiff in the case, appellant would have had the right to take his deposition. That being the case, it necessarily follows that under sub-section 8, of section 606, appellant had the right to take his deposition.

It is earnestly insisted that the right given by sub-section 8, of section 606, if interpreted according to the contention of appel-

lant, is liable to great abuse; that it will enable the party to find out his opponent's evidence in advance of the trial. As, however, the right is given to each party, they will both be upon terms of equality; and, as it is to be presumed that neither will offer any evidence other than the exact facts and truth of the case, we do not see how either could be prejudiced.

By section 537, of the Code, the right is given to a defendant to begin taking depositions immediately after filing his answer. Appellant's answer had been filed when it made the motion for a continuance on the ground that appellee had declined to give his deposition. Appellant had the right to take appellee's deposition. This right was denied to it; we, therefore, think the court should, under the circumstances, have continued the case, and its failure so to do was prejudicial error.

Appellant also insists that the trial court erred in permitting appellee to testify to the fact that he, in conjunction with Dr. Lovell, a physician who attended his mother at the time of her death, had treated his mother frequently before, and that she yielded to such treatment and speedily recovered; also that the court erred in permitting Dr. Lovell to testify to the fact that appellee's mother was disappointed and depressed when she heard that her son had not arrived on the train, and that this disappointment and consequent depression had a tendency to hasten her death.

Counsel for appellee insist that such evidence was admissible as bearing upon appellee's mental anguish, for his grief would be all the greater because of his inability to give his mother the treatment that had previously brought about her recovery, and because of the fact that she was depressed by reason of his failure to arrive in time to see her. In our opinion, however, the effect of appellee's testimony would be to lead the jury to the conclusion that the telegraph company was in a sense responsible for the death of appellee's mother, because of his failure to get there and give her the treatment that had formerly resulted in her recovery, while to admit the testimony of Dr. Lovell would, in effect, permit a recovery for the mother's anguish instead of the son's. This is one of the few courts giving the right of recovery in cases of mental anguish. We have restricted this to cases of the nearest degree of relationship. The ground of this restriction is that there is a natural mental anguish resulting from a failure to arrive at the bedside of a dying relative or the failure to attend the funeral of such relative. The law naturally concludes that mental anguish in case of such relationship will necessarily follow. If testimony of the kind given above were admissible, there would be no reason for restricting a recovery to cases of the nearest degree of relationship, for friends could frequently prove greater mental anguish than could a parent or son. Again, if such testimony were admissible a son might prove that the relationship between him and his mother was more tender than that which usually exists between mother and son; he might go into matters of sentiment and love which it would be impossible for the defendant in any way to rebut. We think in cases of this kind the party suing should be confined to a statement of the mere facts of mental anguish, and should not be permitted to introduce testimony of the nature referred to for the mere purpose of harrowing the feelings of the jury and increasing the size of the verdict. Upon the next trial the court will exclude such testimony.

For the reasons given, the judgment is reversed and cause remanded, for a new trial consistent with this opinion.

ROGERS v. S. C. & C. ST. R'Y CO.

(Filed October 1, 1908—Not to be reported.)

Master and Servant—Injury to Servant—Rule as to Master's Liability—Where a servant objects to the continued use of a defective tool, or calls the master's attention to its defective condition, and the master, with such information, insists that the servant proceed with the work, or assures the servant that the tool is safe, the servant has the right to rely upon the master's superior knowledge, and if he is injured in using the tool, the master is liable. Such a state of fact appearing in the trial of this case, it was error to peremptorily instruct the jury to find for appellee.

A. E. Stricklett for appellant.

Ernst & Cassatt for appellee.

Appeal from Kenton Circuit Court.

Opinion of the court by Judge Nunn, reversing.

This action was instituted in the court below by appellant to recover damages for a personal injury sustained by him while in the employ of appellee. It was charged, substantially, in the petition and amended petition that appellee furnished and required him to work with a wrench, in the performance of his duties as its servant, which was defective, unsafe and dangerous, and not fit to do the work which he was required to perform. On the day that he received his injury, he informed one Cox, appellee's foreman in charge of the work, of the unsafe and defective condition of the wrench, and that it was in need of repair; thereupon the foreman assured him that it was safe and sufficient to do the work. He relied upon the assurance of the foreman and began the work with the wrench, and because of its defective and worn condition the wrench slipped and turned on the nut he was tightening, precipitating him violently to the ground and across a rail, injuring him about the side and back, in the region of the kidneys. Appellee answered and traversed all the material allegations of the petition and amended petition, and charged contributory negligence on the part of appellant, to which a reply was filed, thus joining issue.

From the evidence it appears that the wrench in question was an ordinary solid iron or steel wrench, with a piece of gaspipe attached to the handle to give it sufficient leverage to securely tighten the nuts. The nuts which they were engaged in tightening were those which held the joints of the steel rails together; they were square, being one and one-half inches across. Two wrenches were in use—one with a short handle was used to start the nuts on the bolts, and the other one was used by appellant to turn them farther up and tighten them securely. At the time of the injury the foreman was hurrying his workmen to complete the work laid off for them before quitting time, which was about fifteen minutes after the accident occurred. It was also proven that this long handled wrench was furnished appellant with which to do the work, and it was the only wrench of that kind furnished for the work; that when he was directed by the foreman to work with it, he told the foreman, Cox, that it was not safe; that it was out of repair, and Cox told him to go ahead and do the work, the wrench was all right; to tighten the bolts up tight; and that he proceeded to do the work in a careful manner and received his injury as stated. It was also shown

that the foreman knew, before that time, of the defective condition of the wrench, for he had used it himself in the morning before appellant's injury in the afternoon, and it had caused him to be nearly thrown by its defective condition.

In compliance with a peremptory instruction given by the court, after the introduction of appellant's testimony, the jury returned a verdict for appellee. Appellee's counsel contends that this action of the court was correct for the reason that the defective condition of the wrench was known to appellant, and he must be regarded as having voluntarily assumed the risk incident to the use of it. If a servant knows of a defect in a tool with which he is required to work and continues to use it, without complaining to his master, and is injured thereby, he can not recover for such injury; but when the servant objects to the continued use of a defective tool or calls the master's attention to a defective one and the master, with information of such defects, insists that the servant proceed with his work or assures the servant that the tool is safe and adequate, the servant has the right to rely upon the master's presumed superior knowledge, and if, in the use of the defective tool, the servant is injured, the master is liable, unless the danger or risk is so obvious that an ordinarily prudent person would have refused to do the work under the circumstances, in which event the servant acts at his own peril. Appellant began work with this tool on the day he was injured, about the noon hour, and used the wrench in tightening bolts most of the time that afternoon, and in two or three instances, before he received his injuries, the defects came near causing him to fall. Appellee's counsel contends that he made no complaint of this to the foreman, and for this reason he should not be allowed to recover in this action. The foreman was present with the crew, and if he had called the foreman's attention to these slips of the wrench that occurred during the afternoon, it would only have been a repetition of what he had said to the foreman that noon with reference to the defective condition of the wrench. The fact that the wrench slipped two or three times during the afternoon and he saved himself from injury indicated that the use of the defective wrench was not an obviously dangerous undertaking. This was a question for the jury to determine. (Long's Adm'r v. L. & N. R. R. Co., 113 Ky., 806; Wake & Co. v. Price, 22 Ky. Law Rep., 696; I. C. R. R. Co. v. Keebler, 27 Ky. Law Rep., 305; L. & N. R. R. Co. v. Richardson, 23 Ky. Law Rep., 2090; and Pullman Co. v. Geller, 32 Ky. Law Rep., 884.)

Appellee's counsel also claims that the action of the lower court should be sustained for the reason that appellant relied in his petition entirely upon the assurance of the foreman that the wrench was all right, and that it was not alleged that appellant was directed to tighten the nuts with the wrench referred to. Counsel overlooked the fact that appellant alleged, in both his petition and amended petition, that appellee provided a dangerous, unsafe and defective tool and required him to use it in the performance of his duties, by reason of which he was injured. In our opinion, the court erred in giving a peremptory instruction.

For these reasons the judgment of the lower court is reversed, and remanded, for further proceedings consistent herewith.

GOULD CONSTRUCTION CO. v. CHILDERS' ADM'R.

(Filed October 1, 1908—To be reported.)

1. Master and Servant—Constructing Bridge—Absence of Foreman—Authority of Acting Foreman—Duty of Hands—Where a foreman in charge of hands constructing a bridge put one of the hands in charge while he was temporarily absent, such hand, for the time, stood in place of the foreman, and the men were under the same obligation to obey his orders as the orders of the foreman.

2. Same—Death of Servant—Orders of Acting Foreman—Contributory Negligence—Question for Jury—In constructing a double track railroad bridge across a river it was necessary to draw up some logs from below by the use of a derrick, which when hoisted to the proper height the foreman gave the stop signal. Where in such case the foreman gave such signal when the log had been raised too high, and one of the hands whose duty it was to guide it to its proper position, in attempting to do so was struck by the log and thrown from the bridge, killing him. Held—That the deceased was not required to anticipate that the stop signal would be given until the log was lowered to its proper position for his guidance, and the question of his contributory negligence was properly left to the jury.

J. N. Sharp and M. S. Singleton for appellant.

C. C. Williams and Robert Harding for appellee.

Appeal from Rockcastle Circuit Court.

Opinion of the court by Judge Hobson, affirming.

The Gould Construction Company was engaged in constructing a double track railroad bridge across Rockcastle river. The tracks were eight or ten feet apart, and the ends of the cross ties were so far apart as to leave an opening of about three feet between them. Through this opening the construction company was drawing up logs from below, and placing them on trucks which were loaded on one of the railroad tracks. The logs were about twelve feet long and twelve inches in diameter. To get them up a rope attached to a derrick was let down and fastened to one log at a time, and this was then raised through the opening by machinery to a point above the bridge and then lowered to the truck placed to receive it. One man was stationed at the engine and controlled it; another was stationed at a pulley and guided the rope. Men under the bridge tied the rope to the log and when it was ready, the foreman standing on the bridge gave the signal to the engineer who hoisted it up; and when it had reached the proper height, he gave him the stop signal. In order to get the log placed on the truck properly, one man was placed at each end of the truck and it was the duty of these two men, when the log had been raised to the proper height and was lowered, to take hold of the ends of the log and guide it to its proper position on the truck. The regular position of these two men was at the ends of the truck. The ties on which the truck rested extended out about six inches beyond the side of the truck. Childers and one James Neil were the men at the truck. The foreman had gone to the express office, and had put in his place a man named McEwan while he was gone. When the log was brought up the small end of the log was toward Childers, and as the large end was the heavier, it hung lower down than the small end. The log being tied in the middle by the rope would not always swing parallel with the track, and the small end of this

log swung out to the side next to the opening between the two tracks. To pull it back to its position Childers stepped to the side of the truck, and standing there was pushing the log back to its position, when McEwan suddenly gave the signal to the engineer to let the log drop. The engineer obeyed the signal; the log dropped to the truck through a space of about four feet; the large end striking first, the smaller end was thrown around against Childers, striking him on the point of the chin and knocking him from the bridge. He fell to the river below, a distance of about sixty feet, and when rescued, was dead. This suit was brought by his administrator to recover for his death on the ground that there was negligence on the part of McEwan in giving the engineer the drop signal at the time he did and that this was the cause of Childers' death. The answer controverted the allegations of the petition, and on a trial, the jury found for the plaintiff, assessing the damages at \$4,000. The defendant appeals.

The first question to be considered on the appeal is whether the court should have instructed the jury peremptorily to find for the defendant. It is insisted that this should have been done for two reasons: First, because McEwan was a fellow servant of Childers; second, because Childers would not have been hurt if he had remained at the end of the truck, and it was negligence of him to go to the side of the truck. It is also insisted that if there was any evidence to take the case to the jury, the verdict is palpably against the evidence, and should be set aside.

1. If the foreman had not gone to the express office and had remained on the bridge continuing to give the signals as before, it would hardly be maintained that the company would not be responsible for his negligence. That there was negligence on the part of McEwan is manifest. The custom was to lower the log gradually until it reached the truck. Any one would know that as large an object as this, if dropped through a space of four feet, suddenly, was liable to hurt the man at the truck whose duty it was to guide it into position and load the truck. Instead of giving the drop signal, when McEwan saw the man take hold of the log to push it over to its proper place, he should have given the engineer the signal to let it down slowly; and if this had been done, Childers would not have been hurt. The drop signal should not have been given until the log had reached the truck and been placed in its proper position. McEwan could see the log; he could see the men at the truck; he could not but know that Childers was at the side of the truck, and that the dropping of the log, at the time it was dropped, would imperil him. We do not think it is material that McEwan was not the regular boss. He was there at the time in the place of the boss. The gang of men had not been left without any head; McEwan, for the time, stood in the place of the boss and the men were under the same obligation to obey his orders as the orders of the boss. He was not at the time a fellow laborer; the other men could not control him or exercise any supervision over him; his signals were his orders and it was their duty to obey these orders. In giving these orders he represented the master, and they were not his equals, but his inferiors for the time being. The case of *Dana v. Blackburn*, 28 Ky. Law Rep., 695, is not in point. There it was held that the engineer was a fellow-servant of the men who loaded the coal at a coal elevator, and that one of the loaders was a fellow-servant of the other loader. The same rule was in effect applied in *Cooper's Adm'r v. Oscar Daniel's Co.*, 29 Ky. Law Rep., 1172. There it was also held that the engineer in charge of the engine employed in lifting the girders in a building, was a fellow servant of the other men

employed in handling the girders. But this case does not turn on the negligence of the engineer. The engineer here simply obeyed the signal that was given him. The negligence was in the giving of the signals and these signals were given by the man who was directing the work, and who for the time being was the foreman.

2. Every one knows that a log one foot thick and twelve feet long tied in the center with a rope, when drawn up will not always stay in one position, and that when it got above the truck it might be at right angles to the track or parallel with it or in any position between the two; so that it must necessarily be that the men who had to handle the log would have to leave the ends of the truck at times and push the log at the side back to its position. The testimony for the plaintiff clearly shows that such was the case when Childers went to the side of the truck. He could not reach the log from the end of the truck and he went to the side, because that was the only practicable way of getting it into position. He was not, therefore, guilty of contributory negligence in taking this position. He was not required to anticipate that the log would be dropped before it reached the truck or to anticipate if it was dropped which way it would jump when it rebounded on the truck. In cases of this sort, the question of contributory negligence is ordinarily for the jury; and in this case there was no error in submitting the question of contributory negligence to the jury.

The weight of the evidence sustains the verdict of the jury. There was conflict in the testimony on several questions, but we think the facts as we have stated them, are shown by the weight of the evidence. The instructions of the court submitted to the jury substantially the material questions in the case. There was no showing made which would warrant the court in continuing the case for the defendant after the plaintiff's proof was introduced on the trial. The decedent was a healthy young man, twenty-four years of age; the verdict for \$4,000 is a reasonable one; and on the whole record we see no reason for disturbing it.

Judgment affirmed.

WESTBROOK, &c. v. POTTER'S SONS' TRUSTEE.

(Filed October 1, 1908—Not to be reported.)

Judgment—Rule of Court of Appeals as to Chancellor's Judgment—Evidence—Question of Fact—This case turns on a question of fact. While it is a rule of this court not to disturb the chancellor's judgment on questions of fact, where the evidence is conflicting and the mind is left in doubt as to the truth, but this does not mean that his judgment will be affirmed on a question of fact where it is clearly against the evidence. In this case the clear weight of the evidence does not support the chancellor's finding.

J. M. Simmons and Wright & McElroy for appellants.

Basham & Basham for appellee.

Appeal from Warren Circuit Court.

Opinion of the court by Judge Hobson, reversing.

On May 20, 1901, Nancy Westbrook bought at commissioner's sale for \$1,335, a tract of land in Warren county, belonging to her father, John B. Horton, containing about 100 acres. J. E. Potter signed

the sale bond as her surety. Potter paid off the sale bond and on November 12, 1901, Nancy Westbrook and her husband, James Westbrook, executed to Potter a note and mortgage to secure it, for the sum of \$1,379.95, being the amount of the sale bond with interest. This mortgage covered not only the Horton land but also a tract of land owned by James Westbrook. On June 26, 1903, Westbrook and wife executed to Potter a note for \$1,500, with interest from date and a mortgage on the same land to secure it. On November 9, 1903, Nancy Westbrook and her husband sold and conveyed the Horton land to J. S. Hunt for \$2,000, for which he executed notes. These notes went into the hands of Potter. Hunt failed to pay his notes, and sold the land on November 14, 1904, to Oscar Finney for \$2,500. Finney paid Potter the amount of the Hunt notes which he held. On September 28, 1906, Potter having become a bankrupt, this suit was brought by his assignee in bankruptcy against Westbrook and wife on the \$1,500 note and the mortgage securing it. Westbrook and wife filed an answer pleading that the note for \$1,500 and mortgage securing it, were given in renewal of the note for \$1,379.95, a small debt which John Allen Cherry had against James Westbrook being included in the note; and they pleaded that the debt had been satisfied in the sale of the Horton land, when Finney paid off the Hunt notes to Potter. On the other hand the plaintiff pleaded at the time the \$1,500 note was executed, the banking house of P. J. Potter & Sons, of which J. E. Potter was a member, held 21 notes against James Westbrook aggregating \$1500, and that the note for \$1,500, was given to take up these 21 small notes and not in renewal of the note for \$1,379.95. Proof was taken on the issues thus made by the parties and on final hearing, the circuit court entered a judgment in favor of the plaintiff on the note, and subjected the land to its payment. From this judgment Westbrook and wife appeal.

The question raised by the appeal is wholly one of fact. Nancy Westbrook and her husband James Westbrook by their testimony sustain the allegations of their answer. J. E. Potter by his testimony sustains the allegations of the plaintiff's reply testifying positively that the \$1,500 note was given to take up the 21 small notes. J. M. Simmons, a member of the Warren county bar, testifies that he was employed by J. E. Potter to draw the \$1,500, mortgage, and that Potter, at that time, had him to make an abstract of the title telling him that he wanted the abstract with a view to a sale of the land; that when Potter employed him he told him that he had a note and mortgage for thirteen hundred and some odd dollars and that he was going to pay a little remnant of a judgment in favor of John Allen Cherry, and that he wanted to get the thirteen hundred and some odd dollars mortgage and the remnant of that judgment together and get them all in one debt; that he prepared the abstract and prepared the mortgage and note; that the parties came to his office after the papers were prepared and Mrs. Westbrook then said to him in the presence of Mr. Potter, "When we execute this \$1,500 note and mortgage, why of course Mr. Potter will deliver to me the thirteen hundred and some odd dollar mortgage and note;" that he said, "of course," and turned to Mr. Potter, and Mr. Potter said, "Why certainly." He also testified that after the papers were executed he said to Potter, "I have not made any calculation of the interest on the mortgage and note, and I do not know how much the amount of the John Allen Cherry judgment is, and I do not know whether your \$1,500 note will cover the \$1,379.95 note and interest and the John Allen Cherry balance on the judgment, and you had better be sure about that because I do not know;" and that Potter replied that he had been col-

lecting some rents on what was known as the Horton tract of land and that the \$1,500 mortgage and note was sufficient to pay the thirteen hundred dollar mortgage and interest and the balance on the John Allen Cherry judgment; and that he was going to sell the Horton tract of land for Mrs. Westbrook to pay off the \$1,500 mortgage and note. Hunt, the purchaser of the land, testified to this statement made to him by Potter before his purchase: "He had told me before that he had a mortgage for \$1,500 on the two places, on the place that he got and on the home place; but when he sold out to me for \$2,000 there would be something like \$600 coming to Mrs. Westbrook." He also testified that Potter at no time ever mentioned to him having any other mortgage on the land than the \$1,500 mortgage. Byron Renfrew, also a member of the Bowling Green bar, testified that he represented Hunt in his purchase of the property, and Finney in his purchase from Hunt; that Finney paid to Potter \$2,120, and he then makes this statement: "My recollection is that Mr. Potter said that that wiped out the Westbrook debts and that they would have to have a straightening out, as if there might be something coming back to the Westbrooks." The plaintiff introduced on his behalf John Allen Cherry, who testified that he signed, as surety for James Westbrook, a note to P. J. Potter & Co., for \$160, dated November 22, 1898, and due four months after date; also a note for \$70 dated April 10, 1899, and due four months after date; that on July 15, 1899, P. J. Potter & Co., executed to him a written release from the \$160 note, by reason of an arrangement between them and James Westbrook by which they were to look to Westbrook alone for the money; and that when the \$70 note fell due, he received notice of it and went to see Potter with Westbrook and Potter said: "That note is settled and all other notes you are on." These two notes referred to by Cherry are among the 21 notes which Potter testifies were included in the \$1,500 note and mortgage, but it will be observed that Cherry was released on these notes in the year 1899; that Mrs. Westbrook did not buy the Horton land until two years after that; and that the \$1,500 note and mortgage was executed some four years afterward. There is no witness in the case but Potter who testifies that the \$1,500 note was given in the renewal of the 21 small notes, and there are no facts in the evidence confirming his testimony. He does not deny that he employed Simmons; he does not deny that Simmons called his attention to the fact that he had made no calculation to see whether the \$1,500 note was large enough to cover the \$1,300 note and the Cherry judgment. He does not deny Simmons' statement that he then said that he had been collecting the rents; and that he had collected the rent is shown by other evidence. He does not testify that he named to Nancy Westbrook or to Simmons that the \$1,500 note was given to take up the 21 small notes. These 21 small notes were not delivered to the Westbrooks; they remained in the bank and when the bank failed, were included in its list of assets. No reason is shown why Mrs. Westbrook should have mortgaged her land to secure the 21 small notes, nor is it shown that any one at any time ever proposed to her that she should do so. She shows by herself and by her daughter that she called on Potter to surrender to her the \$1,300 note and to release the mortgage, and that he said that he could not put his hand on the note, but would attend to it another day. A married woman may lawfully mortgage her land to secure her husband's debts; but she must make the mortgage freely and intelligently. She must not be led to believe that she is securing her own debt.

It is insisted that the \$1,379.95 note with interest and the balance of the Cherry judgment, amounts to much more than the \$1,500 note. Whether this is so or not, we can not tell from the record, but it does appear from the record that Potter had collected the rents on the Horton land; and that the balance would be over \$1,500 after subtracting the rents nowhere appears in the record.

Our rule is not to disturb the chancellor's judgment on the facts in cases of this sort, where the proof is conflicting, and on the whole evidence the mind is left in doubt as to the truth; but this does not mean that the chancellor's judgment will be affirmed on a question of fact, where it is against the clear weight of the evidence. When that is the case we must assume either that the chancellor misunderstood the evidence, or that his judgment is based upon some view of the law not held by this court. On the whole case the clear weight of the evidence is with the defendant.

Judgment is therefore reversed, with directions to the circuit court to dismiss the petition.

Judge Settle not sitting.

COMMONWEALTH v. STANDARD OIL CO.

(Filed October 2, 1908—T., be reported.)

1. Penal Action—Selling Oil Unsafe for Illuminating Purposes—Pleadings—Burden of Proof—In a penal action by the Commonwealth against the Standard Oil Co., under section 2209, Kentucky Statutes, for selling oil that had been condemned as "unsafe for illuminating purposes," the answer admitted that certain oil had been so condemned, but alleged that it had subsequently been mixed with other oil in a large tank that brought the resultant mixture up to the required standard, which answer was denied by a reply. Held—That under the pleadings the burden was on the defendant to show that the resultant mixture was up to the required standard.

2. Same—Peremptory Instructions—New Trial—Failure to File Motion—Presumption—Upon the conclusion of the evidence for both parties the court directed the jury to find the defendant, appellee, not guilty. No motion or grounds for a new trial was made or entered. Held—As the answer presented a good defense and the evidence is not in the record, the court must presume that the proof offered by defendant in the lower court sustained the defense and that the action of the trial court was proper.

3. Same—Civil Actions—Practice—It may be regarded as the settled practice that in civil actions, where a verdict is returned in obedience to a peremptory instruction, there must be a motion and grounds for a new trial, if it is desired to have this court consider errors committed during the progress of the trial, or pass upon the correctness of the ruling of the lower court in taking the case from the jury.

Denny P. Smith, N. B. Hays, C. H. Morris, Jas. Breathitt and T. B. Blakey for appellant.

Humphrey & Humphrey and L. R. Yeaman for appellee.

Appeal from Christian Circuit Court.

Opinion of the court by Judge Carroll, affirming.

This penal action was instituted in the name of the Commonwealth against the Standard Oil Company for a violation of section 2209, of the Kentucky Statutes, providing that:

"If any person or persons in this State shall sell, or offer to sell, to be consumed or used in this State, for illuminating purposes, any of the oils or fluids specified in section 2202, that will ignite or permanently burn at a temperature less than 130 degrees Fahrenheit, or shall sell or offer for sale, to be consumed in this State for illuminating purposes, any of the oils and fluids aforesaid, which have been condemned by an authorized inspector of this State, and the barrels, casks or packages containing the same been branded or marked by him 'unsafe for illuminating purposes,' the person or persons so offending shall be guilty of a misdemeanor, and, on conviction, be punished by a fine not exceeding one hundred dollars, and the oils and fluids be forfeited and sold, and the proceeds go to the State."

The petition charged in substance that the appellee company did offer for sale about eight thousand gallons of oil, a product of coal, petroleum or other bituminous substance for illuminating purposes, which oil might be used for illuminating purposes. That the oil so offered for sale had then and there and previous to the offer for sale, been tested, examined and condemned as unsafe for illuminating purposes, and the cask or tank containing the oil had been marked or branded "unsafe for illuminating purposes" by a duly appointed and authorized inspector, who found that it would and did ignite and permanently burn at 125 degrees Fahrenheit.

The appellee, in the first paragraph of its answer, traversed all the material averments of the petition. In the second paragraph it set out the following facts:

"Further answering, defendant states that the facts concerning the eight thousand gallons of oil referred to in the petition herein are as follows: Said oil was shipped and delivered to this defendant at Cadiz, Ky., and was there condemned and marked 'unsafe for illuminating purposes' by John S. Lawrence, an inspector. Thereafter, at the request of the defendant, C. O. Prowse, an inspector located at Hopkinsville went to Cadiz and in conjunction with Lawrence re-inspected and retested said oil, and reported to this defendant that said oil would ignite and permanently burn at a temperature slightly less than 130 degrees Fahrenheit. Thereupon this defendant shipped said oil from Cadiz to Hopkinsville, where it caused said oil to be pumped into a large storage tank owned by this defendant and containing a large quantity of oil which would not ignite or permanently burn at a less temperature than several degrees above 130 degrees Fahrenheit. After said eight thousand gallons of oil, which had been condemned as aforesaid, had been pumped into and mixed with this large quantity of oil in this large tank, the resultant mixture was inspected and tested by said C. O. Prowse, an authorized inspector of this State, and said Prowse found and notified this defendant, and it is true, that the oil composing said mixture would not ignite and permanently burn at a temperature less than 130 degrees Fahrenheit. Defendant further says that none of said eight thousand gallons of oil which had been condemned as aforesaid was sold or offered for sale by this defendant before it was pumped into said storage tank, and mixed with the oil contained therein and became a component part of the resultant mixture."

In a reply the plaintiff denied that the resultant mixture in the large tank in Hopkinsville would not ignite or permanently burn at less than 130 degrees Fahrenheit after the said eight thousand gallons of condemned oil was pumped into the said large tank, as alleged in defendant's answer.

Upon the conclusion of the evidence for both parties, the court directed the jury to find the appellee not guilty. No motion or grounds for a new trial was made or entered. With the record in

this condition, the point is made for appellee that we cannot consider the bill of evidence, and that the case must be determined on the sufficiency of the pleadings alone to support the judgment entered on the verdict. This question of practice, under the decisions of this court, must be ruled favorably to appellee's contention. Under section 11, of the Criminal Code, proceedings in penal actions are regulated by the Code of Practice in civil actions; so that the question must be adjudged as if this were a purely civil action. There is no statute treating particularly of this subject, but this court, in more than one decision, has held that, in civil actions, in the absence of a motion and grounds for a new trial, there is nothing before this court except the question whether or not the pleadings are sufficient to support the judgment appealed from. (*L. & N. R. Co. v. Commonwealth*, 92 Ky., 114; *Kistler v. Slaughter*, 20 Ky. Law Rep., 1937.) There is an intimation to the contrary in *Meachem v. L. & N. R. Co.*, 20 Ky. Law Rep., 112, but this must be regarded in conflict with the better considered opinions in the other cases. So that, it may be regarded as the settled practice that in civil actions where a verdict is returned in obedience to a peremptory instruction, there must be a motion and grounds for a new trial if it is desired to have this court consider errors committed during the progress of the trial, or pass upon the correctness of the ruling of the lower court in taking the case from the jury.

This leaves to be considered only the question whether or not the pleadings alone supported the judgment. The petition stated a good cause of action for the Commonwealth, and the second paragraph of the answer presented a good affirmative defense. The statute prohibits the selling or offering for sale oil that will ignite or permanently burn at a temperature less than 130 Fahrenheit, or oil that has been condemned by an authorized inspector and branded "unsafe for illuminating purposes." But it does not prohibit the owner of oil that has been found to be below the test, or that has been condemned, from mixing it before it is sold or offered for sale with other oil, thereby bringing the entire quantity up to the statutory test. In this particular, the appellee company after the 8,000 gallons of oil had been condemned and branded "unsafe for illuminating purposes," had the right to pump the condemned oil into a larger tank in which there was other oil, and then sell and offer for sale the resultant mixture, provided the whole of it was up to the legal standard. But, when the appellee company in its answer admitted that it placed the condemned oil in a larger tank with other oil and by failing to deny that it sold the resultant mixture, admitted that it did so, it assumed the burden of proving that the oil in the large tank, after the condemned oil had been pumped into it, was up to the standard required by law, as this averment was denied by the reply. It is the general rule that in prosecutions, whether by indictment or penal actions, the burden of proving the guilt of the accused, and every fact necessary to establish it, is on the Commonwealth; and this practice would be applicable to this case if the appellee had contented itself, as it might have done, with entering a plea of not guilty or standing on the first paragraph of its answer which was in effect a plea of not guilty. Under a plea of not guilty, which in law would amount to a traverse of every material averment of the petition, a conviction could not be had unless the appellee was proven to be guilty beyond a reasonable doubt, of the offense charged. But it did not content itself with entering a plea of not guilty and resting its case upon this defense. It filed, as it had the right to do, an answer, setting up an affirmative defense, and having done so, its defense must be adjudged by the averments of

the pleading and the rules of practice applicable to pleadings in civil actions. (L. & N. R. R. Co. v. Commonwealth, 23 Ky. Law Rep., 1900.)

The answer set up a defense that was more than a traverse of the allegations of the petition, and involved new matter entirely separate from and independent of the original transaction, upon which the Commonwealth sought to recover.

In the second paragraph, the answer admitted that the oil mentioned in the petition was below the standard and had been condemned as "unsafe for illuminating purposes;" and that for the purpose of bringing this oil up to the standard it put it in a tank in which there was other oil above the standard, the result being that the whole body of oil was above the legal test; and that after mixing the oils, it sold the resultant mixture. This plea, although it denied the sale of any part of the 8,000 gallons before the mixture, was in the nature of a plea of confession and avoidance. It put into the case a distinct and affirmative defense, upon which it rested its right to a verdict of acquittal. Under this defense, it was not necessary that the Commonwealth should prove that the oil mentioned in the petition would ignite or permanently burn at a temperature less than 130 degrees Fahrenheit, or that it had been branded "unsafe for illuminating purposes," because these two material facts were admitted. Nor was it necessary that the Commonwealth should prove that a part of the condemned oil had been sold or offered for sale, as the answer admitted that it had been after it was mixed with the other oil. So that, there was only left open by the pleadings the single question of fact, whether or not the oil in the large tank, after the condemned oil had been mixed with it, was up to the standard. The appellee affirmed that it was, and the Commonwealth denied it. Therefore, the burden of proving this fact was upon the appellee. If no evidence had been introduced and the case had been submitted on the pleadings alone, judgment should have gone for the Commonwealth. There are exceptions to the general rule that places upon the Commonwealth the burden of proof as to every element of the offense necessary to constitute the guilt of the accused. These exceptions are generally recognized, and are well stated in an article on Criminal Law, by authors of established reputation, in 12 Cyc., page 380, where it is said:

"Although the burden of proof is on the prosecution, even as to negative matters, such as the absence of self-defense, the want of sufficient provocation, and the like, yet, by the weight of authority, as to distinct and substantial matters of defense consisting of facts either of justification or excuse, or of exemption from criminal liability, which are wholly disconnected from the body of the particular offense charged, and constitute distinct affirmative matter, the burden of proof is on the defendant, unless the fact relied upon otherwise appears in evidence to such an extent as to create a reasonable doubt of guilt." (State of Kansas v. Wilson, 52 L. R. A., 679; State of Connecticut v. Schweitzer, 6 L. R. A., 125.)

The principle announced in these authorities is uniformly applied in this State in prosecutions against persons for selling liquor without license, when the accused rests his defense upon the fact that he had a license. (Haskill v. Commonwealth, 3 B. Mon., 342; Orme v. Commonwealth, 21 Ky. Law Rep., 1412, as well as in other like cases.) And is well illustrated by the practice in prosecutions for murder where the defendant relies upon the plea of insanity, thereby assuming the burden upon this issue. The defendant may, in many statutory misdemeanors, by relying upon a distinct affirmative defense, relieve the Commonwealth of the necessity of

proving all the facts necessary to constitute his guilt. This is particularly true in prosecutions by penal actions where the defendant may set up his defense in a written pleading. In the case before us, when the defendant company admitted that the oil was below the statutory test, and placed its defense upon the ground that by mixing it with other oils it cured the quality, the burden of establishing this, the only issuable fact left open was upon it. As the answer presented a good defense, and the evidence is not in the record, we must presume that the proof offered by defendant in the lower court fully sustained its affirmative defense, and that the action of the trial judge in giving the peremptory instruction was proper. If the answer had not presented a good defense, then it would not support the judgment in favor of appellee, and on the pleadings alone a reversal would follow.

The judgment must be affirmed.

LOWE, &c. v. COMMONWEALTH.

(Filed October 2, 1908—To be reported.)

1. Bonds to Keep the Peace—Strikers—Threatening Violence to Persons and Property—Warrant by Magistrate—Trial by Circuit Judge—Where strikers are threatening to do violence to the employes and to destroy the property of a corporation, they may be arrested on a peace warrant, properly sworn out before a magistrate, and where the circuit court is in session the officer making the arrest may deliver the prisoners to the judge of the circuit court for trial on the warrant, who may hear the evidence and determine whether or not they shall be put under bond to keep the peace, and, on their failure to give such bond, may commit them to jail.

2. Same—Failure to Execute Bond—Commitment to Jail—Right of Appeal—There is no statutory authority authorizing an appeal from an order of a circuit judge committing one to jail under a peace warrant, upon his failure to execute the bond fixed by the judge as required by the statute.

Weller & Points for appellants.

Jas. Breathitt and Tom B. McGregor for appellee.

Appeal from Bell Circuit Court.

Opinion of the court by Judge Lassing, dismissing appeal.

Appellant and nine others were arrested on a warrant which was issued by a justice of the peace of Bell county, charged with having threatened to do violence to certain persons in the employ of the Wallsend Coal & Coke Company, and to destroy the property of said company. Circuit court being in session, the officer making the arrest, instead of returning the warrant to the magistrate who issued it, delivered it and the prisoners to the judge of the circuit court. Appellant and his associates objected to the jurisdiction of the court, and moved to dismiss the warrant on that ground. This motion was overruled. They then filed a demurrer to the warrant and the affidavit upon which it was based. This was likewise overruled. They each thereupon demanded a separate trial which was also overruled.

It appears that a strike had been on at the mines of the Wallsend Coal & Coke Company from sometime in May until September, the

date of the issuing of this warrant, in which some 125 miners were involved. The evidence brought out during the hearing before the circuit judge showed that much lawlessness had existed in and around the camp during the time covered by this strike. That the union men had done all that they could do to induce other miners to cease work at the mines, and to prevent newcomers from entering the mines. Much shooting was done at night; property of the company along the railroad lines was patrolled by union men; houses belonging to the company were burned under suspicious circumstances; foreign miners were, at times, driven from their homes, and terrified by shots at night, and threats were shown to have been made against the lives of several persons who were opposed to and not in sympathy with the union miners.

After hearing all of the evidence for and against those charged in the warrant, the judge dismissed all of them save appellants Richard Lowe, Robert France, Harve McDonald and Ed Jagers, whom it appears were the principal offenders, according to the proof offered. He fixed the bond of each of these at \$1,000, save Robert France, whose bond was fixed at \$2,500, conditioned that they each should keep the peace for a period of twelve months, and directed that the bonds be executed forthwith, or the defendants placed in jail in the custody of the jailer. Thereupon Robert France, J. H. McDonald and Richard Lowe executed bond and were released from custody. The defendant Ed Jagers was committed to jail for three months, or until he executed bond. They each thereupon filed a motion for a new trial, upon the following grounds:

First. Because the finding of the court is not sustained by the evidence, and is not supported by any evidence.

Second. Because the finding of the court is contrary to law; and,

Third. Because the court erred in refusing to quash the warrant and affidavit upon which the prosecution was based. The court, upon considering the motion, overruled same, and refused to grant the defendants, or either of them, a new trial, and they prosecute this appeal. The bond of Ed Jagers was reduced to \$500 and he executed same on the 14th of September, the same day upon which the motion for a new trial was overruled.

The circumstances and conditions under which peace bonds may be required in this State are regulated by sections 382 to 393, inclusive, of the Criminal Code. Section 382 makes it the duty of the magistrate to issue a warrant for the arrest of the offending person, when an affidavit is filed to the effect that another person has threatened to commit an offense against his person or property, or where the conduct of the accused in the presence of the court is such as to lead him to believe that one person is about to commit an offense against the person or property of another, and in the latter case the court may verbally order the arrest of the person so offending. (Section 383.) Upon being taken into custody, either under oral direction or on warrant, section 384 makes it the duty of the magistrate or court to: "Hear the evidence which may be produced on either side; and if satisfied that there are reasonable grounds for apprehending that the defendant will commit an offense against the person or property of another, or will commit violence endangering human life, or an offense amounting to felony, may require of him surety to keep the peace, or for his good behavior, in a sum not exceeding five thousand dollars, if human life be endangered, or one thousand dollars in other cases; and in default of giving such surety, may commit the defendant to jail, for a period not exceeding three months, unless he shall, in the meantime, give such surety."

By section 385 it is made the duty of the magistrate, if in his opinion the evidence justifies holding the accused, to take a bond for his good behavior, until the defendant shall appear before the circuit court of the county on the first day of its next term, and the bond so taken shall be returned to the circuit court of the county (386.) Section 387 directs how the trial shall be conducted in the circuit court.

Appellants' principal complaint is that when arrested they were taken before a circuit judge, (the circuit court then being in session) rather than before the magistrate who issued the warrant. Had they been taken before the magistrate he could not have tried the case further than to ascertain whether or not the accused should be held over to the circuit court, and if, in his judgment, they should he would have required bond for their appearance in the circuit court on the first day of its next term for trial. Had he been of the opinion that the charge in the affidavit had not been substantially sustained he would, of course, have discharged them from custody. The circuit court being in session, we are of opinion that no substantial rights of the accused were violated by having them surrendered up to the custody of the circuit court upon being arrested. It was within the power of the circuit court to try the charge against them, and, from the evidence offered by the complainant and such as accused had to offer in their behalf, determine whether or not they should be put under bond to keep the peace.

Appellants do not complain that they were not given ample opportunity to procure their witnesses, and present their defense, but there was no evidence which warranted the judge in holding them. The conclusion which we have reached in the case renders it unnecessary to go into the merits of the case, but in justice to the circuit judge it may be said that, while there is a sharp conflict between the testimony offered by the complainant and that introduced by appellants, still there was evidence which tended to show that appellants were very active in promoting the interest of the union men in the prosecution of their strike, and had, at times, been guilty of acts calculated to precipitate serious difficulties and endanger both life and property; under such circumstances the judge was entirely justified in requiring of them a bond to keep the peace.

The real question in this case is, have appellants any right of appeal?

In the sections of the Code regulating proceedings of this character, no provision is made for an appeal from the finding and judgment of the circuit judge, and, if an appeal lies, the authority therefor must be found in those provisions of the Code regulating appeals in civil or criminal cases. Clearly such a right does not fall within the provisions of the Code regulating appeals in civil cases; the provisions regulating appeals in criminal cases of the class under which this case must fall, to-wit: section 347, is as follows:

"The Court of Appeals shall have appellate jurisdiction in penal actions and prosecutions for misdemeanors, in the following cases only, viz: if the judgment should be for a fine exceeding fifty dollars, or for imprisonment exceeding thirty days; or, if the judgment be for the defendant, in cases in which a fine exceeding fifty dollars, or confinement exceeding thirty days, might have been inflicted."

The order of the circuit judge is not that appellants pay a fine, nor is it for imprisonment, nor fine and imprisonment, but it is simply to the effect that they shall give bond, conditioned for their good behavior in general and toward the complainant witness and his company in particular, during a stated time, named in the order, and not exceeding one year.

This exact question has not heretofore been before us, although in the case of *Commonwealth v. Oldham*, 31 Ky., 466, it was held that where a party had been arrested on a bench warrant and improperly discharged, the Commonwealth had no right of appeal. And, in the case of *State v. Long*, 18 Ind., 438, the same doctrine was announced. In the case of *State v. Lyon*, 93 N. C., 576, it was held that there was no appeal from the action of the officer requiring a party to give security to keep the peace, "for," says the court:

"The nature of the purpose to be subserved suggests and requires that the action of the officer requiring such security of a party must be conclusive and not subject to the right of appeal ordinarily. An appeal, in the absence of any statutory regulation to the contrary, would vacate the order requiring security to keep the peace, and the persons from whom danger is apprehended, might, without such restraint, commit the offense pending the appeal."

And, in the case of *State v. Locust*, 63 N. C., 574, it was held that generally there was no appeal from the action of the justice of the peace in requiring a bond to keep the peace. There is much good sense and reason for such a rule.

Proceedings of this character are instituted for the purpose of preventing crimes or violations of the law of a serious nature, and, by requiring the one who is threatening to violate the law to give security to the effect that he will behave himself and not do so, the good of society is promoted and the peace and quiet of the neighborhood is, in a measure, assured, so far as the parties complainant and accused are concerned. Nothing is exacted of the one required to give bond further than what the law expects every good citizen to do without being coerced. The Code provisions undertake to deal with the subject in detail, defining the mode of procedure with much particularity, and yet, no provision is made therein for an appeal from the finding of the circuit judge. Whether the law-makers failed to make such a provision because they intended that ultimate power should be rested with the circuit judge, or, whether they regarded any order which he might make as an interlocutory one and not a final order, and therefore, not subject to appeal, we do not know, but certain it is that there is no statutory authority in this State authorizing an appeal. The order of the court is not final, for the judge has control over it during its legal existence, to-wit; the time the bond has to run.

For the reasons given the appeal is dismissed.

ROBERTS, &c. v. CHENOWETH, &c.

(Filed October 2, 1908—Not to be reported.)

1. Wills—Construction of—Where a will provided for whatever residue might be left after paying specific legacies, by directing that such residue should be distributed among legatees to whom specific sums of money had been given, it was not intended that persons to whom mementoes were given should share in the residue, or that persons to whom land was given should share in it, the purpose of the testator was plainly indicated that only those should share in the residue who were given specified sums of money.

2. Same—Meaning of Words and Phrases—Unless it is plain that certain words mentioned in section 467, Kentucky Statutes, were not intended to mean the same thing, it is fair to apply to the construction of wills, the rule laid down in that statute.

3. Same—The Methodist church being one of the legatees named in the will, and not being excluded from sharing in any residue of the estate, is placed upon the same footing as the other legatees.

W. D. Nicholas, N. J. Hartly and Shelby & Shelby for appellants.

Butler Southgate and E. S. Hutchison for appellees.

Appeal from Fayette Circuit Court.

Opinion of the court by Judge Carroll, affirming.

This litigation involves the construction of certain clauses in the will of Mrs. Scota Inskeep Chenoweth. Mrs. Chenoweth was a lady of large estate, and in her will there are numerous distinct items disposing of it. The fourth, sixty-first and sixty-second clauses are the only ones particularly involved. They read as follows:

"4. I bequeath and devise all the right, title and interest of which I may die seized in and to my grandfather, Silas Roberts', estate, also all my interest of which I may die seized in and to my uncle, John Roberts', estate and in addition thereto twenty thousand (\$20,000) dollars out of the balance of my estate, to my beloved aunts, Miss Di Roberts and Mrs. Louisa L. Lackey, both of Xenia, Ohio, to be equally divided between them share and share alike.

"61. I devise and bequeath the residue of my estate up to ten thousand (\$10,000) dollars unto the trustees of the Hill street Methodist Episcopal Church, South, to be used by them in buying additional property adjoining said church building or in erecting a new stone church building in place of the present church, upon this condition, however; provided the congregation of said church, the church extension fund and conference will raise twenty-five thousand (\$25,000) dollars to complete and furnish said new building within two years after my death, and provided said new church, when complete and furnished, can be turned over to the congregation free from debt; otherwise this legacy shall fail and become null and void.

"62. In the event any legatee herein mentioned dies before I die, the legacy devised to such a one shall pass to my residuary estate and all the balance and residue of my estate I devise to all my legatees above named ratably and in proportion their respective legacies bear to the sum total of all said legacies."

In clauses 8, 9, 10, 11, 12, 13, 15, 16, 17, 18, 19, 20, 22, 25, 26, 27, 29, 30, 31, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59 and 60, she made bequests of money also ranging from one hundred dollars, to seven thousand dollars, to different persons and to various charitable, educational and benevolent institutions.

In clauses 5, 6, 7, 14, 21, 24, 28, 33 and 35, she bequeathed to sundry individuals specified sums of money, and to each of them in addition to the money, articles of jewelry, household furniture, tableware and other personal property.

In clauses 23, 32, 34, 37, 38, 39, 40 and 41, she bequeathed to other persons specified articles of personal property.

After all of the bequests of money, and the various articles of personal property had been given to the respective legatees, there remained of her estate a large sum of money, which passed under the sixty-second clause of her will.

The questions to be considered are whether or not the beneficiaries of this residue are limited to the persons to whom specified sums of money were given; and whether the Hill street Methodist Episcopal Church is entitled to receive any part of the residue upon the ten thousand dollars given to it in clause sixty-one. To put it in a simpler form, Miss Di Roberts and Mrs. Louisa R. Lackey contend

that they are entitled to receive a proportionate part of the residue, not only on the \$20,000, given to them, but also on the value of the land devised. This, the other legatees deny, and insist that these ladies are only entitled to share in the residue to the extent of \$20,000. The Hill Street Methodist Episcopal Church contends that it is entitled to a proportionate part of the residue on the \$10,000 given to it; while the other legatees insist that it is not entitled to any part of the residue.

The lower court adjudged that Miss Di Roberts and Mrs. Louisa R. Lackey were entitled to participate in the residue only in proportion to the pecuniary legacy of \$20,000 given to them, and that the value of the real estate devised to them was not to be considered in determining their proportion of the residuum; and further, Held—That the trustees of the Hill Street Methodist Episcopal Church were, entitled to participate in the residue in proportion to the amount bequeathed to them in clause sixty-one.

In the briefs of counsel for appellants, it is argued that the legatees to whom specified articles of personal property alone were given are entitled to participate in the distribution of the residue in proportion to the value of the respective articles received by them. But we do not understand from the record that these legatees are complaining of the judgment. The only persons who excepted to the judgment are Miss Di Roberts and Mrs. Louisa R. Lackey; and they are the only appellants as appears from the statement filed with the record. Doubtless counsel for appellants in order to make their argument harmonious, were obliged to insist that the persons to whom articles of personal property had been given were entitled to share in the residue as well as their clients to whom land was devised. Looking at the matter from their standpoint, if any of the persons except those who received specified sums of money are entitled to share in the residue, then there is no good reason for denying the right of the persons who received personal property alone to participate. If the testatrix intended that those who received land should share in the residue; and the will was so construed there would be no escape from the conclusion that the persons who received gifts of personal property were equally entitled to share in it. And so, if it were held that the legatees of personal property were entitled to participate, no sound reason could be assigned for not allowing those to whom land was given to share in proportion to the value of the land. In our opinion, the testatrix did not intend that either the persons to whom she gave land or the persons to whom she gave articles of property, should participate in the residue of her estate. Her purpose was that the residue should be distributed between the persons to whom specified sums of money were given. The testatrix did not fix any value in her will upon the land devised by the fourth clause, or any value upon any of the articles of jewelry or personal property given in other clauses. She directed that the residue of the estate be distributed among the legatees in "the proportion their respective legacies bear to the sum total of all said legacies"—evidently having in mind in using the words "sum total" the amount of the money legacies that she disposed of. It seems clear that she did not intend that her cousin, Miss Ewing, or her cousin, Miss Kaufman, to whom she gave diamond rings, pictures, and other jewelry, should share in the residue of her estate upon the value that appraisers might place upon these articles; and equally plain that she did not contemplate that her cousin to whom she gave as an heir-loom, a flint lock shot gun, or the lady to whom she gave a sewing machine, bed-room set, and carpets, or the gentlemen to whom she gave machinery, tools and harness,

should receive any part of this residue. We rather conclude that these articles were given as mementos of her friendship and affection for the persons to whom she left them, and not with any intention that their value, whatever it might be, should be appraised in a business way and made the basis for other gifts to these friends and relatives. If the testatrix intended that Miss Di Roberts and Mrs. Louisa R. Lackey should share in the residue upon the value of the land received by them, or desired that the legatees of personal property should participate in proportion to the value that might be fixed on these articles, it is fair to conclude that she would have used some other language in designating the persons who were to be the beneficiaries of the residue of her estate, and would not have used the words "in proportion their respective legacies bear to the sum total of all said legacies." Judging by human experience, the testatrix did not and could not know the exact value of the estate she would leave at her death; but, desiring to dispose of the whole of her estate, and recognizing that the bequests and legacies might not exhaust it, she provided for the disposition of whatever residue might be left, and directed, in language reasonably clear, that this residue should be distributed between the legatees to whom she had given specific sums of money. This disposition of the residue made the matter of distribution and the share to which each was entitled a simple matter of calculation.

In the construction of this will, as well as all other wills, the intention of the testator or testatrix must control if it can be reasonably gathered from a reading of the entire paper, and in our opinion the conclusion reached by the chancellor effectuates as nearly as may be the intention of Mrs. Chenoweth.

We do not attach great importance to the use in the will of the words "legatee" or "legacies" or "devisee" or "devises." It is apparent that they were interchangeably used and not in any technical sense. To illustrate, in several clauses disposing of money as well as in the clause disposing of land, the words "devise and bequeath" and "give and devise" and "bequeath and devise" are used. The word "devise" properly and technically applies only to real estate; and means a gift of real property by a person's last will and testament. A "devisee" is a person to whom a devise has been made. While a "legacy" is a gift of personal property by a last will and testament, and a "legatee" is a person to whom a legacy is given. "Bequest" is a gift by will of personal property; and "bequeath," means to give personal property by will to another. (Bouvier's Law Dictionary.) In Webster's Dictionary the same definition is given.

In wills and other writings, and indeed often in legal papers, as well as the opinions of courts, and statutory enactments, these words are used indiscriminately, interchangeably and without regard to their strict legal signification. Recognizing the generally careless, inadvertent and interchangeable use of these words, the General Assembly of the State provided in section 467, of the Kentucky Statutes, that "the words 'legatee' and 'devisee' shall each be held to convey the same idea; and the words 'bequeath' and 'devise' to mean the same thing; and the words 'bequest' and 'legacy' shall be held to mean the same thing and to embrace and include either real or personal property or both." Although this statute is more particularly applicable to questions involving the construction of statutes, yet in a will or writing, unless it was plain these words were not intended to mean the same thing, we should say it would be fair to apply in the construction of the document the rule laid down in the statute.

There is more room for difference of opinion about the correctness of the judgment below in holding that the Hill Street Methodist

Episcopal Church was entitled to share in the residue of the estate than there is about the exclusion of appellants and the legatees of personal property from participation.

It is argued that in the sixty clauses of her will preceding clause sixty-one, the testatrix had disposed of the principal part of her estate without mentioning any residuum; and that she intended by the language: "I devise and bequeath the residue of my estate up to \$10,000 unto the trustees of the Hill Street Methodist Episcopal Church, South," to give to the church this sum out of the residue of her estate left after the payment of the legacies mentioned in the preceding clauses; and that as this \$10,000 is spoken of as a part of the residue of her estate, she did not intend that the church should participate in any residue that might be left after it had received, out of the residue, the \$10,000 given to it. This argument is plausible and there are some reasonable grounds upon which to rest it; but clause sixty-two, which entirely disposes of any residue of the estate that might be left after paying all the legacies, including the \$10,000 given to the church, does not directly or by implication exclude the church from participation in the residue. The language, without any qualification in a separate distinct clause of the will, immediately following the clause making the gift to the Methodist Church, is "all the balance and residue of my estate, I devise to all my legatees above named, ratably and in proportion their respective legacies bear to the sum total of all said legacies." The Methodist Church was one of the legatees above named, and if the testatrix did not intend the church should share in the final residue, it seems singular that she did not exclude it.

We think the fair meaning of the use of the phrase "the residue of my estate up to \$10,000," in item sixty-one, is that when the testatrix came to make this gift she did not know definitely what the residue of her estate, if any, would be, after the payment of the sums mentioned in the sixty preceding clauses, or whether or not there would be any residue left; and therefore used this language to indicate her purpose that if the remainder of her estate, after providing for the gifts and devises in the sixty preceding clauses of her will, was not sufficient to pay the \$10,000, the church could not require the other legatees to contribute any portion of their legacies to make it equal with them. In other words, if the language had been "I devise and bequeath to the Methodist Church \$10,000," thereby placing the church upon the same footing as the other legatees, and in the settlement of the estate there was not sufficient to pay all the legacies in full, each legacy would be reduced so that all of them would receive the same proportionate part. To provide against a contingency of this kind, the words "residue of my estate" were used—the effect of these words being that if, after all the other legatees had received their legacies in full, there had been only \$5,000 left, this is all the Methodist Church would have received. We think this construction is more in harmony with the intention of the testatrix, as we gather it from the entire will, than the one insisted upon by appellants.

The judgment of the lower court is affirmed.

CORNELISON v. MILLION.

(Filed October 2, 1908—To be reported.)

1. Guardian and Ward—Settlements with County Judge—Statutory Provisions—Failure to Settle—Kentucky Statutes, section 1065, provides that county judges shall "once in each two years require all fiduciaries to settle their accounts," section 1068 requires the county judge "once in each year to carefully inquire into the solvency of all the sureties upon the bond of each fiduciary, &c.," where, upon the failure of such judge to perform this duty the wards estate or any part of it is lost, the ward may recover upon the bond of the judge the amount of the loss so sustained.

2. Action by Ward Against County Judge—Failure to Require Settlements—Negligence of Predecessors—In an action by a ward against his guardian the pleadings show that one Bales, was appointed his guardian in 1887, and made a settlement in 1889 and in 1902, showing a balance of some \$400 due his ward. Suit was brought by the ward and judgment obtained upon which execution was issued and returned no property found. The ward then brought this suit against the county judge who held the office from December, 1899, until January, 1902. Held—That a county judge can not excuse a performance of his duty upon the ground that he presumed his predecessors in office did their duty.

Grant E. Lilly for appellant.

W. S. Moberly for appellee.

Appeal from Madison Circuit Court.

Opinion of the court by Judge Carroll, reversing.

In 1887, J. W. Bales was appointed by the Madison County Court as guardian of the appellant, and executed a bond with Socrates Maupin as his surety. In February, 1889, Bales made a settlement of his accounts as guardian, which was put to record in the proper office. Again in January, 1902, he made a settlement, showing a balance of some four hundred dollars due his ward. Afterwards, Cornellison brought suit against his guardian on the bond to recover the amount due him on the settlement, and obtained judgment upon which execution issued and was returned no property found. Thereupon Cornellison brought this action against Chenault, Burnam, Sullivan, Turpin and appellee, Million, who were judges of the Madison County Court at different times from 1887 to 1905. The action was dismissed or filed away with leave as to all of the defendants except the appellee, Million.

So that, the only questions before us are whether or not the petition stated a cause of action as against appellee Million, and whether or not his answer presented a defense.

It is in effect alleged that Million was elected county judge and acted as such from December, 1899, until January, 1902. That he did not, during that time, make any inquiry into the solvency of Bales or his surety, and that if he had made reasonable inquiry as to their solvency he would have discovered that they were in failing circumstances and in debt in excess of the reasonable value of their property; and if he had required the guardian to make a settlement or had inquired into the solvency of the surety, the condition of their affairs would have been disclosed and the rights of the ward protected and his estate saved from loss; but by reason of the negligence of Million in failing to inquire into the solvency

of the guardian and his surety and in failing to require the guardian to make a settlement, the whole of the amount due the ward has been lost.

In his answer, Million admitted that during the time he was judge he did not make any inquiry into the solvency of the guardian, Bales, or his surety, or require any settlement, and attempts to excuse himself from discharging this duty upon the ground that the only settlement Bales made as guardian, previous to his assuming the office of county judge, in 1899, was made in 1889. That he had no knowledge or information that Cornelison had a guardian or that Bales had ever qualified as his guardian. That when he became county judge, he examined the guardian settlement books in the clerk's office of his court, for the purpose of ascertaining what guardians had made settlements within the two years preceding his induction into office. That not finding any settlement made by Bales, or any record in the settlement book, concerning his guardianship within the two years, he had no notice that Bales was then or had ever been a guardian.

It is admitted in the record that the last settlement, and indeed the only one prior to the time Million became county judge, made by Bales, was in 1889. If Judge Million had examined the records of the county court as far back as 1889, he would have discovered that Bales made a settlement showing a balance of some four hundred dollars in his hands.

The argument of counsel for appellee is that as the statute requires county judges to make settlements with guardians every two years, which are recorded, that each county judge may presume that his predecessors have performed their duties under the statute, and is not required to examine the records further back than two years preceding his induction into office for the purpose of ascertaining what guardians are delinquent. We can not agree in this construction of the statutory duties of a county judge in respect to guardians. Section 1065 provides that the county judge "shall, when called on by a fiduciary, settle his accounts, and shall once in each two years require all fiduciaries to settle their accounts, unless there is an action pending in the circuit court for such settlement." And section 1068, provides that "it shall be the duty of the county judge to at least once in each year, to carefully inquire into the solvency of all the sureties upon the bond of each fiduciary; and if upon such inquiry there is reasonable grounds to believe that any bond is not amply sufficient to protect from all loss to those interested, he shall at once give notice to such fiduciary that a new bond or additional surety on the old one is required, and upon the failure of the fiduciary to give said bond or surety within a reasonable time to be fixed by the court, he shall be removed." These statutes are mandatory. They impose unconditionally upon the county judge certain duties that he must perform. He can not excuse a performance upon the ground that he presumed his predecessors in office did their duty. Each county judge must do his duty as pointed out in the statute without reference to what his predecessor did, or whether he was punctual or careless in discharging the duties of his office. Judge Million was county judge of Madison county for two years. It was his peremptory duty to, at least once in each of those years, carefully inquire into the solvency of the sureties upon the bond of Bales and all other fiduciaries who had executed bond in the county court, and to require settlements to be made in accordance with the statute. If by his failure to perform this duty the ward's estate or any part of it was lost, the ward may recover upon the bond of the county judge the amount of the loss so sustained. It is not material when Bales was appointed or whether he made any settlement within

the two years preceding the induction into office of Judge Million. The record showed that he was appointed guardian and in the settlement of 1889 that he had in his hand money due his ward. These two facts made it the duty of Judge Million to comply with the statute. As suggested by counsel, these statutes impose upon the county judge duties that may, unless great care and diligence is exercised, involve them in serious loss. But the law is so written and it has been so construed, and we are not disposed at this day to impair the useful purpose of the statute by getting away from the opinions that seem to us do no more than give them the effect intended by their enactment.

The law applicable to cases of this character is so fully and clearly settled in *Cosby v. Commonwealth*, 91 Ky., 225; and *Commonwealth v. Lee*, 27 Ky. Law Rep., 806, that it is unnecessary to further elaborate it in this opinion.

As the case went off on the pleadings, we express no opinion whatever as to the liability of Million. Whether he is liable or not will depend upon the facts developed when the case is prepared for trial.

The judgment of the lower court is reversed with directions to proceed in conformity with this opinion.

POOR v. NEW SOUTH BREWERY & ICE CO.

(Filed October 2, 1908—Not to be reported.)

Appeals—Lies Only From Final Order—Refusing to Permit Filing of Amended Petition Not Final Order—There was no order dismissing appellant's action. An appeal lies only from a final order. An order refusing the filing of an amended petition is not a final order, and no appeal lies from it.

E. N. Ingram for appellant.

Appeal from Bell Circuit Court.

Opinion of the court by Wm. Rogers Clay, Commissioner, dismissing appeal.

Appellant, H. M. Poor, instituted this action against the New South Brewing & Ice Company to recover damages for personal injury. Summons was served on the New South Brewery & Ice Company. The latter afterwards filed a pleading which it denominated a plea in abatement and in which it set forth that it and the New South Brewing & Ice Company were not the same corporation, and that it is in no wise liable for the acts of the former. Thereafter, appellant tendered and made a motion to have filed an amended petition. In this amended petition appellant set forth the fact that the New South Brewery & Ice Company was the real defendant to the action, and that it was the only corporation in Bell county operating a brewery; that the New South Brewery & Ice Company is the successor to the New South Brewing & Ice Company, and is, in fact, the same company. The trial court at first permitted this amended petition to be filed; afterwards, upon reconsideration, it refused to permit the filing of the amended petition. From this ruling appellant has prayed an appeal to this court.

No order was entered dismissing appellant's action. An appeal lies only from a final order. An order refusing to permit the filing of an amended petition is not final; therefore, no appeal lies from it. It follows, that the appeal herein must be dismissed, and it is so ordered.

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1. Injury to Servant—Rule as to Master's Liability—Where a servant objects to the continued use of a defective tool, or calls the master's attention to its defective condition, and the master, with such information, insists that the servant proceed with the work, or assures the servant that the tool is safe, the servant has the right to rely upon the master's superior knowledge, and if he is injured in using the tool, the master is liable. Such a state of facts appearing in the trial of this case, it was error to peremptorily instruct the jury to find for appellee. Rogers v. S., C. & C. St. Ry. Co. 1067
2. Constructing Bridge—Absence of Foreman—Authority of Acting Foreman—Duty of Hands—Where a foreman in charge of hands constructing a bridge put one of the hands in charge while he was temporarily absent, such hand, for the time, stood in place of the foreman, and the men were under the same obligation to obey his orders as the orders of the foreman. Gould Con. Co. v. Childers' Adm'r.1069
3. Same—Death of Servant—Orders of Acting Foreman—Contributory Negligence—Question for Jury—In constructing a double track railroad bridge across a river, it was necessary to draw up some logs from below by the use of a derrick, which, when hoisted to the proper height, the foreman gave the stop signal. Where in such case the foreman gave such signal when the log had been raised too high, and one of the hands, whose duty it was to guide it to its proper position, in attempting to do so was struck by the log and thrown from the bridge, killing him, Held—That the deceased was not required to anticipate that the stop signal would be given until the log was lowered to its proper position for his guidance, and the question of his contributory negligence was properly left to the jury. Idem.....1069

MEMENTOES—See Wills, 1.

MISCONDUCT OF COUNSEL—See Witnesses, 2.

NEW TRIALS—See Penal Actions, 2, 3.

NUISANCE—See Railroads, 1, 2.

PARTIES TO ACTIONS—See Telegrams, 1.

PEACE BONDS—

1. Bonds to Keep the Peace—Strikers—Threatening Violence to Persons and Property—Warrant by Magistrate—Trial by Circuit Judge—Where strikers are threatening to do

PEACE BONDS—Continued—**Page.**

violence to the employes and to destroy the property of a corporation, they may be arrested on a peace warrant, properly sworn out before a magistrate, and where the circuit court is in session the officer making the arrest may deliver the prisoners to the judge of the circuit court for trial on the warrant, who may hear the evidence and determine whether or not they shall be put under bond to keep the peace, and, on their failure to give such bond, may commit them to jail. *Lowe v. Commonwealth* 1078

2. Failure to Execute Bond—Commitment to Jail—Right of Appeal—There is no statutory authority authorizing an appeal from an order of a circuit judge committing one to jail under a peace warrant, upon his failure to execute the bond fixed by the judge as required by the statute. *Idem.* 1078

PENAL ACTIONS—

1. Selling Oil Unsafe for Illuminating Purposes—Pleadings—Burden of Proof—In a penal action by the Commonwealth against the Standard Oil Co., under section 2209, Kentucky Statutes, for selling oil that had been condemned as "unsafe for illuminating purposes," the answer admitted that certain oil had been so condemned, but alleged that it had subsequently been mixed with other oil in a large tank that brought the resultant mixture up to the required standard, which answer was denied by a reply. Held—That under the pleadings the burden was on the defendant to show that the resultant mixture was up to the required standard. *Commonwealth v. Standard Oil Co.* 1074
2. Same—Peremptory Instructions—New Trial—Failure to File Motion—Presumption—Upon the conclusion of the evidence for both parties the court directed the jury to find the defendant, appellee, not guilty. No motion or grounds for a new trial was made or entered. Held—As the answer presented a good defense and the evidence is not in the record, the court must presume that the proof offered by defendant in the lower court sustained the defense and that the action of the trial court was proper. *Idem.* 1074
3. Same—Civil Actions—Practice—It may be regarded as the settled practice that in civil actions, where a verdict is returned in obedience to a peremptory instruction, there must be a motion and grounds for a new trial, if it is desired to have this court consider errors committed during the progress of the trial, or pass upon the correctness of the ruling of the lower court in taking the case from the jury. *Idem.* 1074

QUESTION FOR JURY—See Master and Servant, 3.

RAILROADS—

1. Indictments—Nuisance—An indictment charging appellee with conveying to its premises and permitting to assemble there in large numbers persons who engaged in dancing, drinking, swearing, and so on, the grounds being on a public highway, and further charging that such acts disturbed the peace, happiness and pleasure of those residing at, on and near the said highway, sufficiently states a public offense, and it was error to sustain a demurrer to it. *Commonwealth v. Cin., N. O. & T. P. R. R. Co.* 1056
2. Dancing—When Constituting Public Offense—Where dancing and drinking are accompanied by swearing and being drunk, making loud noises and otherwise misbehaving, such acts constitute a public nuisance. *Idem.* 1056

TELEGRAMS—

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1. Parties to Action—Taking Deposition of Adverse Party—Refusal to Give—Under Civil Code, section 606, providing that “a party may be examined, as if under cross-examination, at the instance of the adverse party, either orally or by deposition, as any other witness,” a party to an action can not refuse to give his deposition when called on by the adverse party, on the ground that it will enable one party to get the benefit of the testimony of the adverse party, and that if the adverse party, whose deposition is sought, actually appears at the trial and testifies, the party seeking his deposition can not complain because he failed to take it. *W. U. Tel. Co. v. Williams*.....1062
2. Same—Grounds for Continuance—Prejudicial Error—By section 537, of the Code, the right is given the defendant to begin taking depositions immediately after filing his answer. In such case the failure of the plaintiff to give his deposition, when called on by the defendant after answer filed, was ground for continuance by the defendant, and a failure to grant the continuance was prejudicial error. *Idem.*1062
3. Illness of Mother—Failure to Deliver—Non-arrival of Son—Disappointment of Mother—In an action for damages against a telegraph company for mental anguish in failing to deliver a telegram announcing the illness of a mother, where the plaintiff was a physician, it was error in the court to permit the plaintiff to testify that he had treated his mother frequently before, and that she yielded to such treatment and speedily recovered, and that she was disappointed and depressed when she heard that he had not arrived and that this hastened her death, which would be a recovery for the mother's anguish instead of her son's. *Idem.*1063
4. Mental Anguish—Evidence—Statement of Facts—Harrowing Recitals—In cases of this kind the party suing should be confined to a statement of the mere facts of mental anguish, and should not be permitted to introduce testimony of the nature referred to for the mere purpose of harrowing the feelings of the jury and increasing the size of the verdict. *Idem.*.....1063

TRESPASS—See Contracts, 1, 2.

WILLS—

1. Construction of—Where a will provided for whatever residue might be left after paying specific legacies, by directing that such residue should be distributed among legatees to whom specific sums of money had been given, it was not intended that persons to whom mementoes were given should share in the residue, or that persons to whom land was given should share in it, the purpose of the testator was plainly indicated that only those should share in the residue who were given specified sums of money. *Roberts, &c. v. Chenoweth, &c.*1081
2. Same—Meaning of Words and Phrases—Unless it is plain that certain words mentioned in section 467, Kentucky Statutes, were not intended to mean the same thing, it is fair to apply to the construction of wills, the rule laid down in that statute. *Idem.*.....1081
3. Same—The Methodist church, being one of the legatees named in the will, and not being excluded from sharing in any residue of the estate, is placed upon the same footing as the other legatees. *Idem.*.....1081

WITNESSES—

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1. Impeachment of Witness—Exclusion of Testimony of One
Convicted of Felony—The Code authorizes the impeachment of a witness' testimony by showing that he has been convicted of a felony, and appellant's rights were not prejudiced by the exclusion of the testimony of his witness that he had been pardoned. The pardon being the best evidence, oral testimony of its existence was properly excluded. Parson v. Commonwealth.....1051
2. Commonwealth's Attorney—Improper Statements by—Action of Court in Excluding—When the court directs the jury not to consider improper remarks of the Commonwealth's Attorney in argument, justice to the defendant requires nothing further in order to secure an impartial verdict. Idem.1051

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